Deference Mistakes

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This Article begins with what should seem a relatively straightforward proposition: it is impossible to fully understand a case's holding without understanding its "deference regime"—the standard of review or burden of proof that governs the case. If a court holds in the context of a habeas petition that a constitutional right was not "clearly established," that does not necessarily mean that the court would hold that the right does not exist were it writing on a blank slate. If a court refuses to invalidate a granted patent, which is presumed valid and can be held invalid only upon a showing of clear and convincing evidence, that does not mean that the court believes the patent should have been granted in the first place. And if an appellate court holds that a trial court's ruling was not "plain error," that does not necessarily mean that the appellate court believes the trial court reached the correct result or would have affirmed the ruling if the review were more searching.

Yet in case after case, we find that judges (and their clerks) confuse one deference regime for another or ignore deference entirely. In so doing, they make what we term "deference mistakes." Courts in standard criminal cases regularly rely on habeas precedents holding that a federal right was not clearly established to conclude that the right does not exist. The Federal Circuit and the Patent and Trademark Office regularly rely on precedents involving granted patents (which are presumed valid) to justify granting new patents (which are not entitled to that presumption). And courts of appeals regularly rely on plain error precedents to justify holdings in cases in which the standard of review is less deferential.

Although the problem of deference mistakes cuts across legal doctrines, it has been neither identified nor described in prior scholarship. Our Article presents a multitude of examples of deference mistakes in practice and explains why they are likely to occur. Deference mistakes may seem relatively innocuous, particularly if they are confined to individual cases. But that appearance is misleading. We develop a theoretical model of how deference mistakes, coupled with particular

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asymmetries in adjudication, can generate systematic shifts in legal doctrine. Deference mistakes may have contributed to the current patent crisis by adding to the proliferation of bad patents. They may also be partly responsible for retrenchment in the law of constitutional criminal procedure rights or the pro-employer shift in employment discrimination law. After analyzing deference mistakes' potential to affect the long-term evolution of the law, we discuss possible solutions.

INTRODUCTION

A district court relies on Eighth Circuit precedent to conclude that a claimed federal right does not exist—but the Eighth Circuit court had held only that the right was not "clearly established" for purposes of habeas corpus.[1] The US Patent and Trademark Office (PTO) relies on Federal Circuit precedent in granting a patent application—but the Federal Circuit had held only that the challenger to a granted patent had not presented "clear and convincing" evidence to overcome the presumption of patent validity.[2] A district court relies on Seventh Circuit precedent in granting an employer's summary judgment motion in an employment discrimination case—but the Seventh Circuit had held only that a finding of no discriminatory intent was not "clearly erroneous."[3]

In each of these examples, the second decisionmaker made a "deference mistake": it relied on precedent without fully accounting for the legal and factual deference regime under which that precedent was decided, thereby stripping the holding from its legal context.[4] (We use "deference" broadly to refer to anything

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[1] *Newton v Kemna*, 352 F3d 776, 785 (8th Cir 2004). In that case, the Eighth Circuit concluded that, although "the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges," "[g]iven the restrictive nature of habeas review," it was not the Eighth Circuit's "province to speculate as to whether the Supreme Court, if faced with the issue, would find that Missouri's physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination." Id at 781–82. A later district court mischaracterized *Newton* in rejecting a party's request for a witness's medical records, stating that *Newton* "held that the trial court's denial of the criminal defendant's access to the witness's medical records did not violate the confrontation clause under the Sixth Amendment." *Jackson v Wiersema Charter Service, Inc*, 2009 WL 1531815, *1 (ED Mo).

[2] This example is drawn from *Ex parte Albritton*, 2009 WL 671577, *16 (BPAI), which reversed an obviousness rejection in a "close case" based on *Arkie Lures, Inc v Gene Larew Tackle, Inc*, 119 F3d 953 (Fed Cir 1997).

[3] *Oxman v WLS-TV*, 12 F3d 652, 656, 661 (7th Cir 1993). In that case, the Seventh Circuit stated that, while "it [would be] reasonable to infer that [the] statements [of a television station's news director] reflected [the] opinions [of the station's general manager, who had exclusive authority to fire employees], . . . such an inference is not mandated," and that the district court's decision to exclude the news director's statements was "not clearly erroneous." Id at 660. In granting summary judgment for the employer in another employment discrimination case, a later district court interpreted *Oxman* to suggest that the intentions of someone without firing authority "are irrelevant" and "not evidence of discrimination." *Respondi v Merrill Lynch & Co*, 1998 WL 355447, *4 (ND Ill).

[4] To be clear, the latter decisions are not "wrong" in the sense of contravening precedent; rather, the mistake is that the second decisionmaker—the one relying on the

that causes a decisionmaker to consider an issue differently from how it would in the first instance, including different standards of review, standards of evidence, or legal presumptions.) Just because an evidentiary holding is not an abuse of discretion does not mean that a contrary holding is not allowed. Just because a determination of negligence is not clearly erroneous does not mean that courts should find negligence in every similar factual scenario. When a mistake of this type causes a decisionmaker to decide a case differently than it would have but for the error, the mistake has effectively produced a change in the law.

Nonetheless, these types of mistakes might seem minor. After all, courts make small errors of many types on a regular basis. What are a few more here and there? And, in many instances, deference mistakes will have no net effect on doctrinal development: some district judges might mistakenly rely on precedent to exclude evidence that they otherwise would (within their discretion) allow, while others might mistakenly rely on other precedent to allow evidence that they otherwise would exclude.

But when some asymmetry in the legal system results in a skewed distribution of deference mistakes, their overall effect is not so innocuous. Each time a deference mistake leads a court to exclude evidence erroneously, the law governing the admission of evidence narrows slightly. Conversely, each time a deference mistake leads to the erroneous admission of evidence, the law governing the admission of evidence expands. If one type of deference mistake comes to predominate over the other, the result will be a *systematic* shift in the doctrine. For example, imagine that litigants appealed evidentiary rulings admitting evidence much more frequently than rulings excluding evidence.[5] Appellate courts would have many more opportunities to consider admissions of evidence, and the appellate case law would be skewed toward deferential affirmances of those admissions. Subsequent courts would thus have many more opportunities to make deference mistakes with respect to admissions of evidence

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precedent—failed to correctly account for the deference regime under which the original case (the precedent) was decided.

[5] This might occur in the context of forensic evidence because criminal appeals are almost always made by defendants, who are more likely to complain about the admission of incriminating evidence. See Part II.B.2.

than with respect to exclusions. The long-term result would be legal bias in the direction of admitting more and more evidence.

This Article thus joins a broader literature on extralegal determinants of doctrinal pathways. Other scholars have shown that legal doctrine can evolve due to factors other than normative rightness or judicial interpretive methods, including the choice of enforcement mechanism, the identity of the parties bringing suit, or structural factors related to the courts.[6] To this literature, our Article contributes the idea of long-term doctrinal evolution via mistake. This doctrinal evolution is problematic even if the mistakes are made by decisionmakers who rule differently from how they otherwise would for strategic, reversal-averse reasons.

Of course, for this mechanism to result in a shift in *doctrine*, the court granting deference must defer on some issue that will matter in future cases. In theory, appellate courts defer only on case-specific factual determinations, while reviewing legal questions without deference. In practice, however, factual decisions often infect legal decisions, and courts have recognized the difficulty of separating legal and factual determinations by declaring some issues to be "mixed questions of law and fact,"[7] which are sometimes reviewed deferentially.[8]

Furthermore, there are a few areas in which legal questions are reviewed under different standards in different situations. These doctrinal areas can be especially fertile grounds for deference mistakes. For example, patent invalidity must be established by clear and convincing evidence in the infringement

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[6] See generally, for example, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 Colum L Rev 1913 (2014) (describing this literature and presenting a new theory of how the choice of private versus public enforcement can systematically shift doctrine); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L & Society Rev 95 (1974) (discussing the dynamics of litigation in the presence of repeat players); Bert I. Huang, *Lightened Scrutiny*, 124 Harv L Rev 1109 (2011) (showing that, when the Second and Ninth Circuits were overwhelmed with immigration appeals, they began to overrule district courts less often than other circuits in nonimmigration civil appeals). See also generally Jonathan Masur, *Patent Inflation*, 121 Yale L J 470 (2011) (suggesting that patent law has evolved in pro-patent directions because of asymmetries in the conditions under which parties may appeal adverse decisions); Lisa Larrimore Ouellette, *What Are the Sources of Patent Inflation? An Analysis of Federal Circuit Patentability Rulings*, 121 Yale L J Online 347 (2011) (hypothesizing that misunderstandings of deference regimes may have contributed to patent law's pro-patent evolution).

[7] Charles Alan Wright and Arthur R. Miller, 9C *Federal Practice and Procedure: Civil Procedure* § 2589 at 473 (West 3d ed 2008).

[8] See id at § 2589 at 484–85.

context, but only by a preponderance of the evidence when validity is challenged before the PTO.[9] Just because there is not clear and convincing evidence that a patent is invalid does not mean that it should not be held invalid under a lower standard. It is often a mistake for the PTO to rely on precedent from infringement cases when deciding to grant patents.[10] Similarly, in the habeas and qualified immunity contexts, courts consider whether federal rights are clearly established rather than whether these rights exist at all.[11] It is a mistake to rely on precedent holding that a right is not "clearly established" in order to conclude that it is "clearly not established." We find numerous mistakes of this type.[12]

We make two principal contributions in this Article. First, we explain, categorize, and document deference mistakes across a wide swath of legal fields. We discuss numerous cases in which a court cites precedent for a proposition that the precedent does not support given the deference regime under which the precedent was originally decided. Though we cannot be certain, it seems likely that, in many of these cases, the deference mistake was dispositive. Second, we build and analyze a theoretical model of deference mistakes in judicial decisionmaking. Using this model, we demonstrate that, under the right conditions, deference mistakes can propagate across time and lead to long-term doctrinal evolution. Asymmetries in the types of cases that come before courts, or the contexts in which these cases arise, or even the types of decisionmakers involved, can lead to asymmetries in the number and type of deference mistakes that courts or other decisionmakers commit. Over time, like water dripping

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[9] See *Microsoft Corp v i4i LP*, 131 S Ct 2238, 2242 (2011) (holding that the standard of proof to establish patent invalidity in an infringement case is clear and convincing evidence); *In re Baxter International, Inc*, 678 F3d 1357, 1364 (Fed Cir 2012):

> [A] challenger that attacks the validity of patent claims in civil litigation has a statutory burden to prove invalidity by clear and convincing evidence. . . . In contrast, in PTO reexaminations the standard of proof—a preponderance of the evidence—is substantially lower than in a civil case and there is no presumption of validity in reexamination proceedings.

(quotation marks omitted). We will at times use "validity" to refer to the patentability of patent applications for ease of explication, even though this term is technically reserved for granted patents.

[10] One of us has suggested that this mechanism may have been partially responsible for the expansion of the boundaries of patentability that has occurred since the creation of the Federal Circuit. See Ouellette, 121 Yale L J Online at 368–71 (cited in note 6).

[11] See *Williams v Taylor*, 529 US 362, 402–03 (2000) (habeas); *Harlow v Fitzgerald*, 457 US 800, 818 (1982) (qualified immunity).

[12] See Part II.

on a rock, these asymmetries can carve new doctrinal channels and steer the law in directions it might not otherwise have taken.

This Article proceeds in four parts. In Part I, we explain why we expect deference mistakes to occur. First, we review the various deference regimes (again, using our broad definition of "deference") and describe a number of situations in which appellate decisionmakers grant deference on issues that will matter in future cases. Second, we review the literature and cases on the extent to which deference regimes actually affect outcomes, and we conclude that deference likely does matter to at least some extent. Finally, we discuss factors that might cause courts to make deference mistakes—using "mistake" to refer to the kinds of legal errors discussed above.

Part II then presents numerous examples of actual deference mistakes. For instance, we show that courts have erroneously relied on precedents holding that a given right was not clearly established (in the context of a petition for habeas relief) in concluding that a right does not exist. Analogously, the PTO and the Federal Circuit have relied on precedents from patent infringement suits—in which patents and trademarks carry a presumption of validity—to justify granting new patents or registering new trademarks (which are not entitled to that presumption). We also provide examples of criminal cases in which a precedent involving plain error review—which applies because the appealing party failed to object at trial—is used to decide a later case subject to a lower standard of deference.

In Part III, we present a theoretical model of how deference mistakes can lead to systematic doctrinal shifts. This model is simplest when the deference is not to a lower decisionmaker but rather is a legal presumption, such that similar cases are sometimes decided under different legal standards (as in patent and habeas cases). But we also show that, when an appellate decisionmaker defers to a lower decisionmaker, a skewed distribution of precedents can arise when only one type of party appeals (or appeals more often), when the deference is one-sided, or when the lower decisionmaker is likely to be biased relative to the appellate decisionmaker. We then explain how a skewed distribution of precedents, coupled with the cumulative effect of seemingly innocuous deference mistakes, can lead to systematic doctrinal shifts.

To be clear, we do not claim that deference mistakes are solely responsible for doctrinal shifts in the areas of law that we

describe in Part II—the areas in which we have documented repeated instances of deference mistakes. Rather, the mechanism we describe can work in tandem with, or even supplement, shifts based on changing judicial philosophies and other factors. We do not even claim to have proven here that our mechanism has caused systematic doctrinal shifts. Part II demonstrates that all the elements necessary for the mechanism that we lay out in Part III—including actual examples of deference mistakes—are present in a variety of doctrinal areas. The extent to which deference mistakes are driving doctrinal shifts in these or other areas is thus ripe for empirical study.

Part IV then explores potential solutions to the problem of deference mistakes. We consider whether appellate decisionmakers should be required to address deference more explicitly, for instance by noting that they might have reached a different conclusion had they been deciding the case on a clean slate. In the qualified immunity context, courts are encouraged (and were, for a time, required) to decide whether a constitutional right was violated before deciding whether that right was clearly established.[13] So far as we can tell, this has led to fewer formal deference errors than in the habeas context. But the qualified immunity regime is not necessarily healthier for the development of constitutional doctrine—it might simply cause courts to overstate the case against a particular right in order to avoid cognitive dissonance and minimize the probability of reversal. In any case, because the problem occurs only when some actor in the system makes a mistake, simply publicizing the problem is likely to help. Unless decisionmakers become more comfortable admitting ambiguities, the best hope for avoiding deference mistakes may lie with increased awareness on the part of decisionmakers, advocates, and commentators, which will enable these various actors to recognize and announce such mistakes when they occur.

I. DEFINING DEFERENCE MISTAKES

One of the virtues of a system in which judges issue written opinions is clarity regarding what the judge has actually decided. In the written opinion, the judge will typically explain both

[13] See *Camreta v Greene*, 131 S Ct 2020, 2031–32 (2011). See also *Saucier v Katz*, 533 US 194, 201 (2001) (noting that the "initial inquiry" for a court ruling on qualified immunity must be whether a constitutional right was violated), revd, *Pearson v Callahan*, 555 US 223 (2009).

the decision she has reached and the legal standard under which she made the decision—including such basic elements as the burden of proof. Of course, this system does not always function smoothly. Sometimes a judge is not clear about what she has decided or the standard she has applied. Other times a judge is clear, but subsequent courts and litigants misinterpret what she has written. It is difficult to imagine a subsequent court mistaking which party actually won an earlier case, but occasionally a court will err in interpreting the burden of proof or standard of review that a previous judge applied.

A mistake regarding the appropriate burden of proof in a prior case may not, at first glance, appear particularly important. It might seem like a highly technical legal mistake, of interest only to legal sticklers (or pedants). But this impression is misleading. Misunderstanding the operative burden of proof in an earlier case is often equivalent to misunderstanding the legal decision on the merits. For example, if a court holds that a right is not clearly established in the habeas or qualified immunity contexts, and that court is subsequently misunderstood to have held that a right is *clearly not established*, the mistake creates a precedent (at least in the opinion of the misinterpreting court) that may be precisely the opposite of what the first court would actually have decided had the issue been presented to it outside the prevailing deference regime. This type of misunderstanding is a deference mistake.

In this Article, we focus on unintentional deference mistakes. We note, however, that deference mistakes can be either honest and inadvertent errors or willful and strategic decisions—or somewhere on the continuum between. Outside observers typically cannot discern where a decisionmaker's motivation falls along this spectrum. In many ways, the motivation behind a deference mistake is unimportant: both unintentional and intentional deference mistakes lead to similar doctrinal shifts for normatively problematic reasons. The most important distinction is that strategic mistakes may call for different solutions. We focus here on unintentional errors because our impression is that few judges intentionally insert errors into their opinions in the hope that the mistakes will slip past their colleagues. Judges may be more likely to err in favor of their preferred

normative outcomes due to unconscious motivated reasoning,[14] but we suspect that few mistakes are consciously intended.

For deference mistakes to matter for future cases, three key elements must be present. First, courts must sometimes grant deference (in our broad sense of the term) on issues that will matter in future cases. Second, legal-deference regimes must actually affect outcomes in at least some cases. And third, courts, agencies, or other legal decisionmakers must sometimes make deference mistakes: they must rely on precedent without fully accounting for the legal and factual deference regime under which that precedent was decided. In this Part, we argue that these three elements are present in the US legal system.

A. What Is Deference?

Judicial deference can be a "slippery concept to define precisely."[15] In this Article, we use "deference" in its broadest sense to include any situation in which a second decisionmaker is influenced by the judgment of some initial decisionmaker rather than examining an issue entirely de novo.[16] In our model, these decisionmakers might be courts, agencies, or other government actors that resolve individual cases.[17]

Deference might be granted through a variety of mechanisms. Federal courts often review decisions of lower courts and

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[14] See generally Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv L Rev 1 (2011) (arguing that judges' decisions are influenced by cultural cognition, predisposing them to fit their judgments to their group commitments).

[15] Jonathan M. Justl, *Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases*, 119 Yale L J 270, 285 (2009). See also Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum L Rev 1, 4–5 (1983) (noting that deference is "not a well-defined concept but rather an umbrella that has been used to cover a variety of judicial approaches").

[16] We thus adopt a broader definition than that of Professor Paul Horwitz, who was hesitant about using "deference" to describe "a thumb on the scales but not a complete surrender of judgment," or situations in which "some independent controlling authority dictates to [the second decisionmaker] that it defer to [the first decisionmaker]." Paul Horwitz, *Three Faces of Deference*, 83 Notre Dame L Rev 1061, 1073, 1076 (2008). We also adopt a broader definition than commentators who have focused on deference to facts. See, for example, Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 Iowa L Rev 941, 958 (1999).

[17] For example, Professor Daniel Solove has noted that the US Supreme Court "frequently accords deference to the judgments of numerous decisionmakers in the bureaucratic state: Congress, the Executive, state legislatures, agencies, military officials, prison officials, professionals, prosecutors, employers, and practically any other decisionmaker in a position of authority or expertise." Solove, 84 Iowa L Rev at 944 (cited in note 16).

agencies under deferential standards of review such as clear error (for district court fact-finding in civil cases[18]), plain error (for issues not raised below[19]), substantial evidence (for jury verdicts[20] and certain agency fact-finding[21]), and abuse of discretion (for many procedural and evidentiary determinations).[22] Deference might also be granted due to legal presumptions coupled with standards of evidence or burdens of proof. For example, patents are presumed valid,[23] which means that a court will hold a patent invalid only if there is clear and convincing evidence of invalidity (rather than a preponderance of the evidence).[24] In essence, this means that courts are granting some deference to the PTO's prior determination of patent validity. And, as we describe in Part I.C, many other specific deference regimes are required by statute or have been developed by courts.

Because we are interested in deference only as it affects doctrinal development, the issue on which deference is granted must matter in subsequent cases. Agencies frequently receive deference on legal determinations under *Chevron, USA, Inc v Natural Resources Defense Council, Inc*[25] or other agency-deference regimes,[26] and it would be erroneous for another decisionmaker to treat one of these deferential precedents as if it had been decided under de novo review. But outside the *Chevron* context, one might question whether courts in fact defer on issues of future relevance. Questions of law are almost universally reviewed without deference;[27] instead, deference is typically

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18 See FRCP 52(a)(6).

19 See FRCrP 52(b). Errors that do "not affect substantial rights" are considered "harmless" and "must be disregarded." FRCrP 52(a). While we do not focus on them here, the rules for harmless error are themselves complex.

20 See *Hamling v United States*, 418 US 87, 124 (1974).

21 Agency fact-finding is reviewed for substantial evidence when it results from formal adjudication and rulemaking; other agency actions are reviewed under an "arbitrary and capricious" standard. 5 USC § 706(2)(A).

22 See generally Steven Alan Childress and Martha S. Davis, *Federal Standards of Review* (LexisNexis 4th ed 2010) (summarizing the standards of review employed by federal courts).

23 See 35 USC § 282(a).

24 See *Microsoft Corp v i4i LP*, 131 S Ct 2238, 2243 (2011).

25 467 US 837 (1984).

26 See id at 842–44; William N. Eskridge Jr and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Georgetown L J 1083, 1098–1120 (2008). See also generally Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 Tex L Rev 625 (2015).

27 See Chad M. Oldfather, *Universal De Novo Review*, 77 Geo Wash L Rev 308, 312–16 (2009) (criticizing universal de novo review of legal issues).

granted on case-specific facts—known as "adjudicative facts"—which (by definition) are supposed to be unimportant in subsequent cases.[28] If this formal law/fact division were clear and precisely followed, so that any issue that might be relevant in a subsequent case were always reviewed de novo (functionally as well as formally), the deference mistakes at the heart of our model would never occur.

The real world, however, is not so precisely divided. Some facts are relevant in many cases—these "legislative facts" might be found by courts or legislatures,[29] and these facts are sometimes granted deference.[30] Even adjudicative facts might be relevant in subsequent cases if those facts infect legal decisionmaking. For example, an appellate court that sees only particular factual postures might subconsciously shape the law to fit those facts.[31]

There is also no clear divide between fact and law: the Supreme Court has acknowledged that the boundary is "slippery"[32] and "vexing,"[33] and scholars have questioned the coherence of the distinction.[34] Legally imbued issues that have been deemed questions of fact—and which are thus reviewed deferentially—include whether there was discriminatory intent in an employment discrimination case,[35] whether an exemption to the Fair Labor Standards Act[36] applies in a particular case,[37] and whether there was negligence and causation in tort cases (except in

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28 See *United States v Hernandez-Fundora*, 58 F3d 802, 811 (1995), citing FRE 201, Advisory Committee's Note to the Federal Rules of Evidence ("Adjudicative facts are simply the facts of the particular case."). See also text accompanying notes 18–22.

29 See *Hernandez-Fundora*, 58 F3d at 811, citing FRE 201, Advisory Committee's Note to the Federal Rules of Evidence ("Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.").

30 See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-record Fact-Finding*, 61 Duke L J 1, 49 (2011); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 Ind L J 1, 6–13 (2009) (discussing the confusion in the courts as to how much deference should be given to legislative fact-finding).

31 See note 211 and accompanying text.

32 *Williams v Taylor*, 529 US 362, 385 (2000), quoting *Thompson v Keohane*, 516 US 99, 110–11 (1995).

33 *Pullman-Standard v Swint*, 456 US 273, 288 (1982).

34 See, for example, Ronald J. Allen and Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw U L Rev 1769, 1790 (2003); Gary Lawson, *Proving the Law*, 86 Nw U L Rev 859, 863 (1992).

35 See *Pullman-Standard*, 456 US at 289.

36 52 Stat 1060 (1938), codified at 29 USC § 201 et seq.

37 See *Icicle Seafoods, Inc v Worthington*, 475 US 709, 713 (1986).

the Second Circuit).[38] Some issues have been explicitly called "mixed questions of law and fact," and the standard of review for these issues varies.[39] Wright and Miller have compiled a long list of issues "that certainly seem to contain both legal and factual elements" but that have been reviewed for clear error; these include the scope of a fiduciary relationship, the existence of a contract, the likelihood of consumer confusion about trademarks, and the existence of personal jurisdiction.[40] In any of these cases, an appellate court might grant deference to a district court decision on an issue that will matter in future cases, such as a conclusion that an employer's seniority system does not reflect discriminatory intent[41] or a decision about the extent of a speeding driver's contributory negligence.[42]

Appellate courts also apply deferential review to many decisions that involve legal judgments of possible future relevance, including evidentiary rulings,[43] injunctions,[44] sentences,[45] attorneys' fees and sanctions,[46] declaratory jurisdiction (in some circuits),[47] and numerous other issues.[48] This deference means that

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[38] See Childress and Davis, 1 *Federal Standards of Review* at § 2.28 at 2-195 (cited in note 22).

[39] See Wright and Miller, 9C *Federal Practice and Procedure* at § 2589 at 484–86 (cited in note 7). See also *Lowry Development, LLC v Groves & Associates Insurance, Inc*, 690 F3d 382, 385 (5th Cir 2012) (applying different standards of review to the legal and factual aspects of a single issue).

[40] Wright and Miller, 9C *Federal Practice and Procedure* at § 2589 at 486–92 (cited in note 7).

[41] See *Pullman-Standard*, 456 US at 289–90.

[42] See *Pohl v County of Furnas*, 682 F3d 745, 754 (8th Cir 2012).

[43] See *Kumho Tire Co v Carmichael*, 526 US 137, 152 (1999) (affirming that decisions whether to admit expert testimony are subject to abuse of discretion review); *General Electric Co v Joiner*, 522 US 136, 141 (1997) ("All evidentiary decisions are reviewed under an abuse-of-discretion standard.").

[44] See *eBay Inc v MercExchange, LLC*, 547 US 388, 391 (2006) (reviewing the grant of a permanent injunction for abuse of discretion); *Ashcroft v American Civil Liberties Union*, 542 US 656, 664 (2004) (reviewing the grant of a preliminary injunction for abuse of discretion).

[45] See *Gall v United States*, 552 US 38, 41 (2007) (reviewing a criminal sentence for abuse of discretion).

[46] See *Cooter & Gell v Hartmarx Corp*, 496 US 384, 405 (1990) (affirming that a district court's imposition of sanctions under FRCP 11 is reviewed for abuse of discretion); *Pierce v Underwood*, 487 US 552, 563 (1988) (holding that a determination whether the government's litigation position was "substantially justified" for purposes of awarding attorneys' fees is reviewed for abuse of discretion).

[47] See *Pacific Employers Insurance Co v M/V Capt W.D. Cargill*, 474 US 909, 909–10 (1985) (White dissenting from denial of certiorari) (noting a circuit split on the appropriate standard of review for declaratory jurisdiction).

[48] See, for example, *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 US 424, 433 (2001) (noting that a district court's determination whether a punitive damages

a given case may have more than one acceptable conclusion.[49] If an appellate court affirms one such outcome—for example, the exclusion of a certain type of expert testimony or the denial of an injunction under certain circumstances—district courts may thereafter rely on that precedent without realizing that admitting the testimony or granting the injunction would also be within their discretion.

Finally, as we will discuss in much greater detail in Part II, courts sometimes evaluate issues more deferentially based on specific statutory requirements. As we mentioned earlier, courts must evaluate granted patents more deferentially than they would in the examination context due to the presumption of patent validity.[50] Similarly, courts must evaluate convictions challenged via habeas petitions more deferentially than direct criminal appeals due to the requirement that relief may be granted only when there was a violation of "clearly established Federal law."[51] When statutes require review of similar issues under different standards in different contexts, deference mistakes may be especially pernicious.

In sum, decisionmakers often grant deference (broadly defined) on issues that will matter in future cases. This brief review of deference regimes has focused on US federal law, but similar mechanisms may also operate at the international,[52] state,[53] and

award is excessive is reviewed for abuse of discretion); *Wilton v Seven Falls Co*, 515 US 277, 289–90 (1995) (holding that a district court's decision to stay a declaratory judgment action pending state litigation is reviewed for abuse of discretion); *Immigration and Naturalization Service v Abudu*, 485 US 94, 96 (1988) (holding that the decision whether to reopen deportation proceedings is reviewed for abuse of discretion).

[49] See, for example, *Wheat v United States*, 486 US 153, 164 (1988) ("[W]e hold that the District Court's [decision] . . . was within its discretion. . . . Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was 'right' and the other 'wrong.'").

[50] See notes 23–24 and accompanying text.

[51] 28 USC § 2254(d)(1).

[52] See generally, for example, Steven P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am J Intl L 193 (1996) (examining the standard that the World Trade Organization uses to review national governments' actions). See also Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L J 1143, 1178–97 (2005) (discussing issues related to the amount of deference accorded to domestic court decisions under review by international arbitration panels).

[53] See generally, for example, William T. Allen, Jack B. Jacobs, and Leo E. Strine Jr, *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus Law 1287 (2001); W. Wendell Hall, *Standards of Review in Texas*, 29 St Mary's L J 351 (1998).

local levels.[54] All that is needed is for one authoritative decisionmaker to defer to another decisionmaker on an issue that will be relevant in the future.

B. Does Deference Matter?

The second key element required by our model is that legal-deference regimes must actually affect outcomes. One reason to believe that standards of review, legal presumptions, and other deference regimes can matter is that judges say that they do. Judge Harry Edwards of the DC Circuit opens his book on standards of review by noting that they "are critically important in determining the parameters of appellate review."[55] Former Tenth Circuit chief judge Deanell Tacha said that the standard of review "is everything."[56] Former DC Circuit chief judge Patricia Wald stated that the appellate standard of review "more often than not determines the outcome."[57] And Judge Harry Pregerson of the Ninth Circuit wrote that "[t]he standard of review is the keystone of appellate decision making" because appellate courts do not "reweigh all the evidence and find the facts anew;" he criticized briefs that "overlook this critical issue."[58]

Federal courts require parties to state the applicable standard of review for each issue,[59] and many opinions state that the standard of review was outcome determinative in that case[60] or

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54 See generally Christopher P. Terry, *On the Frontiers of Knowledge: A Flexible Substantial Evidence Standard of Review for Zoning Board Tower Siting Decisions*, 20 Temple Envir L & Tech J 147 (2002) (discussing a circuit split over the deference due to local zoning-board decisions about where service providers may erect cell phone towers).

55 Harry T. Edwards and Linda A. Elliott, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions and Agency Decisions* v (Thomson West 2007).

56 Id.

57 Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U Chi L Rev 1371, 1391 (1995).

58 Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L Rev 431, 437 (1986).

59 See FRAP 28(a)(8)(B) (requiring briefs to contain, "for each issue, a concise statement of the applicable standard of review").

60 See, for example, *Brown v Payton*, 544 US 133, 148 (2005) (Breyer concurring) ("[T]his is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."); *Fantasyland Video, Inc v County of San Diego*, 496 F3d 1040, 1041 (9th Cir 2007) ("Identification of the proper standard of review under state law will likely determine the outcome of this appeal."); *Transamerica Premier Insurance Co v Ober*, 107 F3d 925, 929 (1st Cir 1997) ("[T]he pertinent standard of review . . . is decisive in shaping the outcome of our assessment."); *In re Brana*, 51 F3d 1560, 1569 (Fed Cir 1995) ("[E]ven though in some cases [the standard of review] might

explicitly distinguish precedents based on differing standards of review.[61] The Seventh Circuit has memorably stated that a decision will be overturned under the clearly erroneous standard only if it "strike[s] [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish,"[62] a metaphor adopted by many other circuits to illustrate the burden of challenging facts on appeal.[63] Commentators agree that standards of review matter and have devoted many pages to drawing subtle distinctions between various standards of review, which suggests that these distinctions are not entirely meaningless.[64]

To be sure, legal realists who believe that judicial outcomes are determined primarily by the facts may be skeptical of the relevance of deference regimes—although realists do not claim

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not matter, in others it would, otherwise the lengthy debates about the meaning of these formulations and the circumstances in which they apply would be unnecessary."); *United States v Conley*, 4 F3d 1200, 1204 (3d Cir 1993) ("[T]he standard of review can be outcome determinative."); *Payne v Borg*, 982 F2d 335, 338 (9th Cir 1992) ("The relevant standards of review are critical to the outcome of this case."); *United States v Vontsteen*, 950 F2d 1086, 1091 (5th Cir 1992) (en banc) ("[T]he standard chosen often affects the outcome of the case."); *United Steelworkers of America v Schuylkill Metals Corp*, 828 F2d 314, 320 (5th Cir 1987) ("In this case, the standard of review determines the outcome."); *Fox v Commissioner of Internal Revenue*, 718 F2d 251, 253 (7th Cir 1983) ("The critical issue in this case is one not discussed by the parties: our standard of review.").

61 See, for example, *Collins v Alco Parking Corp*, 448 F3d 652, 658 (3d Cir 2006); *United States v Aguilera*, 106 Fed Appx 892, 896 (5th Cir 2004); *Marshall v United States*, 436 F2d 155, 157 n 4 (DC Cir 1970); *Highmark Federal Credit Union v Hunter*, 814 NW2d 413, 418 (SD 2012); *State v Reed*, 21 SW3d 44, 46 (Mo App 2000). But see *United States v Shelton*, 937 F2d 140, 143–44 (5th Cir 1991) (rejecting the defendant's argument that precedent was "not controlling because it was decided under a different standard of review," and choosing to treat the precedent as "controlling" regardless).

62 *Parts and Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (7th Cir 1988).

63 See, for example, *McCormack v Hiedeman*, 694 F3d 1004, 1019 (9th Cir 2012); *L.J. v Wilbon*, 633 F3d 297, 311 (4th Cir 2011); *United States v Lanham*, 617 F3d 873, 888 (6th Cir 2010).

64 See, for example, Childress and Davis, 1 *Federal Standards of Review* § 1.01 at 1-2 (cited in note 22) ("[S]tandards of review—those yardstick phrases meant to guide the appellate court in approaching both the issues before it and the trial court's earlier procedure or result—actually matter. They do affect subsequent courts, trial and appellate, in doing their job.") (emphasis omitted); Edwards and Elliott, *Federal Courts* at v (cited in note 55); Eugene Volokh and Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L J 2431, 2441 & nn 62–63 (1998) ("Skeptics may suggest that, in practice, the standard of review matters little—that judges will manipulate the standard to reach the results they want. We disagree. Doubtless such manipulation sometimes happens, but in our experience courts generally do take the standard of review seriously."). See also generally Kevin Casey, Jade Camara, and Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 Fed Cir Bar J 279 (2002). As of May 27, 2015, there were over 670 articles in Westlaw's database of journal articles with "standard" (or "standards") and "review" in their titles.

that rules never matter.[65] A treatise on federal standards of review begins by emphasizing two points about the importance of legal practice over formalism: first, "[t]he formulations do not say much until the appeals court . . . gives them life"; and second, "[e]ven when the slogans have no real internal meaning . . . the issue framing or assignment of power behind the words is the turning point of the decision."[66] Thus, for example, the phrase "abuse of discretion" reflects the sense that appellate courts should not review de novo every minor evidentiary or procedural determination of trial courts—but "the variety of matters committed to the discretion of district judges means that the standard is necessarily variable."[67]

Similarly, one might believe that the Federal Circuit uses a higher standard to invalidate issued patents not because of formal evidentiary standards, but because of its reluctance to disrupt settled expectations and reveal a split with a coordinate branch.[68] The presumption of patent validity merely captures this legal practice. And the legal practice behind the words matters: former Federal Circuit chief judge Paul Michel once told practitioners that "standards of review influence dispositions in the Federal Circuit far more than many advocates realize."[69]

When the Federal Circuit, sitting en banc, considered its review of PTO fact-finding in *In re Zurko*,[70] it noted that "the

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65 See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex L Rev 267, 275 & n 39 (1997) (stating that a fundamental tenet of legal realism is that "judges respond primarily to the stimulus of facts" but cautioning that "[p]roper emphasis must be put on the word 'primarily': no Realists (except perhaps Underhill Moore) claimed that rules never mattered to the course of decision"); Joseph William Singer, Book Review, *Legal Realism Now*, 76 Cal L Rev 465, 471 (1988) ("The most convincing legal realists argued that the reasoning demanded by judicial opinions substantially constrained judges.").

66 Childress and Davis, 1 *Federal Standards of Review* § 1.01 at 1-2 (cited in note 22) (emphasis omitted). See also Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 Me L Rev 367, 396–98 (1997) (arguing that "the reasoning behind the labeling is the important first step in the [standard of review] analysis" and the attempt to base standards of review on the law/fact distinction "is a misguided and impossible adventure").

67 Edwards and Elliott, *Federal Courts* at 67 (cited in note 55).

68 See, for example, *Dickinson v Zurko*, 527 US 150, 161–62 (1999) ("[B]oth bench and bar have now become used to the [Federal] Circuit's application of a 'clearly erroneous' standard that implies somewhat stricter court/court review.").

69 Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 Ohio St L J 1415, 1415 (1995).

70 142 F3d 1447 (Fed Cir 1998) (en banc), revd, *Dickinson v Zurko*, 527 US 150 (1999).

outcome of this appeal turns on the standard of review."[71] This means that the court thought the PTO's finding was clearly erroneous (and thus reversible under the clear error standard) even though the finding was supported by substantial evidence (and thus not reversible under the less searching standard of the Administrative Procedure Act[72] (APA)).[73] The Supreme Court reversed, stating that the Federal Circuit had not explained why PTO review "demands a stricter fact-related review standard than is applicable to other agencies."[74] The debate was not over the inherently slippery distinction between clear error and substantial evidence. Rather, it was over the meaning behind these words and the balance of power between the PTO and the Federal Circuit.[75] An empirical study concluded that there was a statistically significant decrease in Federal Circuit reversals of the PTO in post-*Zurko* patent cases,[76] suggesting that the decision did impact Federal Circuit review.

Efforts to quantify the effect of standards of review are challenging due to selection effects. Simply counting reversals misses those cases that are settled or not appealed. But one would expect these effects to *decrease* the observable impact of the standard of review.[77] It is thus noteworthy that there was an observable effect post-*Zurko*, and that another empirical study of Illinois appellate cases found that "application of standards of review that grant less deference to the lower court's decision regularly yield lower affirmance rates."[78] Another study of federal appellate cases found both that "deferential standards of review appear to considerably decrease the probability of outright reversal" and "no evidence that judges manipulate standards of

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71 *In re Zurko*, 142 F3d at 1449.

72 60 Stat 237 (1946), 5 USC § 706(2)(E) (instructing that courts shall "hold unlawful and set aside agency action . . . found to be . . . unsupported by substantial evidence").

73 See *In re Zurko*, 142 F3d at 1449.

74 *Dickinson*, 527 US at 165.

75 See id at 160–61.

76 See Jeffrey M. Samuels and Linda B. Samuels, *The Impact of* Dickinson v. Zurko *on Federal Circuit Review of USPTO Board Decisions: An Analytic and Empirical Analysis*, 20 Fed Cir Bar J 665, 675–80 (2011) (reviewing all relevant decisions of the Federal Circuit from 1990 to 2009, a period straddling the 1999 *Zurko* decision).

77 See George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1, 17–20, 29 (1984) (arguing that selection effects will cause win rates to be independent of decision standards but dependent on the stakes of the parties and further noting that this model "applies indistinguishably to trial and appellate disputes").

78 Timothy J. Storm, *The Standard of Review* Does *Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 SIU L J 73, 103 (2009).

review."[79] One study avoided the selection-effect problem by looking at the effect of changing standards of review on departures from federal sentencing guidelines (because all convicted offenders must be sentenced) and found that "[c]hanges to standards of review clearly have an impact on district judges' sentencing behavior."[80] The authors of this study concluded that "[these] results also provide indirect evidence that review standards constrain circuit courts."[81]

To be sure, courts sometimes make mistakes in determining the correct standard of review,[82] and similar deference regimes may be treated differently in different contexts.[83] We are not claiming that all courts necessarily treat deference identically. Some courts might treat deference regimes literally, scrutinizing each appellate issue to determine whether it was actually clear error, an abuse of discretion, and so on. Other courts might apply a rough two-step process: give deferential cases only a cursory look but then scrutinize them more carefully if something appears amiss. Still others might employ a different type of procedure. For our purposes, all that matters is that courts do in fact grant deference: the evidence presented in this Section demonstrates that, in some cases, courts place a thumb on the scales in favor of the judgment of another decisionmaker rather than simply making the decision independently.

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79 Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 Utah L Rev 1, 5. The full effects of deferential review were "complex"; for example, "findings of fact [were] associated with more manifested ideological disagreement than discretionary rulings or conclusions of law." Id. The overall rates of reversal in the federal courts are quite low. In 2013, for instance, the federal courts of appeals reversed only 6.8 percent of the cases that they decided on the merits. *Statistical Tables for the Federal Judiciary: December 31, 2013* table B-5 (Administrative Office of the US Courts, 2014), archived at http://perma.cc/G772-FKRU. Reversal rates for private civil cases were slightly higher, at 11.8 percent. Id.

80 Joshua B. Fischman and Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J Legal Stud 405, 431 (2011).

81 Id at 432.

82 See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 Lewis & Clark L Rev 233, 252–75 (2009) (reporting that, "in nearly three percent of the factual sufficiency appeals in Texas, the appellate court was using a disfavored standard of review" and that a handful of California cases applied de novo review "under questionable circumstances").

83 See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm & Mary L Rev 679, 718–20 (2002) (quantifying affirmance rates in various administrative appeals and finding that agency-specific practices can affect these rates).

C. Deference Mistakes Formally Defined

We are now ready to describe the class of cases and situations with which this Article is centrally concerned. We are interested in situations in which, at time t_1, some legal decisionmaker C_1 decides a particular legal issue. At time t_2, some other legal decisionmaker C_2 is confronted with a similar legal issue in a different case, and C_1's opinion is either binding or persuasive precedent. Note that C_2 could be a court, an agency, or any other legal actor—the only requirement is that C_1's opinion have some influence on C_2's eventual decision. C_2 makes a deference mistake when it misapplies C_1's opinion by failing to account for the deference regime under which the case was decided.

We use "deference regime" to describe trans-substantive standards of review, burdens of proof, and standards of evidence. "Clear and convincing evidence" is a deference regime, as are "abuse of discretion," "clearly established federal law," "preponderance of the evidence," "*Chevron* deference," and "de novo review." We focus on these trans-substantive standards because their potential to generate judicial errors—particularly errors that propagate and thereby affect doctrine—has been overlooked. And we treat them as a class because they share many of the same characteristics, including their propensity to be misunderstood or addressed sloppily by the decisionmakers applying them.

"Deference regime" may not seem like the most appropriate term, as many of these evidentiary standards do not self-evidently involve deference to a lower body in the way that an abuse of discretion standard might. We employ the term largely because it is convenient and relatively descriptive. But we also believe that it captures much of what is driving the trans-substantive standards in these situations. For instance, the fact that a federal court can invalidate an issued patent only if there is clear and convincing evidence results from the deference that the court affords to the PTO, which issued the patent.[84] The fact

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[84] See *Microsoft*, 131 S Ct at 2243 (agreeing with the Federal Circuit that the statutory presumption of patent validity codified the "common-law presumption based on 'the basic proposition that a government agency such as the [PTO] was presumed to do its job'"), quoting *American Hoist & Derrick Co v Sowa & Sons, Inc*, 725 F2d 1350, 1359 (Fed Cir 1984); *KSR International Co v Teleflex Inc*, 550 US 398, 426 (2007) (noting that the "rationale underlying the presumption" of patent validity is "that the PTO, in its expertise, has approved the claim").

that a federal court will overturn a state conviction only if it violated "clearly established [f]ederal law" is due to the deference that the federal courts owe to state courts under the Antiterrorism and Effective Death Penalty Act[85] (AEDPA).[86] The same is true for cases of qualified immunity, in which police officers and other state actors may be held responsible under § 1983 only for violations of clearly established law in part because of the deference owed by courts to those whose responsibility it is to enforce the law.[87] Although the precision of the term "deference regime" is not of great importance, we wish to emphasize the commonalities between these trans-substantive standards, and thus the sense behind treating them collectively here.

A deference mistake occurs when C_2 relies on C_1's opinion without fully accounting for the deference regime under which C_1 decided the prior case.[88] C_2 could mistakenly treat C_1's opinion as if it involved more deference than it actually did (a "stronger" deference regime) or less; either type of error is a deference mistake. The mistake could be explicit or implicit, and it might or might not be dispositive in a given case. Deference mistakes might also be more or less influential depending on the identity of C_2. If C_2—the erring decisionmaker—is an appellate court, its deference mistakes will likely have a substantial impact on the law. A trial court will have more-modest influence; an administrative agency may exert less influence still. But even an administrative agency that issues nonbinding decisions

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85 Pub L No 104-132, 110 Stat 1214, codified at 28 USC § 2241 et seq.

86 See AEDPA § 104, 110 Stat at 1219, codified at 28 USC § 2254(d)(1). See also *Renico v Lett*, 559 US 766, 773 (2010) ("AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt.") (quotation marks and citations omitted); Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 Hofstra L Rev 1263, 1264 (2003) ("Although opinions differ on the practical magnitude of change in federal habeas review of state petitions wrought by the enactment of the AEDPA, the statute does mandate a level of federal deference to state court decisions on issues of federal law previously nonexistent.").

87 See Charles T. Putnam and Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions under 42 U.S.C. § 1983*, 12 U Bridgeport L Rev 665, 708 (1992) ("As might be expected, the courts appear willing to grant wide deference to the judgment of correctional officials when those officials are confronted with situations in which the use of force is perceived as necessary."); *Hoitt v Vitek*, 361 F Supp 1238, 1242 (D NH 1973) ("This deference to the judgment of prison officials in perceiving what they consider to be an emergency situation and unilaterally acting to quell or prevent it has been recognized by the federal judiciary and reflects a proper understanding of a prison's need for discipline, safety, and security.").

88 This definition includes the possibility that C_2 treats C_1's decision as having been qualified by deference when the decision was really de novo.

can nonetheless influence the law through repeated deference mistakes. For instance, those mistakes may create reliance interests that future decisionmakers are reluctant to upset.[89] Past practice and facts on the ground can exert a powerful influence even when they have no binding legal effect.

In sum, if C_2's decision exerts any precedential influence going forward, then C_2's deference mistakes will potentially influence the way that cases are decided and, in the long run, the shape of the law.

D. Why Would Courts Make Deference Mistakes?

Those who believe that deference regimes matter might still be skeptical of our thesis for another reason: the idea that a court might make a *mistake* about the relevant deference regime might seem bizarre. For example, it is well understood that a right must be clearly established to defeat a claim of qualified immunity, so the very fact that the defendant is a public official—or that the defendant has made a claim of qualified immunity—should alert the judge reading the opinion to the fact that the issue is whether the right is clearly established, not whether the right exists.

Yet it is easy to imagine how such a mistake might be made. A sloppy judge (or clerk) might not read an opinion in full or might not attend to all the details and circumstances surrounding a holding. A judge (or clerk) might take a single sentence or

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[89] For example, the PTO can affect the development of patent doctrine by repeatedly making the same deference mistake when granting patents. Granted patents are then entitled to a presumption of validity, making them more likely to be upheld in the infringement context. The existence of many such patents may create reliance interests that courts are reluctant to upset, even if those courts do not believe that the patents should have been granted in the first instance. Indeed, this precise consideration appears to have been decisive when *Association for Molecular Pathology v Myriad Genetics, Inc*, 133 S Ct 2107 (2013), the case involving the patenting of human genes, was heard by the Federal Circuit. See generally *Association for Molecular Pathology v United States Patent and Trademark Office*, 689 F3d 1303 (Fed Cir 2012). Judge Kimberly Moore, the deciding vote in that case, explicitly rested her decision on the desire not to disturb settled reliance interests related to already-granted (and upheld) gene patents. See id at 1343 (Moore concurring) (citation omitted), revd in part, *Association for Molecular Pathology v Myriad Genetics, Inc*, 133 S Ct 2107 (2013):

> If I were deciding this case on a blank canvas, I might conclude that an isolated DNA sequence that includes most or all of a gene is not patentable subject matter. . . . [But] [t]here are now thousands of patents with claims to isolated DNA . . . . I believe we must be particularly wary of expanding the judicial exception to patentable subject matter where both settled expectations and extensive property rights are involved.

paragraph out of context. The availability of legal materials online, which allows individuals to search electronically for certain words or phrases and jump to certain portions of an opinion, might facilitate and exacerbate these types of errors.[90] And indeed, courts *do* make these types of mistakes, and they do so across a variety of legal doctrines, as we show in Part II. Even though we cannot quantify the frequency of such mistakes, we think it uncontroversial that courts sometimes cite cases inappropriately.

Judges may sometimes have strategic reasons for citing precedents misleadingly. But such mistakes may also occur when judges lack the resources to carefully consider each of their citations. When judicial caseloads surge, judges have less time to devote to each case. This can affect substantive outcomes.[91] Deference mistakes are also likely to multiply as average opinion length increases, because judges will have less time to focus on each citation.[92] The average number of cases cited in federal appellate opinions has increased from around fifteen in 1957 to over thirty in 2007, in part due to the ease of citation production through electronic legal research.[93]

Judges increasingly rely on law clerks (who are typically fresh out of law school) to perform legal research and draft opinions (as indicated by textual analysis,[94] statements by judges,[95] and even opinions themselves[96]). Nonprecedential cases may be written entirely by staff attorneys and law clerks, with little

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90 One of us committed such an error while clerking, though the error was fortunately caught by a co-clerk.

91 See generally Huang, 124 Harv L Rev 1109 (cited in note 6).

92 See generally Ryan C. Black and James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Houston L Rev 621 (2008) (examining the increase in the length of Supreme Court opinions over time).

93 See Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U Ill J L Tech & Pol 51, 69–70.

94 See generally Jeffrey S. Rosenthal and Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 Cornell L Rev 1307 (2011).

95 See, for example, Richard A. Posner, *Cardozo: A Study in Reputation* 148 (Chicago 1990) ("[M]ost judicial opinions are written by the judges' law clerks rather than by the judges themselves."); William H. Rehnquist, *The Supreme Court* 261 (Knopf 2d ed 2001) ("After this [post-conference] discussion, I ask the clerk to prepare a first draft of a Court opinion and to have it for me in ten days or two weeks."); Wald, 62 U Chi L Rev at 1383 (cited in note 57) ("It is an ill-kept secret that law clerks often do early drafts of opinions for their judges.").

96 See *Acceptance Insurance Co v Schafner*, 651 F Supp 776, 778 n * (ND Ala 1986) ("This Memorandum of Opinion was prepared by William G. Somerville, III, Law Clerk, in which the Court fully concurs.").

supervision.[97] A law clerk might insert a quotation from some precedential opinion that supports his or her judge's argument without reading the entire opinion or considering its context, and judges might not verify every citation in their opinions.[98]

The persistence of deference mistakes is made somewhat more puzzling by the adversarial nature of litigation. We have described the process by which judges insert citations that they have themselves identified into their own opinions. At the same time, many citations in published opinions derive from the parties' briefs. It seems natural to expect that the parties and their attorneys would make deference mistakes only rarely, and that many of these deference mistakes would be identified by the adverse party. And yet parties, like courts, may sometimes be resource-constrained or may even purposely attempt to introduce deference mistakes.[99] Tracing the source of deference mistakes would be a useful avenue for further research. For now, we know for certain only that deference mistakes exist, often in important cases regarding significant issues.

In sum, we believe that there are many reasons why courts make deference mistakes. In Part II, we bring some content to

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97 See Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz St L J 1, 42 (2007) ("[M]ost Ninth Circuit unpublished opinions are clerk and staff attorney work product, rather than the fruits of judicial labor."); Brian Soucek, *Copy-Paste Precedent*, 13 J App Prac & Process 153, 169 (2012).

98 See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 Yale L J 1898, 1933–34 (2011) (stating that, when federal courts "cite [state] cases that are outdated from a methodological perspective," "[t]hese citation choices are likely due to errors by law clerks or lawyers or to the tendency of courts to rely on the same (sometimes outdated) set of boilerplate precedents from case to case").

99 Indeed, there may be cases in which a court catches and eliminates a deference mistake introduced by a party. A version of this occurred during the October 2014 argument in *al Bahlul v United States*, 767 F3d 1 (DC Cir 2014). There the government argued that a prior case (involving the same petitioner) was binding, only to be admonished by Judge David Tatel that the earlier case had been decided under a plain error standard, while at least Tatel believed that the instant case should be reviewed de novo. See Steve Vladeck, *Evidence of Absence: A Brief Reply to Peter Margulies on the* al Bahlul *Argument* (Lawfare, Oct 23, 2014), archived at http://perma.cc/JXV5-VG85. We hesitate to deem this an outright deference mistake, because the standard of review in the *instant* case was at issue, and the government had argued that a plain error standard should govern. See Brief for the United States, *al Bahlul v United States*, No 11-1324, *23–26 (DC Cir filed Sept 17, 2014) (available on Westlaw at 2014 WL 4647818). The government may have simply been operating under an ongoing belief that the standards of review in the two cases were identical, or it may have been trying to induce the court into making a deference mistake by treating the prior case as binding regardless of the standard that the court chose to adopt in the case before it.

this existence claim by documenting instances in which courts have made such errors. Part III will then explicate our model of deference mistakes and the way in which they can exert long-term influence on legal doctrine.

II. DEFERENCE MISTAKES IN PRACTICE

Part I showed that the three necessary elements for deference mistakes are present in the real-world legal system: (1) decisionmakers sometimes grant deference on issues that will matter in future cases, (2) this deference does sometimes affect outcomes, and (3) various institutional factors might cause courts to rely on precedent without considering the deference regime under which the precedent was decided. This Part demonstrates that deference mistakes have actually occurred in practice, that they may have been dispositive and caused courts and agencies to err, and that they are a plausible source of some of the doctrinal movement that has occurred in the relevant areas of law.

A. Federal Rights under Habeas and Qualified Immunity: Not Clearly Established or Clearly Not Established?

Deference mistakes may be most pernicious when courts review issues of law under different standards. If a defendant raises an issue of criminal procedure in the course of a criminal trial, the court will decide the issue according to whatever legal standard is intrinsic to the criminal procedure right itself. A court must decide whether a search was reasonable,[100] whether a defendant's waiver of her Fifth Amendment rights was voluntary,[101] or whether a defendant was denied the right to confront an accuser.[102] These are the baseline legal standards. As described in the following sections, however, if one of these questions arises in the context of a habeas petition or a § 1983 suit for damages, the baseline standard is not the only one at issue. A court must also determine whether the right was clearly established—that is, whether prior cases firmly establish the right, or whether it represents a step beyond existing law.[103]

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[100] See US Const Amend IV.

[101] See *Miranda v Arizona*, 384 US 436, 461 (1966).

[102] See *Crawford v Washington*, 541 US 36, 43 (2004).

[103] See notes 107–11 and accompanying text. We do not mean to imply that "clearly established" has the same meaning in both contexts. The precise meaning of the term is

This is a higher standard and represents a position of deference, either to the state court that originally tried the defendant (habeas) or to the state actor who is the defendant (§ 1983).

If a court announces that a certain right was not clearly established, and courts subsequently rely on that precedent in a direct criminal appeal to conclude that the right does not exist at all, this mistake would tend to shrink the scope of the right. In other words, if courts regularly mistake a right that is not clearly established for one that is clearly not established, the effect will be to contract the scope and power of that right.[104]

1. Habeas relief for criminal defendants.

The writ of habeas corpus allows a prisoner to challenge the legal authority for his detention. We focus here on 28 USC § 2254, which allows the writ to be granted when a state prisoner is held "in violation of the Constitution or laws or treaties of the United States."[105] Under AEDPA, such relief is available after a state court merits adjudication only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts."[106]

A court considering a habeas petition is thus not determining de novo whether there was a violation of federal law; rather, the court may consider only whether there are on-point Supreme Court "holdings, as opposed to [ ] dicta,"[107] on the legal issue and whether the state court decision was "diametrically different"[108] from this precedent or involved an "unreasonable" application of law on which it is not "possible [that] fairminded jurists could

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unimportant here; the important point is only that finding a right to be clearly established requires a more searching inquiry than de novo review.

104 As we will explain in Part III.C, such mistakes could also run in the opposite direction: just because some court has held that a right is established does not mean that the right is clearly established. We have not found any examples of such errors, and we think that these errors are less likely because the government tends to focus on the importance of the "clearly established" requirement in cases in which it applies, but which kind of mistake dominates is ultimately an empirical question.

105 28 USC § 2254(a).

106 28 USC § 2254(d). See also generally Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 Buff Crim L Rev 535 (1999).

107 *Williams v Taylor*, 529 US 362, 412 (2000).

108 Id at 406.

disagree."[109] The Supreme Court has made clear that it is not enough for the state court to have gotten the law wrong: "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[110] In addition to this restricted legal review, a court considering a habeas petition must also give "remarkably deferential review . . . to state court factfindings, actual or implied."[111]

Given this high degree of deference on both law and facts, one would expect federal courts at all levels to deny habeas relief—finding no clearly established violation of federal law—in many cases in which they would have found a violation of the defendant's rights on direct review. It would thus be a mistake to rely on these habeas precedents when evaluating the existence of these rights on direct review, and yet numerous courts have done exactly that.

In *Harris v Stovall*,[112] the Sixth Circuit considered a habeas petition filed by an indigent defendant who argued that due process was violated when he was denied transcripts from the earlier trial of his codefendants.[113] The defendant had hoped to use these transcripts to impeach the state's witnesses.[114] The Supreme Court had held, in *Britt v North Carolina*,[115] that "the state must 'provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.'"[116] But the Sixth Circuit concluded that the Supreme Court had not specifically extended *Britt*'s principle to the situation in *Harris*: "Supreme Court precedent existing at the time of petitioner's trial did not dictate or compel a rule that a defendant is entitled to a free copy of a transcript of his codefendants' previous trial for impeachment of witnesses."[117] *Harris* was then cited by a district court *in an initial criminal trial* to deny an indigent defendant's motion for transcripts:

> In *Harris v. Stovall* . . . this Circuit reviewed the limits of the United States Supreme Court's directive in *Britt*. . . . The Court concluded in *Harris* that U.S. Supreme Court

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109 *Harrington v Richter*, 131 S Ct 770, 786 (2011).

110 Id at 785, quoting *Williams*, 529 US at 410.

111 Childress and Davis, 2 *Federal Standards* § 7.02 at 7-5 (cited in note 22).

112 212 F3d 940 (6th Cir 2000).

113 Id at 941–42.

114 Id at 942.

115 404 US 226 (1971).

116 *Harris*, 212 F3d at 944, quoting *Britt*, 404 US at 227.

117 *Harris*, 212 F3d at 945.

> precedent did not establish that the defendant was entitled to a free copy of a transcript of his co-defendants' previous trial for impeachment of witnesses.[118]

But this is a mistake: *Harris* did not say that "Supreme Court precedent did not establish" a right to free transcripts of earlier proceedings—it said that Supreme Court precedent did not *clearly* establish such a right.[119] The Supreme Court of Ohio also made a deference mistake involving *Harris*: in rejecting a capital defendant's request for daily transcripts of his trial, the court erroneously cited *Harris* as "rejecting defendant's contention that *Britt* entitled him to transcripts from his accomplice's trial."[120] And a brief by the United States before the First Circuit similarly erred by citing *Harris* as holding that "an indigent defendant is not entitled to free copies of transcripts from a co-defendant's trial."[121]

In *Brown v Payton*,[122] the defendant sought habeas relief from a prior state court decision, in which the California Supreme Court had held that the prosecutor's misstatements (that the jury should disregard the defendant's religious conversion) did not mislead the jury about its ability to consider mitigating evidence.[123] The US Supreme Court agreed that the prosecutor was mistaken but held that habeas relief was unwarranted because the decision was not an objectively unreasonable application of clearly established federal law.[124] Two concurrences disagreed about whether they would have found an Eighth Amendment violation on direct review; Justice Stephen Breyer noted that "this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."[125] But *Payton* was later cited to reject challenges to similar prosecutorial statements in nonhabeas cases. The Arizona Supreme Court stated in *State v Roque*[126] that the US

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118 *Carrion v Wilkinson*, 405 F Supp 2d 850, 851–52 (ND Ohio 2005), citing *Harris*, 212 F3d at 944.

119 See *Harris*, 212 F3d at 945 ("[T]he Supreme Court precedent on the rule sought by petitioner was not clearly established.").

120 *State v Treesh*, 739 NE2d 749, 770 (Ohio 2001).

121 Brief for Appellee, *United States v Solano-Moreta*, No 09-1067, *50 (1st Cir filed Sept 11, 2009) (available on Westlaw at 2009 WL 7196601).

122 544 US 133 (2005).

123 Id at 138–39.

124 Id at 144, 147.

125 Id at 148 (Breyer concurring). See also id at 147–48 (Scalia concurring).

126 141 P3d 368 (Ariz 2006).

Supreme Court had concluded in *Payton* that "the jury was adequately instructed as to mitigation," and that the prosecutor's comments at issue in *Roque* were "[l]ikewise" allowable.[127] *Payton* was also cited by the Second Circuit in support of the conclusion that "it is extremely unlikely that the jury felt constrained in its consideration of [ ] mitigating evidence" in a case in which "the prosecutor erroneously argued that the jury could not consider mitigating evidence that was unrelated to the crimes for which [the defendant] had been found guilty."[128]

In *Poole v Goodno*,[129] the Eighth Circuit affirmed the denial of a habeas petition because "[t]here is no clearly established Supreme Court law which holds that due process requires a jury trial in civil commitment proceedings or that incorporates the Seventh Amendment right to a jury for such cases."[130] But in five subsequent cases, the Minnesota Court of Appeals mischaracterized *Poole*, repeatedly stating that "the Eighth Circuit held that federal due process does not require a jury trial before a person is committed as [a sexually dangerous person] under Minnesota law."[131] The First Circuit also cited *Poole* as a case in which "the claim to a jury trial right in civil commitments has been rejected."[132]

In the habeas appeal at issue in *Sims v Rowland*,[133] the Ninth Circuit held that "the state court's failure to hold an evidentiary hearing *sua sponte* when presented with evidence of juror bias" was not contrary to clearly established federal law.[134] The court explained that "[t]he reason is simple: the Supreme Court has not yet decided whether due process requires a trial court to hold a hearing *sua sponte* whenever evidence of juror bias comes to light."[135] But in a later direct appeal involving juror bias, the Ninth Circuit itself erroneously cited *Sims* as "holding that due process does not require a trial court to hold an

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127 Id at 398.

128 *United States v Fell*, 531 F3d 197, 221, 223 (2d Cir 2008).

129 335 F3d 705 (8th Cir 2003).

130 Id at 710–11.

131 *In re Civil Commitment of Sargent*, 2005 WL 406345, *2 (Minn App). See also *In re Civil Commitment of Shell*, 2009 WL 1182152, *8 (Minn App); *In re Civil Commitment of Martin*, 2005 WL 354088, *5 (Minn App); *In re Commitment of McEiver*, 2005 WL 704298, *2 (Minn App), citing *Poole*, 335 F3d at 710–11 ("There is no established law requiring a jury trial under the Seventh Amendment before a person is committed . . . under Minnesota law."); *In re Civil Commitment of Hartleib*, 2004 WL 2283558, *2 (Minn App).

132 *United States v Carta*, 592 F3d 34, 43 (1st Cir 2010).

133 414 F3d 1148 (9th Cir 2005).

134 Id at 1153.

135 Id.

evidentiary hearing sua sponte when presented with evidence of juror bias."[136]

The habeas petition in *Anderson v Mullin*[137] raised a double jeopardy challenge to the defendant's prosecution for a lesser included offense after his conviction for a greater offense had been reversed based on insufficient evidence.[138] The Tenth Circuit denied the petition based on the Supreme Court's "express reservation"[139] of this question in *Greene v Massey*.[140] But then the Kentucky Supreme Court stated that, "[a]lthough the United States Supreme Court has not ruled upon this precise issue, at least three federal appellate courts have determined that it is permissible for a defendant to be retried for a lesser included offense" in these circumstances—citing *Anderson* and two other habeas cases.[141] A federal district court similarly stated that *Anderson* had held that "double jeopardy [is] no bar to prosecution for [a] lesser included offense" in these circumstances.[142] These citations ignore the deferential context of *Anderson*: the habeas petition was necessarily rejected because of the Supreme Court's express reservation in *Greene*, but that does not mean that the Tenth Circuit panel that decided *Anderson* would not have found a violation on direct review.

Finally, in *Newton v Kemna*,[143] the defendant had sought to disqualify a witness as incompetent based on drug use, and his habeas petition asserted that the trial court's refusal to grant access to the witness's psychiatric records violated the Confrontation Clause.[144] The Eighth Circuit noted that "the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges" but concluded that, "[g]iven the restrictive nature of habeas review," it was not the Eighth Circuit's "province to speculate as to whether the Supreme Court, if faced with the issue, would find that Missouri's

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136 *United States v Mitchell*, 568 F3d 1147, 1151 (9th Cir 2009).

137 327 F3d 1148 (10th Cir 2003).

138 Id at 1150–52.

139 Id at 1155.

140 437 US 19 (1978).

141 *Cohron v Commonwealth*, 306 SW3d 489, 498 n 26 (Ky 2010), citing *Anderson*, 327 F3d at 1154–58, *Shute v Texas*, 117 F3d 233 (5th Cir 1997), *Beverly v Jones*, 854 F2d 412 (11th Cir 1988).

142 *Hargrove v Ohio Department of Rehabilitation and Correction*, 2010 WL 518176, *12 (SD Ohio).

143 354 F3d 776 (8th Cir 2004).

144 Id at 779. See also US Const Amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him.").

physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination."[145] A district court later relied primarily on *Newton* in rejecting a party's request for a witness's medical records, erroneously stating that *Newton* "held that the trial court's denial of the criminal defendant's access to the witness's medical records did not violate the confrontation clause under the Sixth Amendment."[146] Another district court stated that a criminal defendant's request for mental-health records "appears to be foreclosed by the Eighth Circuit's recent decision in *Newton v. Kemna*."[147] And a treatise cites *Newton* as support for the proposition that "privilege claims by testifying witnesses should generally be sustained."[148]

In sum, these examples illustrate that numerous courts have made deference mistakes by relying on habeas precedents in cases that arose on direct review. In the absence of other factors, the cumulative effect of such mistakes would be a systematic shrinking of federal rights. One would thus expect a declining success rate for both habeas petitions and direct criminal appeals.

There is some evidence that criminal procedure rights have constricted over time.[149] There are of course many possible explanations for this—including changes in judicial philosophies[150] and the composition of the courts[151]—and many of these explanations

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145 *Newton*, 354 F3d at 781–82.

146 *Jackson v Wiersema Charter Service, Inc*, 2009 WL 1531815, *1 (ED Mo).

147 *United States v Stone*, 2005 WL 1845153, *3 (D SD).

148 Christopher B. Mueller and Laird C. Kirkpatrick, 2 *Federal Evidence* § 5:43 at 792–93 & n 75 (Thomson Reuters 4th ed 2013).

149 See generally, for example, Louis Michael Seidman, Book Review, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 Yale L J 2281 (1998); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Georgetown L J 151 (1980). See also Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich L Rev 2466, 2515 (1996) (arguing that courts have narrowed particular types of rights); Justin F. Marceau, *Challenging the Habeas Process rather than the Result*, 69 Wash & Lee L Rev 85, 102 (2012) (examining all 115 Supreme Court habeas decisions from 1996 to 2011 and finding that the success rate declined from 50 percent in the late 1990s to just over 20 percent in the 2000s to under 15 percent during 2010 and 2011); Nancy J. King and Joseph L. Hoffmann, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* 79 (Chicago 2011) ("[T]he percentage of petitioners who obtain relief has decreased over time.").

150 See, for example, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Georgetown L J 185, 247 (1983).

151 See, for example, Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 Ind L J 273, 275 (1987).

may be complementary. We simply add one more possible explanation: deference mistakes—in which courts mistake rights that are not clearly established for those that are clearly not established—may be contributing to a systematic doctrinal creep by limiting the range of substantive rights that are enforced.

2. Qualified immunity in § 1983 and *Bivens* suits.

A similar deference regime exists in the qualified immunity context. Plaintiffs may seek redress for constitutional violations by government officials under § 1983[152] (for state actors) or *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*[153] (for federal officials),[154] but the doctrine of qualified immunity limits government liability for damages.[155] The Supreme Court has held that "government officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[156] Thus, as in the habeas context, courts might evaluate whether federal rights exist (applying a less deferential standard), or whether the rights are clearly established (the more deferential standard of § 1983 and *Bivens* cases).[157]

One might expect a similar problem as in the habeas context: even if a court thinks that there was a constitutional violation, the government will win on qualified immunity if the violation was not clearly established. And if similar situations arise outside the qualified immunity context—for example, when a lawsuit seeks an injunction or the suppression of evidence or involves municipal policy[158]—and courts mistakenly rely on these

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152 42 USC § 1983.

153 403 US 388 (1971).

154 Id at 396–97.

155 For a general overview of these topics, see Richard H. Fallon Jr, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 733–42, 955–72, 994–1006 (Thomson Reuters 6th ed 2009) (describing *Bivens*, § 1983, and qualified immunity).

156 *Harlow v Fitzgerald*, 457 US 800, 818 (1982). See also *Hope v Pelzer*, 536 US 730, 741 (2002) (holding that earlier cases with "materially similar" facts are not necessary to show that a clearly established right was violated); *United States v Lanier*, 520 US 259, 268–69 (1997) (determining that a right may be established by consistent circuit court precedent); *Anderson v Creighton*, 483 US 635, 640 (1987) (stating that a right must be established in a "particularized," rather than general, sense).

157 The "clearly established" language was, however, judicially rather than statutorily created.

158 See *Camreta v Greene*, 131 S Ct 2020, 2031 n 5 (2011).

qualified immunity precedents to conclude that there was no violation, the result would be a systematic shrinking of constitutional rights. Once again, courts might mistake rights that are not clearly established for ones that are clearly not established.

But there is an important difference between qualified immunity and habeas that makes these deference mistakes less likely. In the 2001 decision *Saucier v Katz*,[159] the Supreme Court mandated a particular sequencing for qualified immunity cases, holding that courts must first consider whether the alleged conduct violated a constitutional right before considering whether that right is clearly established.[160] Many criticized *Saucier* for mandating dicta about important constitutional questions,[161] but others argued that the benefits of constitutional articulation outweighed these concerns.[162] In 2009, the Supreme Court abrogated mandatory *Saucier* sequencing in *Pearson v Callahan*,[163] but the Court has since emphasized that sequencing "is sometimes beneficial to clarify the legal standards governing public officials."[164] And post-*Pearson* studies have found that, when courts concluded that qualified immunity applied, in only around 25 to 30 percent of circuit cases and fewer than 5 percent of district cases did those courts exercise their discretion to avoid the underlying constitutional issue.[165]

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159 533 US 194 (2001).

160 Id at 201. The Supreme Court had followed this approach in earlier cases. See, for example, *Wilson v Layne*, 526 US 603, 614 (1999) ("Since the police action in this case violated petitioners' Fourth Amendment right, we now must decide whether this right was clearly established at the time of the search."); *Mitchell v Forsyth*, 472 US 511, 535 (1985) ("Mitchell is immune from suit for his authorization of the Davidon wiretap notwithstanding that his actions violated the Fourth Amendment.").

161 See, for example, *Brosseau v Haugen*, 543 US 194, 201–02 (2004) (Breyer concurring); Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 NYU L Rev 1249, 1275–81 (2006).

162 See generally, for example, Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U Colo L Rev 401 (2009); Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L Rev 1539 (2007). But see generally John C. Jeffries Jr, *Reversing the Order of Battle in Constitutional Torts*, 2009 S Ct Rev 115 (arguing that the rule from *Pearson v Callahan*, 555 US 223 (2009), the case that overturned *Saucier*, is defensible in certain contexts).

163 555 US 223 (2009).

164 *Camreta*, 131 S Ct at 2032.

165 See, for example, Ted Sampsell-Jones and Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 Fordham L Rev 623, 628–29 (2011) (examining 190 circuit cases from 2009 to 2010 and finding that 31.4 percent of denied claims avoided the constitutional question); Colin Rolfs, Comment, *Qualified Immunity after* Pearson v. Callahan, 59 UCLA L Rev 468, 489, 496–97 (2011) (examining 100 district cases and 100 circuit cases from 2009 and finding that, of denied claims, 24.6 percent of circuit court decisions and 2.7 percent of district court decisions avoided the constitutional question).

A formal deference mistake (as we have defined it) in this setting requires precedent that finds immunity without reaching the constitutional question, and given the small universe of such cases, it is unsurprising that we found fewer examples of such mistakes than in the habeas context. But that is not to say that no such examples exist.

For example, in *DiMeglio v Haines*,[166] a zoning inspector alleged that the zoning commissioner violated his First Amendment rights by reassigning him in retaliation for his speech at a public meeting.[167] The Fourth Circuit held that the zoning commissioner was protected by qualified immunity: it was not clearly established that the inspector's speech was protected, because he was speaking as an employee.[168] The court noted that, shortly before the events at issue, "the Fifth Circuit [in *Terrell v University of Texas System Police*[169]] actually had held that whether speech is protected . . . depends upon whether the employee is speaking as an employee or as an interested citizen," and that it was thus "at least questionable" whether the speech was protected.[170] A district court within the Fourth Circuit then cited *DiMeglio* in support of its rejection of a First Amendment claim, stating that "the critical determination is 'whether the speech at issue . . . was made primarily in the plaintiff's role as citizen or primarily in [her] role as employee.'"[171] But the language quoted is from *Terrell*, the Fifth Circuit case cited to show that the right was not clearly established—*DiMeglio* was not adopting *Terrell*'s holding.[172]

Given the smaller number of deference mistakes in the qualified immunity context as compared to the habeas context, one might conclude that courts reviewing habeas petitions should similarly be encouraged to determine whether a right is established before deciding whether it is *clearly* established. One scholar has even argued that mandatory *Saucier*-type sequencing should be required in habeas cases as a benefit to future

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166 45 F3d 790 (4th Cir 1995).

167 Id at 794.

168 Id at 805.

169 792 F2d 1360 (5th Cir 1986).

170 *DiMeglio*, 45 F3d at 805, citing *Terrell*, 792 F2d at 1362.

171 *Jackson v Alleghany County*, 2008 WL 3992351, *10 (WD Va), quoting *DiMeglio*, 45 F3d at 805.

172 See *DiMeglio*, 45 F3d at 805, quoting *Terrell*, 792 F2d at 1362.

criminal defendants.[173] There is, however, a vigorous empirical debate over whether *Saucier* actually led to an expansion of constitutional rights, with some evidence demonstrating that, when courts were forced to reach constitutional issues, they almost always decided these issues against the defendant.[174] Professor Nancy Leong, who conducted one of these studies, argues that "[t]he act of recognizing a right, yet precluding a remedy, could create cognitive dissonance for many judges," and, "[r]ather than tolerate this cognitive dissonance, judges may be subconsciously inclined to deny that a constitutional violation occurred at all."[175]

The empirical debate over *Saucier* illustrates that, while requiring courts to be explicit about how they would have decided an issue without deference may reduce the risk of formal legal error, it could also worsen the underlying deference problem. If decisionmakers engage in motivated reasoning to align their nondeferential conclusions with their deferential ones, then these (erroneous) nondeferential conclusions will become formally enshrined in the case law.

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[173] See generally Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 Seattle U L Rev 595 (2009). But see *Berghuis v Thompkins*, 560 US 370, 391–92 (2010) (Sotomayor dissenting) (criticizing the majority for announcing rules that are unnecessary to resolve the case, "which is governed by the deferential standard of review set forth in [AEDPA]").

[174] Compare, for example, Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepperdine L Rev 667, 690 (2009) (finding "virtually no change in the percentage of cases where courts held that a constitutional violation had taken place and a striking increase in the percentage of cases where courts held that no constitutional violation had taken place"); Rolfs, Comment, 59 UCLA L Rev at 486 n 130 (cited in note 165) (noting "a lopsided increase in the frequency with which courts find that no right was violated"); Sampsell-Jones and Yauch, 80 Fordham L Rev at 639 (cited in note 165) (confirming Professor Nancy Leong's findings on *Saucier*'s effects), with Hughes, 80 U Colo L Rev at 422–23 (cited in note 162) (reporting a post-*Saucier* increase in cases announcing constitutional rights); Greg Sobolski and Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 Stan L Rev 523, 547–49 (2010) (reporting a statistically insignificant increase in rights-restricting holdings post-*Saucier* and a statistically significant increase in rights-affirming holdings). Leong has argued that the differences between her study, the Hughes study, and the Sobolski-Steinberg study stem from her inclusion of nonprecedential cases and multiple claims, as well as the different time periods considered. See Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 Nw U L Rev 969, 972 n 32 (2011).

[175] Leong, 36 Pepperdine L Rev at 704 (cited in note 174). But see Jeffries, 2009 S Ct Rev at 125 (cited in note 162) (arguing that cognitive dissonance does not apply in this context because judges are not making unconstrained choices).

B. Criminal Law and Procedure: De Novo, Abuse of Discretion, or Plain Error?

Mistakes between the different contexts of direct criminal appeals, habeas petitions, and qualified immunity cases are particularly striking, but mistakes can also occur wholly within the context of direct appeals. Many issues in criminal cases are reviewed under deferential standards, and later courts (both district and appellate) sometimes fail to account for the deference regime under which a precedent was decided.

When a party to a criminal case appeals an issue that was raised at trial, the appellate court typically considers that issue under one of several deferential standards. Criminal procedure questions—including evidentiary determinations, challenges for cause, jury instructions, and motions for new trials—are reviewed under a deferential abuse of discretion standard.[176] Other issues are reviewed under a clearly erroneous standard, including questions of the defendant's competency and the voluntariness of waivers.[177] Appeals of guilty verdicts based on insufficient evidence are reviewed according to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements beyond a reasonable doubt."[178] However, when the appealing party has failed to raise and preserve the issue at trial, all these types of questions are reviewed only for plain error, an even more deferential standard.[179]

Unlike the habeas and qualified immunity deference regimes, in which the deference formally favors the state, deferential standards of review such as plain error could favor either party in a criminal appeal. But in practice, the deference usually favors the state—defendants appeal convictions but prosecutors generally cannot appeal when the defendant prevails,[180] and

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176 See Wayne R. LaFave, et al, 7 *Criminal Procedure* § 27.5(e) at 96–97 (Thomson West 3d ed 2007).

177 See id at § 27.5(e) at 97.

178 Id, quoting *Jackson v Virginia*, 443 US 307, 319 (1979).

179 See LaFave, 7 *Criminal Procedure* at § 27.5(d) at 87–88 (cited in note 176).

180 See US Const Amend V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."); *Benton v Maryland*, 395 US 784, 795–97 (1969). A judgment for the defendant entered on legal grounds—rather than based on a jury verdict or on the insufficiency of the evidence—may be appealed when a reversal would not require a second trial. See *United States v Scott*, 437 US 82, 91 n 7 (1978); *United States v Wilson*, 420 US 332, 345 (1975). Federal prosecutors may also appeal pretrial suppressions of evidence. See 18 USC § 3731.

defendants appeal sentences much more frequently than prosecutors do.[181] Appellate criminal case law thus appears more government friendly than appellate courts may have intended. This one-sided appeal problem compounds the deference mistakes in the habeas and qualified immunity contexts discussed above.[182] In addition to mistaking the "clearly established" standard, subsequent courts may not fully account for an appellate court's deferential standard of review, which most commonly favors the government.[183]

Below we provide examples of two kinds of deference mistakes that occur in criminal cases: (1) relying on precedent holding that an error did not rise to the level of plain error in order to reject claims of error when this high level of deference is inappropriate, and (2) relying on precedent holding that an evidentiary ruling was not an abuse of discretion when the same issue later arises in a nondeferential posture. We conclude this Section by examining the role of deference mistakes in the overall doctrinal development of criminal law and procedure.

1. Plain error mistakes.

Even those who accept that deference regimes sometimes matter might be skeptical that courts would ever distinguish between different deference regimes rather than lumping different standards such as abuse of discretion and plain error under one mental category of deference.[184] We agree that the labels for

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[181] For example, the federal courts of appeals decided 5,844 sentencing appeals from federal criminal defendants in 2011, compared with 53 sentencing appeals from the government. *2011 Sourcebook of Federal Sentencing Statistics* tables 56–56A (US Sentencing Commission, 2012), archived at http://perma.cc/YQJ5-Z8HS and http://perma.cc/VQK4-9B7R.

[182] See Part II.A.

[183] In habeas appeals, the government will necessarily have won below. And the same may be true in qualified immunity appeals for two reasons. First, a denial of qualified immunity may be appealed only when it involves a question of law (whereas grants of qualified immunity may always be appealed). See *Ashcroft v Iqbal*, 556 US 662, 671–74 (2009); *Mitchell*, 472 US at 530 ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision.'"). Second, the government—as a repeat player in qualified immunity cases—may also be more likely to settle cases that will probably result in unfavorable appellate precedent. See Galanter, 9 L & Society Rev at 102 (cited in note 6) ("[W]e would expect the body of 'precedent' cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to [repeat players].").

[184] See *Koon v United States*, 518 US 81, 100 (1996) ("A district court . . . abuses its discretion when it makes an error of law."). But a district court will be reversed under plain error review only if "the legal error [is] clear or obvious, rather than subject to reasonable dispute," if it "affected the appellant's substantial rights," and if "the error

these deference regimes have little intrinsic meaning, but we think that these labels reflect the way that judges generally treat the different situations in which the labels apply. When a criminal defendant fails to object at trial, such that a district court judge has no warning of a potential problem, appellate judges may be exceedingly reluctant to undo their colleague's hard work. This hesitance may well surpass whatever caution an appellate judge would exercise before overturning a lower court decision reviewed for abuse of discretion. Problems can arise, however, if in one case the defendant does not object at trial and the court of appeals affirms on plain error review, and then in subsequent cases—in which defendants do object at trial—that precedent is used mistakenly by district or appellate courts to find against the defendants.

For example, in *United States v Ristine*,[185] the Eighth Circuit held that it was not plain error to prohibit the defendant from "possessing any pornographic materials" or entering "any establishment where pornography or erotica can be obtained" as a condition of supervised release from imprisonment, despite precedent from another circuit suggesting that such a condition raises First Amendment concerns.[186] The court explicitly highlighted the extremely deferential standard of review:

> Were we reviewing this special condition for an abuse of discretion, we might be forced to select the line of reasoning we find more compelling, but the standard here is plain error. . . . [W]e cannot conclude that the District Court committed an error that is clear under current law because . . . the current law concerning this issue is unsettled. Because the imposition of the condition was not plain error, we are bound to uphold it.[187]

It would be a deference mistake to rely on *Ristine* in a later case to find that similar conditions on supervised release are not an abuse of discretion without recognizing the different postures of the two cases. Yet a later Eighth Circuit panel did exactly that. The court found that a ban on entering any location where pornography could be obtained was not an abuse of discretion

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seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett v United States*, 556 US 129, 135 (2009) (quotation marks omitted).

185 335 F3d 692 (8th Cir 2003).

186 Id at 694–95 (quotation marks omitted).

187 Id at 695.

because the restriction was "virtually identical to wording previously upheld" in *Ristine*.[188] Similarly, *Ristine* held that conditions prohibiting the defendant from owning a camera and restricting his computer usage did not constitute plain error,[189] and subsequent Eighth Circuit cases explicitly relied on *Ristine* to affirm similar restrictions even when the defendant did preserve his objection below.[190]

As another example, deference mistakes have also resulted from the Fourth Circuit's decision in *United States v Hernandez*,[191] which rejected a defendant's procedural challenge to his sentence based on the district court's failure to provide an adequate individualized assessment.[192] The *Hernandez* court noted that, while "the district court in this case might have said more," the defendant had "lodged no objection to the adequacy of the district court's explanation" and "has simply not demonstrated that the district court's explanation constituted plain error."[193] It thus would be a mistake to rely on *Hernandez* when reviewing a sentence under a more stringent standard. The Fourth Circuit itself recognized as much in a later nonprecedential case, rejecting the government's reliance on *Hernandez*—even though "the district court's reasoning in *Hernandez* was essentially identical to the district court's reasoning in this case"—because the review was not for plain error.[194]

Yet numerous other Fourth Circuit cases have erroneously relied on *Hernandez* to affirm sentences under the less deferential abuse of discretion standard. One case cited *Hernandez* as "finding no procedural error" under similar circumstances and affirmed a sentence even though "it would have been preferable for the district court to have specifically mentioned" certain sentence-related factors.[195] Another panel wrote, "[T]he district court's explanation was more than sufficient. *See Hernandez*,"

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188 *United States v Mefford*, 711 F3d 923, 928 (8th Cir 2013), citing *Ristine*, 335 F3d at 694–95.

189 *Ristine*, 335 F3d at 695–96.

190 See, for example, *United States v Koch*, 625 F3d 470, 481 (8th Cir 2010), citing *Ristine*, 335 F3d at 696 ("We have previously upheld the imposition of [conditions that include a ban on owning a camera and a restriction on Internet access]."); *United States v Boston*, 494 F3d 660, 668 (8th Cir 2007), citing *Ristine*, 335 F3d at 696 ("A restriction on computer usage does not constitute an abuse of discretion.").

191 603 F3d 267 (4th Cir 2010).

192 Id at 270, 273.

193 Id at 272–73.

194 *United States v Jackson*, 397 Fed Appx 924, 926 (4th Cir 2010) (per curiam).

195 *United States v Bennett*, 439 Fed Appx 278, 280 (4th Cir 2011) (per curiam).

with no mention of the differing standard of review.[196] Numerous other abuse of discretion cases evince the same mistake.[197] *Hernandez* also has little applicability for district courts imposing sentences in the first instance, but a district court relied on *Hernandez* as having found "the district court's 'sparse explanation' legally sufficient,"[198] with no mention of the highly deferential standard of review or *Hernandez*'s hint that "the district court . . . might have said more."[199]

2. Pro-prosecutor evidentiary determinations.

Deference mistakes in criminal cases do not necessarily require confusion between two different standards of review, such as plain error and abuse of discretion. They can also arise in cases that are reviewed under a single standard when district courts mistake deferential appellate precedents for binding guidance. For example, as we have noted, just because an evidentiary holding is not an abuse of discretion does not mean that the contrary holding would not also be allowed.[200] If litigants are more likely to appeal rulings admitting a certain type of evidence than rulings excluding it, appellate case law would be skewed toward deferential review of decisions to admit (rather than exclude) evidence. Subsequent courts might then be biased toward admitting similar evidence in future cases.[201] And while a shift toward admitting more evidence might not systematically favor either criminal defendants or prosecutors—after all, each side often has evidence to present—certain kinds of evidence might be more likely to be offered by one side or the other.

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196 *United States v Hood*, 487 Fed Appx 69, 70 (4th Cir 2012) (per curiam), citing *Hernandez*, 603 F3d at 271.

197 See, for example, *United States v Messer*, 546 Fed Appx 192, 193 (4th Cir 2013) (per curiam), citing *Hernandez*, 603 F3d at 270–73 ("[T]he district court's explanation, while brief, was legally adequate."); *United States v Buczkowski*, 505 Fed Appx 236, 238–39 (4th Cir 2013) (per curiam), citing *Hernandez*, 603 F3d at 271 ("The court's explanation of the within-Guideline sentence may not have been lengthy, but it was sufficient."); *United States v Garner*, 489 Fed Appx 721, 722 (4th Cir 2012) (per curiam), citing *Hernandez*, 603 F3d at 271 ("[T]he district court provided an adequate explanation."); *United States v Clemons*, 412 Fed Appx 646, 649 (4th Cir 2011), citing *Hernandez*, 603 F3d at 272 (referring to *Hernandez* as holding that the "sentence [was] not procedurally unreasonable").

198 *Pierce v United States*, 2011 WL 3881019, *6 (ED Wis), quoting *Hernandez*, 603 F3d at 272.

199 *Hernandez*, 603 F3d at 272.

200 See note 49 and accompanying text.

201 See Part III.

For example, in a sample of twenty-five appellate cases discussing the admission or exclusion of latent fingerprint evidence, twenty-four were cases in which the defendant had appealed and the appellate court affirmed the admission of fingerprint evidence against the defendant.[202] In every case, the appellate court reviewed the lower court's decision only for abuse of discretion.[203] There are significant questions about the scientific reliability of fingerprint evidence, as summarized by the 2009 forensic-science report from the National Academy of Sciences.[204] But a district court faced with this one-sided body of appellate fingerprint precedent might erroneously conclude that it has no discretion to exclude such evidence.

For example, in *United States v Cerna*,[205] the district court stated that a method of latent fingerprint identification "specifically has undergone *Daubert* analysis by a number of courts and has been repeatedly upheld as sufficiently reliable."[206] But the three cases cited for this proposition had held only that admitting such evidence was not an abuse of discretion. The first specifically acknowledged shortcomings in the method but concluded that "[t]he district court did not abuse its discretion."[207] The second explicitly held that abuse of discretion review was appropriate even when the district court made no findings of fact.[208] And the third was very clear about the deferential standard of

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[202] On February 5, 2013, we ran the following search on Westlaw: [latent /s fingerprint /s (admi! exclu!)]. This located twenty-five precedential federal appellate cases discussing the admissibility of latent fingerprint evidence (in addition to other cases that happened to have these search terms), and in twenty-four out of twenty-five, the criminal defendant had appealed and the appellate court affirmed the admission of fingerprint evidence against the defendant. See, for example, *United States v Mitchell*, 365 F3d 215, 246 (3d Cir 2004) ("[T]he District Court did not abuse its discretion in holding the government's [latent fingerprint] evidence admissible."). In the remaining case, the government sought a writ of mandamus directing the district court to admit fingerprint evidence, which the court of appeals granted. See *In re United States*, 614 F3d 661, 662 (7th Cir 2010). The district court had excluded the evidence because of concerns about government tampering, not concerns about reliability, and the court of appeals reassigned the case because of the district judge's "unreasonable fury toward the prosecutors." Id at 664–66.

[203] See, for example, *Mitchell*, 365 F3d at 234.

[204] National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 8 & n 7, 139–45 (2009). See also generally Robert Epstein, *Fingerprints Meet* Daubert*: The Myth of Fingerprint "Science" Is Revealed*, 75 S Cal L Rev 605 (2002).

[205] 2010 WL 3448528 (ND Cal).

[206] Id at *6.

[207] *United States v Pena*, 586 F3d 105, 110–11 (1st Cir 2009).

[208] *Mitchell*, 365 F3d at 233–34.

review: "Our task is not to determine the admissibility or inadmissibility of fingerprint analysis for all cases but merely to decide whether, on this record, the district judge in this case made a permissible choice in exercising her discretion to admit the expert testimony."[209] It is a mistake to conclude from these deferential precedents that fingerprint evidence clearly should be admitted, but the *Cerna* court seemed to do exactly that.

Similarly, Professor Michael Risinger found ten post–*Kumho Tire Co v Carmichael*[210] criminal appellate cases on the admissibility of handwriting-identification evidence, all of which held that admission of the evidence was not an abuse of discretion.[211] And he recognized the inherent probability of deference mistakes:

> [T]he overwhelming problem [with] these appellate decisions . . . is their inevitable skew. . . . The skew problem arises because appeals by the government challenging exclusion or limitation of prosecution-proffered expert testimony (including handwriting testimony) are virtually nonexistent. . . . So the only cases appellate courts see involve situations where the testimony was admitted and the defendant was convicted. What appellate courts would have to say about exclusion or limitation [of handwriting-identification evidence] under an abuse of discretion standard is unknown, but it seems likely that, given an appropriate hearing and findings, that result would [ ] most likely be affirmed also.[212]

Deference mistakes can also arise from deferential affirmances of decisions to exclude evidence. In *United States v Frazier*,[213] the Eleventh Circuit affirmed the district court's decision to exclude a forensic investigator's testimony on behalf of the defendant.[214] The Eleventh Circuit did not state that allowing the expert to testify would have been an abuse of discretion; to the contrary, it stressed "the basic principle that an appellate court

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209 *United States v Baines*, 573 F3d 979, 989 (10th Cir 2009).

210 526 US 137 (1999). *Kumho* held that a district court's determination of whether to admit any type of expert testimony must be reviewed for abuse of discretion. Id at 152.

211 See D. Michael Risinger, *Goodbye to All That, or a Fool's Errand, by One of the Fools: How I Stopped Worrying about Court Responses to Handwriting Identification (and "Forensic Science" in General) and Learned to Love Misinterpretations of* Kumho Tire v. Carmichael, 43 Tulsa L Rev 447, 467–68 (2007).

212 Id at 468–69.

213 387 F3d 1244 (11th Cir 2004) (en banc).

214 Id at 1283.

must afford the district court's gatekeeping determinations 'the deference that is the hallmark of abuse-of-discretion review.'"[215] When discussing "the central issue" whether the testimony's reliability had been established, the Eleventh Circuit "reiterate[d] that the district court has the same broad discretion in deciding how to assess the reliability of expert testimony that it has in its ultimate reliability determination."[216]

Despite the Eleventh Circuit's clear explanation of the role of deference in its decision, a subsequent district court managed to misread *Frazier*. In a case decided two years later, this court wrote, "The Eleventh Circuit held that, although the witness was qualified as an expert in forensic investigations, he had not offered a reliable foundation."[217] And another district court rejected a defense expert's testimony, which it found to be "similar to the expert testimony that the Eleventh Circuit decided was properly excluded in *United States v. Frazier*."[218]

3. Deference mistakes and doctrinal development in criminal law.

We have given some examples of actual deference mistakes in the area of criminal law and procedure, but determining the net effect of such mistakes on doctrine is far more complicated and ripe for empirical study.[219] One issue is that the effect of deference mistakes on doctrinal development may be overwhelmed by other systematic factors. For example, a number of commentators have suggested that the asymmetry in criminal appeals will cause trial judges to favor defendants in order to avoid reversal.[220] This effect might be outweighed by a competing desire to "preserve

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[215] Id at 1248, quoting *General Electric Co v Joiner*, 522 US 136, 143 (1997).

[216] *Frazier*, 387 F3d at 1264.

[217] *Landrin v MGA Entertainment, Inc*, 2006 WL 5249735, *4 (SD Fla), citing *Frazier*, 387 F3d at 1265. See also *R.K. v Kanaskie*, 2007 WL 2026388, *4 (SD Fla).

[218] *United States v Certantes-Perez*, 2012 WL 6155914, *6 (WD Tex).

[219] Designing such studies is difficult, in large part because of the difficulty in identifying deference mistakes, which is discussed in the following Section on employment discrimination. We think that the best approach may be to begin with an area of doctrine that may plausibly have shifted due to deference mistakes and then to have someone with substantive expertise in the area trace out the development of that doctrine to see whether any of the significant cases seem attributable to deference mistakes.

[220] See, for example, Justin Miller, *Appeals by the State in Criminal Cases*, 36 Yale L J 486, 511 (1927); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U Chi L Rev 1, 38 (1990) (arguing that, because of the rule against government appeals, judges who wish to avoid reversal are incentivized to rule in favor of the defendant).

reviewability,"[221] although Professor Kate Stith has argued that this pro-prosecution bias is generally implausible and has presented a number of other mechanisms by which the asymmetry in appeals may systematically push doctrine in a prodefendant direction.[222]

Stith briefly notes, however, that a contrary pro-prosecution effect could result from appellate deference through a mechanism similar to the one we describe. As she explains, "deference toward the legal evaluations of the trial court" could result in "a tendency to affirm" convictions, and "[i]f observers (including the trial court) do not recognize and adjust for any such tendency, they will infer from appellate decisions a constitutional standard below the original standard."[223] Such mistakes could then propagate: "If the appellate court defers in each successive round of appeals, the apparent precedential standard of law could continually shift in a pro-government direction, absent countervailing bias or correction."[224] Other commentators have similarly argued that the asymmetry in appeals results in a one-sided body of precedent, causing a progovernment doctrinal shift.[225]

This pro-prosecution deference effect is independent from the other sources of bias that Stith describes,[226] and all these effects could be concurrently pushing doctrine in different directions. Although Stith finds the sources of prodefendant bias more plausible, we see no a priori reason to conclude that one of these effects dominates the development of criminal law—indeed, all these effects might be swamped by the shifting

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[221] Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U Pa L Rev 506, 520 n 22 (1973). See also *Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals* 64 (Office of Legal Policy 1987) (arguing that allowing government appeals "of jury instructions might at times work in the defendant's favor" by eliminating the incentive to "not frame questionable jury instructions that would favor the defendant, since judges know that the government cannot appeal instructions on the ground of legal error after an acquittal").

[222] See Stith, 57 U Chi L Rev at 15–42 (cited in note 220).

[223] Id at 27–28 (citations omitted).

[224] Id at 28.

[225] See, for example, Adam Harris Kurland, *Court's in Session: A Law Professor Returns to the Majestic Chaos of a Criminal Jury Trial*, 52 Howard L J 357, 369–70 (2009); Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U Cin L Rev 1, 8 n 15 (2008).

[226] See Stith, 57 U Chi L Rev at 18–28, 36–49 (cited in note 220) (examining selection effects in criminal appeals as well as incentives for trial court error).

political views of the judiciary.[227] As Stith acknowledges, "we need further empirical research on the extent of pro-defendant—or pro-government—bias resulting from the present asymmetry in criminal appeal rights."[228] Our ultimate point is this: even if the effects of deference mistakes are mitigated or overwhelmed by other trends within the law, that does not mean that deference mistakes are unimportant. They will exert influence, even if that influence is not the sole or primary driver of doctrinal development.

C. Employment Discrimination

The opposite asymmetry in appeals may be responsible for a prodefendant shift in employment discrimination law, including cases brought under Title VII of the Civil Rights Act of 1964.[229] Unlike in criminal law, there is no legal barrier to appeals from either side. However, empirical work has shown that, in practice, plaintiffs file the vast majority of federal employment discrimination appeals.[230] This asymmetry exists because few employment discrimination cases go to trial,[231] and most dispositive pretrial motions are made by defendants.[232] Plaintiffs, who have the burden of establishing factually intensive issues such as

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[227] See Vincent Martin Bonventre and Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments, 2000*, 64 Albany L Rev 1355, 1382–84 (2001) (noting that prodefendant outcomes at New York's highest court fluctuated with political changes); Cornell W. Clayton and J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 Georgetown L J 1385, 1423 (2006) ("[T]he aggregate voting patterns [of the Burger and Rehnquist Courts] demonstrate a clear and unmistakable shift from a liberal, pro-defendant position prior to 1968 to a conservative, pro-state position after 1968.").

[228] Stith, 57 U Chi L Rev at 55 (cited in note 220).

[229] Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000e et seq.

[230] See, for example, Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv L & Pol Rev 103, 108–09 & n 18 (2009) (reporting that, from 1988 to 2004, "plaintiffs' appeals [ ] are ten times more frequent in absolute numbers than defendants' appeals").

[231] See *Statistical Tables for the Federal Judiciary* at table C-4 (cited in note 79) (showing that, of 745 federal employment discrimination cases terminated in 2013, only 3.8 percent reached trial).

[232] See *Memorandum from Joe Cecil and George Cort, Federal Judicial Center, to Judge Michael Baylson, US District Court for the Eastern District of Pennsylvania* 4 (Federal Judiciary Center, Nov 2, 2007), archived at http://perma.cc/EFB6-87JV (reporting that plaintiffs file only 8 to 9 percent of summary judgment motions in employment discrimination cases).

intent, rarely succeed on summary judgment.[233] If the defendant's motion to dismiss or summary judgment motion is denied, the defendant cannot immediately appeal,[234] and the case often settles before trial.[235] Thus, most employment discrimination appeals are brought by plaintiffs after the district court has ruled for the defendant on summary judgment or on a motion to dismiss.[236]

In a recent essay, Judge Nancy Gertner argues that this asymmetry has led to shifts in substantive employment discrimination law.[237] She notes that, even though the standard of review for summary judgment orders is formally de novo, appellate courts generally defer to district court judgments in employment discrimination cases because "[i]t takes substantial work, not to mention a motivated decisionmaker, to dig into the voluminous summary judgment record and find a contested issue of fact," and "few appellate court judges are so motivated in this area."[238]

Indeed, only about 10 percent of district court judgments for defendants in employment discrimination cases are reversed on appeal.[239] As "[t]he body of precedent detailing plaintiffs' losses grows," future "[a]dvocates seeking authority for their positions will necessarily find many more published opinions in which courts granted summary judgment for the employer than for the employee."[240] This dynamic, Gertner argues, has caused judges

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[233] See Nancy Gertner, *Losers' Rules*, 122 Yale L J Online 109, 113 (2012) (citations omitted) ("Plaintiffs rarely move for summary judgment. They bear the burden of proving all elements of the claim, particularly intent, and must do so based on undisputed facts. Defendants need only show contested facts in their favor on one element of a plaintiff's claim.").

[234] See *Ortiz v Jordan*, 562 US 180, 188 (2011) ("Ordinarily, orders denying summary judgment do not qualify as 'final decisions' subject to appeal."); *Jackson v City of Atlanta*, 73 F3d 60, 62 (5th Cir 1996) ("Denials of motions to dismiss and motions for summary judgment in the Title VII context are non-final pretrial orders.").

[235] See Kevin M. Clermont and Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J Empirical Legal Stud 429, 440 (2004) ("[A]lmost 70 percent of employment discrimination and other cases are terminated by settlement.").

[236] See Clermont & Schwab, 3 Harv L & Pol Rev at 109–10 (cited in note 230).

[237] Gertner, 122 Yale L J Online at 116 (cited in note 233).

[238] Id at 114.

[239] See Clermont and Schwab, 3 Harv L & Pol Rev at 110 (cited in note 230). More precisely, appellate courts reversed in 8.7 percent of cases in which defendants won at trial and 10.7 percent of cases in which defendants won on a pretrial motion. Id. These rates are lower than the 11.8 percent reversal rate for all private civil cases, even though review of pretrial decisions is formally de novo and review of many other civil issues involves deference to the trial court's decision. See note 79.

[240] Gertner, 122 Yale L J Online at 115 (cited in note 233).

to develop "rules that have effectively gutted Title VII."[241] Other commentators have noticed a similar prodefendant trend in employment discrimination doctrine.[242]

Gertner's argument is distinct from ours, but our model of deference mistakes nonetheless offers another complementary channel by which asymmetric employment discrimination precedent can lead to substantive doctrinal shifts. If appellate courts generally defer to prodefendant district court judgments in employment discrimination appeals, future litigants and courts might rely on these precedents without appreciating the underlying implicit deference regime. This type of error is not quite the same as the typical deference mistake described above. Here, it is unstated deference by the first court—not an error in reading the precedent by a subsequent court—that is causing the problem.

Nonetheless, we think this type of situation fits our model in a general sense because, as with a typical deference mistake, the second decisionmaker is using precedent without fully accounting for the deference regime under which the precedent was decided. It is important to note, however, that the relevant deference regime is *informal*: Gertner argues that the problem arises from appellate courts' tendency to defer to district courts that find for employers on summary judgment, even though the formal standard of review is de novo.[243] This example illustrates that eliminating formal legal errors will not necessarily solve the deference-mistake problem if judges continue to defer sub silentio. It may thus serve as a cautionary tale for those who would eliminate formal deference regimes, such as the presumption of patent validity, which is discussed in the following Section.

D. Patent and Trademark Inflation

When the PTO grants a patent or registers a trademark, those intellectual property rights are entitled to presumptions of

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[241] Id at 123.

[242] See, for example, Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 Mo L Rev 481, 482 & n 1 (2008) (citing scholars who have addressed "the judiciary's decreasing receptivity to employment discrimination claims"); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 SLU L J 111, 168 (2011) (identifying a "movement of the judiciary toward foreclosing employment discrimination plaintiffs' cases").

[243] See Gertner, 122 Yale L J Online at 114 & n 20 (cited in note 233).

validity.[244] A granted patent may be invalidated only if a challenger meets the higher evidentiary burden of clear and convincing evidence (rather than a preponderance of the evidence).[245] Similarly, a registered trademark is entitled to a presumption that it is protectable—that it is either inherently distinctive (such that consumers are unlikely to view it as merely descriptive) or that it has secondary meaning (such that consumers in fact view it primarily as designating a particular source of goods or services).[246] Judicial evaluations of granted patents and trademarks thus involve some deference to the PTO's validity determinations, and this deference might cause a court to hold patents valid or trademarks protectable even though the court would have refused to recognize an intellectual property right without these evidentiary presumptions.

It would thus be a mistake for the PTO or courts considering *new* applications for patents or trademarks (or reevaluating patents during reexamination) to rely on precedents from the infringement context in which *granted* patents and trademarks were held valid.[247] Just because there is not clear and convincing evidence that a patent is invalid does not mean that a similar patent application should not be denied under the lower preponderance standard that applies in the examination context.[248] As we will explain in more detail in Part III, the cumulative effect of these mistakes would be an expansion of the boundaries of patentability and of the kinds of marks that are inherently distinctive.[249] Indeed, commentators have observed this expansion

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244 See 35 USC § 282(a); 15 USC § 1115(a).

245 See *Microsoft Corp v i4i LP*, 131 S Ct 2238, 2243 (2011).

246 See 15 USC § 1115(a) (stating that registration "shall be prima facie evidence of the validity of the registered mark"); J. Thomas McCarthy, 2 *McCarthy on Trademarks and Unfair Competition* § 11:43 at 11-127 to -131 (Thomson Reuters 4th ed 2014). Note that, while US patent rights exist only when the PTO has granted a patent application, US trademark rights stem from *use* of the mark—registration merely results in some legal advantages, such as the presumption of validity. See J. Thomas McCarthy, 3 *McCarthy on Trademarks and Unfair Competition* §§ 19:1.25, 19:9 at 19-14 to -16, 19-34 to -36 (Thomson Reuters 4th ed 2014).

247 See Ouellette, 121 Yale L J Online at 368–71 (cited in note 6).

248 See *In re Oetiker*, 977 F2d 1443, 1445 (Fed Cir 1992) ("[P]atentability is determined on the totality of the record, by a preponderance of evidence."); *In re Caveney*, 761 F2d 671, 674 (Fed Cir 1985) ("Because it is the only standard of proof lower than clear and convincing, preponderance of the evidence is the standard that must be met by the PTO in making rejections.").

249 See notes 301–03 and accompanying text.

in both the patent[250] and the trademark[251] contexts, though they have not recognized the possibility that the expansion might be driven by deference mistakes.

These mistakes could also occur in the opposite direction: it would be a mistake to rely on precedents rejecting applications for *new* patents or trademarks in order to invalidate *granted* patents or trademarks. Such errors would tend to contract the boundaries of patentability and of inherent distinctiveness. Although these "reverse mistakes" are more plausible here than in the habeas context,[252] we suspect that they are still relatively less frequent, both because there are more precedents involving granted patents and trademarks to be erroneously applied, and because the PTO has the chance to erroneously rely on these precedents when granting hundreds of thousands of patents and trademark registrations each year. Of course, both these effects might be swamped by other doctrinal pressures, including other kinds of deference mistakes.[253]

Despite the error inherent in relying on cases out of context, courts[254] and the PTO[255] regularly cite cases from one context in

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[250] See, for example, Masur, 121 Yale L J at 473 & n 6 (cited in note 6) (citing sources that discuss the loosening of Federal Circuit rules for patentability and the resulting expansion of patentability).

[251] See, for example, Ann Bartow, *The True Colors of Trademark Law: Greenlighting a Red Tide of Anti Competition Blues*, 97 Ky L J 263, 264 (2009) ("The decision to recognize colors alone as protectable, defensible trademarks is an iconic example of reflexive expansion of trademark rights by members of the judiciary."); Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 Yale J L & Tech 35, 69 (2010) ("The scope of what can be a trademark today has [been] expanded [by courts] beyond the typical word, phrase, or unique design that comprises most trademarks."); Joseph Cockman, Note, *Running from the Runway: Trade Dress Protection in an Age of Lifestyle Marketing*, 89 Iowa L Rev 671, 691 (2004) (describing "the judicial expansion of trade dress protection").

[252] See note 104.

[253] For example, patent law is similar to the employment discrimination context discussed above in that defendants are likely to settle if they do not win on summary judgment, making patent plaintiffs more likely to appeal. See Jay P. Kesan and Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 Wash U L Rev 237, 258–59 (2006) (finding that roughly 80 percent of all patent cases filed in 1995, 1997, and 2000 settled, and that 8 percent were decided on summary judgment). This may push the law in a prodefendant direction.

[254] See, for example, *In re Vaidyanathan*, 381 Fed Appx 985, 994 (Fed Cir 2010), citing *Perfect Web Technologies, Inc v InfoUSA, Inc*, 587 F3d 1324, 1329 (Fed Cir 2009) (relying in part on *Perfect Web Technologies* in vacating an obviousness rejection by the PTO); *In re Bond*, 910 F2d 831, 835 (Fed Cir 1990) (per curiam), citing *Uniroyal, Inc v Rudkin-Wiley Corp*, 837 F2d 1044, 1050–51 (Fed Cir 1988).

[255] See, for example, *Ex parte Kim*, 2010 WL 3827134, *2–4 (BPAI), citing *In re Omeprazole Patent Litigation*, 536 F3d 1361, 1379–81 (Fed Cir 2008) (reversing an

the other without considering whether this is appropriate in light of the different evidentiary standards. For example, in *Mintz v Dietz & Watson, Inc*,[256] the Federal Circuit concluded that the evidence did not meet the clear and convincing hurdle for invalidity—despite a "simple" meat-encasing invention that appeared obvious under the district court's "common sense" view—when the patentee presented evidence such as initial skepticism by experts followed by commercial success.[257] *Mintz* arguably made it more difficult to invalidate patents for obviousness in the context of an infringement suit,[258] but the meat-encasing invention at issue may well have been obvious under the preponderance standard of a PTO proceeding, so *Mintz* should have limited precedential value in that context. Yet the Patent Trial and Appeal Board (PTAB) within the PTO has repeatedly cited *Mintz* when reversing examiner rejections of patents for obviousness.[259]

Deference mistakes also may be responsible for an expansion in the kinds of claims that pass the "definiteness" requirement for patentability,[260] under which claims must "particularly point[ ] out and distinctly claim[ ]" the invention.[261] In 2001, the Federal Circuit held that whether a claim is invalid for indefiniteness is a pure question of law but stated that to "accord respect to the statutory presumption of patent validity," it would find granted claims indefinite "only if reasonable efforts at claim construction prove futile" and the claim is "insolubly ambiguous."[262] (In 2014, the Supreme Court abrogated this standard in

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obviousness rejection, relying in part on the Federal Circuit's affirmance of the district court's nonobviousness finding in *Omeprazole*); *Ex parte Albritton*, 2009 WL 671577, *16 (BPAI), citing *Arkie Lures, Inc v Gene Larew Tackle, Inc*, 119 F3d 953, 957 (Fed Cir 1997) (reversing an obviousness rejection in a "close case" based on *Arkie Lures*).

256 679 F3d 1372 (Fed Cir 2012).

257 Id at 1377–80.

258 See Jason Rantanen, Mintz v. Dietz & Watson*: Hindsight and Common Sense* (PatentlyO, May 30, 2012), archived at http://perma.cc/GZ9L-VMRZ.

259 See, for example, *Switech Medical AG v Sanuwave, Inc*, 2013 WL 4636443, *6 (PTAB); *Ex parte Werner Montabaur*, 2013 WL 5273983, *3 (PTAB); *Ex parte Kueppers*, 2012 WL 6772030, *4 (PTAB).

260 See Christa J. Laser, *A Definite Claim on Claim Indefiniteness: An Empirical Study of Definiteness Cases of the Past Decade with a Focus on the Federal Circuit and the Insolubly Ambiguous Standard*, 10 Chi Kent J Intell Prop 25, 32 (2010) (finding that the rate at which the Federal Circuit holds claims not to be indefinite has increased).

261 35 USC § 112(b).

262 *Exxon Research and Engineering Co v United States*, 265 F3d 1371, 1375–76 (Fed Cir 2001) ("A decision holding a patent invalid for indefiniteness presents a question of law, which we review de novo.").

Nautilus, Inc v Biosig Instruments, Inc.[263]) But this high barrier to invalidating a patent for indefiniteness was at times improperly imported into the examination context, as illustrated by decisions of the reviewing board within the PTO.[264] Even after the PTO explicitly clarified that examiners should use "a lower threshold of ambiguity," such that claims are indefinite if "amenable to two or more plausible constructions,"[265] other PTO decisions continued to improperly apply the higher standard.[266] And once these unclear patent applications are granted, they receive the presumption of validity, making them even less likely to be struck down as indefinite. These granted patents then create reliance interests, which future decisionmakers—including courts—may be reluctant to disturb.[267]

A review of all 324 Federal Circuit patentability decisions issued over 5 years found only 1 that distinguished precedent based on the different standards.[268] Indeed, there is even some dissent within the Federal Circuit over whether the contexts are really different: when affirming a nonobviousness judgment in *Fresenius USA, Inc v Baxter International, Inc*,[269] Judge Timothy Dyk noted that "[i]t is entirely possible that the [PTO] will" invalidate the claims on reexamination,[270] while Judge Pauline Newman disputed that "a PTO decision on reexamination [could] override a judicial decision."[271] The PTO did find the

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263 134 S Ct 2120 (2014). In this case, the Court replaced the "insolubly ambiguous" standard with a clearer standard for determining indefiniteness. See id at 2130–31 & n 9.

264 See, for example, *Ex parte Crenshaw*, 2008 WL 6678100, *8 (BPAI), quoting *Exxon*, 265 F3d at 1375 ("Claims are indefinite 'if reasonable efforts at claim construction prove futile,' that is, if a claim 'is insolubly ambiguous, and no narrowing construction can properly be adopted.'"); *Ex parte Spina*, 2008 WL 4768094, *2–3 (BPAI) (reversing an examiner's rejection for indefiniteness because the claims were not "insolubly ambiguous"); *Ex parte Saaski*, 2008 WL 4752052, *4–5 (BPAI) (same); *Ex parte Machida*, 2008 WL 4449324, *2, 5 (BPAI) (same).

265 *Ex parte Miyazaki*, 2008 WL 5105055, *5 (BPAI).

266 See, for example, *Ex parte Golle*, 2012 WL 5937546, *4–5 (PTAB) (reversing an examiner's rejection for indefiniteness because the claims were not "insolubly ambiguous"); *Ex parte Kessel*, 2012 WL 4165616, *3 (BPAI) (same); *Ex parte Coble*, 2012 WL 4483292, *2 (BPAI) (same); *Ex parte Dionne*, 2012 WL 3613695, *4 (BPAI) (same).

267 We discussed this mechanism at greater length in Part II.C. See note 89 and accompanying text.

268 See Ouellette, 121 Yale L J Online at 369 & n 119 (cited in note 6). See also *In re Swanson*, 540 F3d 1368, 1379 (Fed Cir 2008) ("[T]he court's final judgment and the examiner's rejection are not duplicative—they are differing proceedings with different evidentiary standards for validity.").

269 582 F3d 1288 (Fed Cir 2009).

270 Id at 1306 (Dyk concurring).

271 Id at 1305 n 1 (Newman concurring).

claims obvious on reexamination, and the Federal Circuit affirmed, noting the different evidentiary standards.[272] Newman dissented from the panel decision and from the denial of rehearing en banc, describing the PTO's decision as "administrative nullification of a final judicial decision."[273] The three-judge concurrence in the rehearing denial explained the different standards:

> In a court proceeding, a patent is not found "valid." A judgment in favor of a patent holder in the face of an invalidity defense or counterclaim merely means that the patent challenger has failed to carry its burden of establishing invalidity by clear and convincing evidence in that particular case—premised on the evidence presented there.[274]

But the opinion was still criticized as an example of the PTO overruling the Federal Circuit, as if there were no difference between validity decisions in the two contexts.[275] As long as some patent decisionmakers treat infringement and examination precedents equivalently, the potential for patent-related deference mistakes will persist.

Trademarks might raise the same sorts of issues. A trademark is valid only if it is distinctive, and if a mark does not have "inherent" distinctiveness—that is, if it is merely descriptive of the product that it signifies—it must have "acquired" distinctiveness (known as "secondary meaning") such that buyers view the mark as uniquely distinctive of a particular source of goods.[276] The PTO's refusal to register a mark—based on either lack of inherent distinctiveness or lack of secondary meaning—is reviewed for substantial evidence.[277] Registration creates a

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[272] *In re Baxter International, Inc*, 678 F3d 1357, 1364, 1366 (Fed Cir 2012).

[273] Id at 1366 (Newman dissenting). See also *In re Baxter International, Inc*, 698 F3d 1349, 1351–55 (Fed Cir 2012) (Newman dissenting from denial of rehearing en banc).

[274] *Baxter*, 698 F3d at 1351 (O'Malley concurring). The parties subsequently disputed the effect of a PTO reexamination proceeding on a pending infringement action. See generally *Fresenius USA, Inc v Baxter International, Inc*, 721 F3d 1330 (Fed Cir 2013), rehearing en banc denied, 733 F3d 1369 (Fed Cir 2013).

[275] See, for example, Kevin E. Noonan, In re Baxter International, Inc. *(Fed Cir 2012)* (Patent Docs, May 17, 2012), archived at http://perma.cc/4KZT-JYEP; Matthew R. Osenga, *PTO Overrules Federal Circuit* (Inventive Step, May 18, 2012), archived at http://perma.cc/S3DX-4AHD.

[276] See Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 Cal L Rev 351, 352–53 (2014) (summarizing the requirements for a trademark to be protectable).

[277] See *In re Bayer Aktiengesellschaft*, 488 F3d 960, 964 (Fed Cir 2007) ("The determination that a mark is merely descriptive is a factual finding, and this court reviews the [Trademark Trial and Appeal Board's] fact finding for substantial evidence."); *In re*

rebuttable presumption that a mark is distinctive.[278] And when a court of appeals considers a challenge to trademark validity in infringement litigation, it must consider both this evidentiary presumption and the deferential standard of review, as distinctiveness is a factual determination that can be reversed only if clearly erroneous.[279]

For example, in *Nautilus Group, Inc v ICON Health and Fitness, Inc*,[280] the Federal Circuit affirmed the grant of a preliminary injunction in a trademark-infringement suit, including the finding that "Bowflex" is a strong mark (that is, it is inherently distinctive).[281] The Federal Circuit said that it "cannot say that . . . the court clearly erred in preliminarily finding Bowflex to be a suggestive mark," and that it "[did] not think the court clearly erred in finding that [the mark owner] has strengthened a presumptively weak suggestive mark through its advertising."[282] *Nautilus* was then cited by the PTO as support for the conclusion that the unregistered mark "BEST REST" was not merely descriptive.[283]

If the presumptions of validity for granted patents and trademarks are indeed contributing to doctrinal inflation in these contexts, one solution might be to change the formal legal rules. For instance, courts might eliminate the presumption of validity—a route that the Supreme Court recently rejected in the patent context in *Microsoft Corp v i4i LP*,[284] contrary to the urgings of patent-law academics.[285] But the nebulous impact of mandatory sequencing in the qualified immunity context illustrates that simply changing the formal rules might not help,

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Pacer Technology, 338 F3d 1348, 1349 (Fed Cir 2003) ("Whether an asserted mark is inherently distinctive is a factual determination made by the [Trademark Trial and Appeal Board].").

[278] See McCarthy, 2 *McCarthy on Trademarks and Unfair Competition* at § 11.43 at 11-127 to -128 (cited in note 246).

[279] See id at § 11:3 at 11-10 to -11. Distinctiveness cannot be challenged for registered marks that have become "incontestable" through five years of use, so it is also possible that a court evaluating a contestable mark might mistakenly rely on a decision on the strength of an incontestable mark. Id at § 11:44 at 11-134.

[280] 372 F3d 1330 (Fed Cir 2004).

[281] Id at 1339–43.

[282] Id at 1343.

[283] *Dreamwell, Ltd v Kittrich Corp*, 2011 WL 1495462, *7 (TTAB).

[284] 131 S Ct 2238 (2011). The Court's holding in *Microsoft* affirmed a heightened evidentiary standard for establishing invalidity of a granted patent. Id at 2242, 2246.

[285] See id at 2251–52. For the amicus brief itself, see generally Brief Amici Curiae of 37 Law, Business, and Economics Professors in Support of Petitioner, *Microsoft Corp v i4i LP*, No 10-290 (US filed Feb 2, 2011) (available on Westlaw at 2011 WL 380832).

depending on the source of deference.[286] In the patent context, even without a formal presumption of validity, courts might simply be more reluctant to invalidate issued patents and disrupt settled expectations than to reject a new patent application. For example, we have argued that the Supreme Court's statement in *Nautilus* that the presumption of validity does not affect the legal standard for indefiniteness[287] might have the perverse effect of undermining the PTO's recent efforts to demand greater clarity in the examination context.[288] We discuss the option of eliminating formal deference variations further in Part IV.

* * *

This Part has shown that deference mistakes are far from theoretical. Habeas precedents holding that a federal right was not clearly established have been relied on in standard criminal cases to conclude that the right does not exist. Criminal appeals holding that an error did not rise to the level of plain error have been used to justify affirmances when the standard of review should have been more searching. Opinions holding that evidentiary rulings were not abuses of discretion have been read as de novo decisions that no court should admit the evidence even as a matter of first impression. And decisions upholding patents in the infringement context have been used to justify granting new patents that are not entitled to the same presumption of validity. In short: courts make deference mistakes. Such mistakes are likely not limited to the few doctrinal areas we have surveyed, nor to judicial or agency decisionmakers.[289] Indeed, Professor

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[286] See notes 174–75 and accompanying text.

[287] See *Nautilus*, 134 S Ct at 2130 n 10 (stating that the "presumption of validity does not alter the degree of clarity that § 112, ¶ 2 demands from patent applicants"). Shortly before *Nautilus* was decided, the Federal Circuit affirmed the PTO's use of a different indefiniteness standard in the examination context, but this conclusion appears incompatible with the Supreme Court's statement in *Nautilus*. See *In re Packard*, 751 F3d 1307, 1312 (Fed Cir 2014).

[288] See Lisa Larrimore Ouellette and Jonathan Masur, *How Will* Nautilus *Affect Indefiniteness at the PTO?* (PatentlyO, June 5, 2014), archived at http://perma.cc/RH4B-3AJW.

[289] Some readers might be wondering why we have not discussed *Chevron* deference, which is perhaps the best known and most thoroughly analyzed form of judicial deference. The Supreme Court is often inconsistent in its application of *Chevron* and other related deference regimes, which is some evidence that courts do not always recognize the appropriate deference regime when dealing with agency interpretations of statutes. See generally Eskridge and Baer, 96 Georgetown L J 1083 (cited in note 26). But we believe that explicit deference mistakes are rare in the *Chevron* context. For a court to make a clear *Chevron* deference mistake, the court would have to be faced with a legal question that another court had previously decided under *Chevron*, but which will now

Trevor Morrison has argued that a similar effect may influence decisionmaking at the Office of Legal Counsel (OLC) in a proexecutive direction.[290]

Of course, deference mistakes are important (and problematic) even if they never exert a lasting influence on doctrine. Any deference mistake has the potential to cause an erroneous result in the case in which it occurs. But deference mistakes are even more pernicious when they lead to long-term shifts in legal doctrine. In the following Part, we develop a model of judging and error that demonstrates how cumulative deference mistakes can lead to systematic doctrinal shifts.

III. A MODEL OF DEFERENCE MISTAKES AND THEIR INFLUENCE

A single deference mistake, by itself, may be a significant matter. A judge may decide a case incorrectly, or litigants may settle a case for more or less than it is worth (or incorrectly decide to pursue or not pursue the case in the first place), because of such a misinterpretation. Misinterpretations might also propagate if a court incorrectly cites a prior opinion and subsequent courts rely on the mistaken citation without noticing the mistake.[291] But courts and parties make errors of many types on a regular basis.[292] There is no obvious reason to believe that

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be decided without deference, or else an issue that another court had previously decided without deference, but which will now be decided with *Chevron* deference. We think it very unlikely that such situations would arise without the court being alerted to the *Chevron* issue, and we were unable to find any such mistakes. Searching for subtler deference mistakes in the agency statutory-interpretation context could be a valuable area for future study.

290 See Trevor W. Morrison, Book Review, *Constitutional Alarmism*, 124 Harv L Rev 1688, 1719–20 (2011) (noting that the OLC produces written opinions about only those policies that it deems lawful, so "new OLC lawyers might overread certain written opinions to support the legality of policies or actions OLC had earlier deemed unlawful in oral advice," which could result in "a jurisprudence that is more one-sided than OLC itself has intended").

291 See, for example, *Equal Employment Opportunity Commission v Service Temps Inc*, 679 F3d 323, 332 (5th Cir 2012) ("[I]n neither case does the chain of citations and authorities lead to any substantive support for the proposition that those courts apply."). See also Adam D. Chandler, Comment, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 Yale L J 2183, 2191 (2011) ("[T]he First Circuit's now-settled holding on Puerto Rico's Eleventh Amendment immunity is ultimately based on a judicial game of 'telephone.'").

292 See, for example, *Iracheta v Holder*, 730 F3d 419, 423–24 (5th Cir 2013) (noting that the government had "conceded that Article 314 of the Constitution of Mexico," which it had relied on in numerous prior cases, "does not exist and never did"). See also Nancy Morawetz, *Convenient Facts:* Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts*, 88 NYU L Rev 1600, 1619–45 (2013); Linda

deference mistakes are more common or more severe than any other type of legal error.

Yet, as we have suggested, the effect of these errors will not necessarily be confined to the cases in which they occur. Over time, across large numbers of cases, deference mistakes can systematically skew legal doctrine. Any type of judicial error could, of course, affect legal doctrine. But errors will exert a systematic skew on doctrine only if they are biased in one direction or another. Most types of judicial errors will be randomly distributed.[293] But that is not the case for deference mistakes, which could point systematically in one direction depending on how courts and doctrine are structured. In the sections that follow, we set forth a model of deference mistakes and describe the mechanisms that could generate systematic evolution of the law.

A. Deference Regimes: A Typology

As explained above, we are interested in situations in which, at time t_1, decisionmaker C_1 decides a particular legal issue. At time t_2, decisionmaker C_2 is confronted with a similar legal issue in a different case, and C_1's opinion is either binding or persuasive precedent.[294] Recall that a deference mistake occurs when C_2 relies on C_1's opinion without fully accounting for the deference regime under which C_1 decided the prior case.

The cases that interest us can arise in multiple ways. There are cases in which the deference regime is a deferential burden of proof or standard of evidence, such as clear and convincing evidence or clearly established federal law. In these cases, C_1 applies the particular burden of proof, which may include deference to a prior decisionmaker, C_0. C_2 later misunderstands the standard applied by C_1. Alternatively, there are cases in which the deference regime arises from a standard of review. That is,

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Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, NY Times A1 (July 2, 2008). See also generally Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time across Cases in the Federal Courts of Appeals*, 81 Geo Wash L Rev 401 (2013) (arguing that judicial attention is a scarce resource and that error correction will never be perfectly achieved).

[293] It is of course possible that random errors will not be evenly distributed, particularly if the overall number of errors is low. But, in expectation, they will be evenly distributed.

[294] As noted previously, C_1 and C_2 could be any combination of decisionmakers: appellate courts, trial courts, administrative bodies, or other legal institutions. All that is necessary is that C_2 would consider C_1's opinion to be at least persuasive on the issue. See note 88 and accompanying text.

there is a lower court C_0 that produces a judgment at t_0. This judgment is then reviewed—under some standard of deference—by C_1 at t_1. C_2 later misunderstands the deference regime applied by C_1. The interaction between C_0 and C_1 is very important to the mechanisms we describe, but fundamentally it is the relationship between C_1's precedent and C_2's interpretation of that precedent that can drive long-term evolution in the law. We do not differentiate between deferential burdens of proof and standards of review in our model because they are analytically similar.[295]

Courts can generate deference mistakes in three distinct circumstances. First, some areas of law are governed by what we call "asymmetric" deference regimes, in the sense that legal issues sometimes reach appellate courts under a more deferential standard that *always* favors one type of party. For example, Part II.A described the legal regimes for habeas and § 1983, which are biased toward the government (as compared with direct criminal appeals), and Part II.D described the legal regimes for granted patents and trademarks, which are biased toward the IP holder (as compared with cases involving IP rights that the PTO has not yet approved). We describe these areas of law as being governed by asymmetric deference regimes because only the government, and only holders of IP rights, respectively, will ever be the beneficiaries of the more deferential standard of review.

Second, some legal issues arise under what we call "symmetric" deference regimes. Consider, for example, evidentiary questions, which can arrive at the courts of appeals under either of two deference regimes: abuse of discretion or plain error.[296] A court mistaking a precedent governed by one regime for a precedent governed by the other would be making a deference mistake. Importantly, however, either deference regime can attach to either side of an evidentiary question: evidentiary admissions

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[295] Consider, for instance, arbitrary-and-capricious review of agency rulemaking by federal courts. See 5 USC § 706(2)(A). This could be thought of as a unitary burden of proof: a party challenging a rulemaking must always prove that the agency's decision was arbitrary and capricious. Or it could be thought of as a standard of review: the federal court (C_1) is reviewing the agency's decision (C_0) with deference and will overturn the latter's decision only if it was arbitrary and capricious. The two ideas can be modeled identically, so we do not differentiate between them here.

[296] See Peter Nicholas, *De Novo Review of Evidentiary Errors in the Federal System*, 54 Syracuse L Rev 531, 537–40 (2004) (explaining the circumstances under which courts of appeals review district court rulings for abuse of discretion or plain error).

and exclusions can both be reviewed for either abuse of discretion or plain error.[297] Accordingly, as a conceptual matter, both sides could benefit equally from the various deferential standards of review; though, as we will see, the situation may be quite different in practice.

Third and finally, courts can generate deference mistakes even if there is only one applicable deference regime. For instance, when a party loses a motion for change of venue or forum non conveniens and appeals, review is for abuse of discretion.[298] Even if appellate courts were only ever confronted with change-of-venue appeals governed by an abuse of discretion regime, deference mistakes might nonetheless result, as we will explain in Part III.C. We hesitate to claim that the laws of venue and forum non conveniens (or any other legal issue) are "governed" by this sort of unitary deference regime, because it is always possible that a case might reach an appellate court under a plain error standard if one party failed to object below.[299] Rather, our claim is that courts may generate deference mistakes even if they only ever review cases under a single standard of review.

In the sections that follow, we present a model of judicial decisionmaking that explains how systematic asymmetries in the law might allow deference mistakes to propagate and eventually influence the long-term evolution of the law. We begin with areas governed by asymmetric deference regimes in Part III.B. Rather than proceed to symmetric deference regimes, we then detour to consider a model of unitary deference regimes in Part III.C. We do so because unitary regimes are actually a special case of symmetric deference regimes, and our model of symmetric deference regimes will draw from and build on our model of unitary deference regimes. Finally, in Part III.D, we address symmetric deference regimes.

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[297] While plain error review of evidentiary exclusions might seem unusual, there are many cases in which the courts of appeals have found that the party offering the evidence failed to preserve the proper argument. See, for example, *Perkins v Silver Mountain Sports Club and Spa, LLC*, 557 F3d 1141, 1147 (10th Cir 2009); *United States v Roti*, 484 F3d 934, 935–36 (7th Cir 2007); *Watson v O'Neill*, 365 F3d 609, 615 (8th Cir 2004); *United States v Thompson*, 279 F3d 1043, 1048 (DC Cir 2002).

[298] See *Windt v Qwest Communications International, Inc*, 529 F3d 183, 189 (3d Cir 2008) ("This Court reviews a district court's dismissal of a complaint on *forum non conveniens* grounds for abuse of discretion."); *United States v Lipscomb*, 299 F3d 303, 338 (5th Cir 2002) ("We review all questions concerning venue under the abuse of discretion standard.").

[299] See, for example, *United States v McCorkle*, 688 F3d 518, 522 (8th Cir 2012) (reviewing a venue challenge for plain error).

One last note is in order. It is perhaps evident that C_0, C_1, and C_2—the various actors in our models—all might be multimember bodies. C_0 might be a district court composed of multiple district judges or an agency with many decisionmakers. C_1 is often an appellate court composed of multiple judges who sit in panels. And C_2 may well be the same (or a similarly situated) appellate court, or the same district court or agency as C_0. For ease of explication, we will generally refer to C_0, C_1, and C_2 as unitary actors, but our analysis generalizes fully to the case of multimember actors. That is, when we discuss how C_1 or C_2 would decide a case, we are really describing how the median member of that court (or agency) would vote. When we describe the possibility that C_0 or C_1 might make random errors, we also mean to include the possibility that one judge (or a three-judge panel) on those courts would have a different view of the law than the court itself holds. Our use of unitary-actor shorthand is not meant to obscure any substantive consideration. We now turn to our model of deference regimes and deference mistakes.

B. Asymmetric Deference Regimes

As described above, some legal questions can arise under a deferential burden of proof or legal standard that systematically favors a particular class of litigants. Here, we use patent law as the paradigm for illustrating our model of asymmetric deference mistakes. Recall that, when a patent has already been granted, a party challenging that patent must prove invalidity by clear and convincing evidence.[300] But, when a patent has not yet been granted and is being considered by the PTO, the standard for determining validity is preponderance of the evidence.

For ease of explication, we employ a linear model of judicial decisionmaking, in which all cases can be arrayed along a single dimension. In our patent example, the cases range from strongest (for the patent-holder) to weakest—that is, from the least likely to be invalidated to the most likely. Following attitudinal models of judging,[301] we assign the Federal Circuit two "ideal

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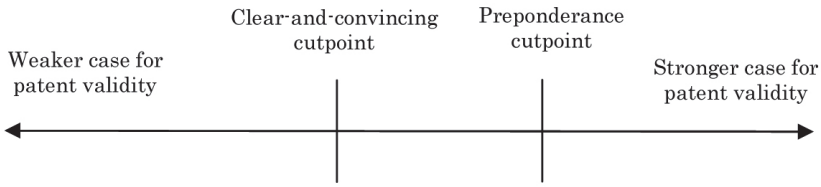
[300] See notes 244–50 and accompanying text.

[301] See Masur, 121 Yale L J at 483 (cited in note 6) (employing such a model); Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946–1963* 208–20 (Northwestern 1965) (employing a social-psychological approach to study how and why judicial decisions are made). See also generally Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am Polit Sci Rev 557 (1989) (quantifying justices' ideological preferences and examining the correlation between ideological values and votes in civil liberties cases).

points" or "cutpoints": one for cases governed by a clear and convincing evidence standard, and one for cases governed by a preponderance of the evidence standard. (That is, along any given dimension of patentability, each judge—were she left to her own devices—would draw a line at a given point and grant patents up to that point and no further.[302]) The further to the right, the more permissive the standard.

FIGURE 1. THE FEDERAL CIRCUIT'S PATENT CUTPOINTS



Each time a federal court or the PTO (C_2) reviews a patent's validity (or a patent application's patentability), it will inevitably turn to some precedents, primarily from the Federal Circuit (C_1). Suppose that C_2 misreads a clear and convincing evidence case (either invalidating or upholding a patent) as having been decided instead under a preponderance standard. It will have misunderstood that precedent as more favorable to the patent than it actually was. The misunderstood precedent may then affect C_2's decision, causing the court to err in a patent-favoring direction. Or suppose instead that C_2 misreads a case decided under a preponderance standard as a clear and convincing evidence case. It will have misunderstood that precedent as *less* favorable to the patent than it actually was. The misunderstood precedent may then cause C_2 to err in an antipatent direction if the precedent influences its eventual decision.

Crucially, that new C_2 precedent will then influence subsequent decisions *even if future courts never make the same deference mistake that C_2 made*. By integrating its deference mistake into an opinion, C_2 has effectively enshrined the mistake while

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[302] See Masur, 121 Yale L J at 483 (cited in note 6); Nicola Gennaioli and Andrei Shleifer, *Judicial Fact Discretion*, 37 J Legal Stud 1, 18–20 (2008) (employing an ideal-point–based model); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U Pa L Rev 1319, 1347 (2009) (employing an ideal-point model of judging); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 NYU L Rev 769, 780–82 (2008) (explaining the use of ideal points in decision models).

simultaneously sanitizing it, making it much more difficult for a subsequent court to recognize and correct the mistake.[303]

Thus, each deference mistake can alter the overall shape of the law. The C_2 precedent, which includes the deference mistake, will influence the law in one direction or another—in a patent-favoring direction in our example. This means that all courts that would treat C_2's decision as precedential *or even influential* will adjust their cutpoints in light of it. In theory, if C_2 made repeated mistakes of a single type—either pro-patent or antipatent—these mistakes could push the law further and further in one direction. This would be a highly significant development. Individual mistakes in particular cases are naturally also important, but they occur frequently and for a wide variety of reasons. But an overall, long-term trend in the law, which will naturally influence hundreds or thousands of subsequent cases, is a much more serious matter.

We wish to stress that C_2's deference mistakes can exert a gravitational influence on the law even if C_2 is not an appellate court or other body with the power to create binding precedent. So long as C_2's decisions will be influential or persuasive to future legal decisionmakers, repeated deference mistakes will have a lasting impact on the evolution of doctrine. That impact will surely be greater if C_2 is an appellate court, but it will exist even if C_2 is a district court or an administrative agency. For instance, as we noted above, repeated deference mistakes by the PTO can lead to large numbers of granted patents that will be presumed valid and likely upheld on appeal. These patents in turn create reliance interests that courts may be reluctant to disturb. In this fashion, even the PTO's deference mistakes can become enshrined in doctrine.[304]

Nonetheless, and irrespective of whether the deference mistakes are being made by appellate courts or agencies, this long-term effect on legal doctrine will materialize only if courts produce more of one type of error than another—more pro-plaintiff mistakes than prodefendant ones, or the reverse. Suppose, however,

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[303] C_2's decisions can enshrine deference mistakes even if the decisionmaker lacks formal precedential authority. For example, if C_2 is the PTO, and it repeatedly makes deference mistakes in favor of granting patents, those granted patents will then be entitled to the presumption of validity and will be more likely to survive challenges in the infringement context. See notes 244–50 and accompanying text.

[304] We discussed this mechanism in greater detail in Part I.C. See also note 89 and accompanying text. As we noted there, reliance interests may have been decisive when *Myriad* was heard by the Federal Circuit.

that equal numbers of cases reach the appellate court (C_1) under each standard. That court will create equally many opportunities for C_2 to err in an expansionary or a restrictive direction. Over long periods of time, we would expect no net effect on overall legal doctrine. Courts may make occasional mistakes, but those mistakes will be random, not biased. Thus, we can say that deference mistakes related to differing legal standards will generate no net legal change so long as two conditions hold:

1. C_1 reviews the same number of cases under the deferential standard as under the nondeferential standard.
2. C_2 is equally likely to misread a case's deference regime whether it was decided with or without deference.

In the sections that follow, we propose a variety of reasons why these conditions may not hold and describe the ramifications for long-term evolution in the law.[305]

1. Unequal numbers of precedents.

There are a number of straightforward reasons why deferential and nondeferential cases might arise in different numbers. First, one type of case might simply be more common than another due to structural factors endogenous to the case types. For instance, criminal prosecutions—in which constitutional rights are evaluated with zero deference—are far more common than § 1983 suits for damages, in which the plaintiff must prove that the right violated was clearly established.[306] Similarly, many more patent infringement lawsuits than direct PTO appeals reach the Federal Circuit each year.[307]

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[305] In the discussion that follows, we assume that deference mistakes are being made unintentionally. Accordingly, we treat deference mistakes as probabilistic outcomes and model their likelihood as a dependent combination of different factors. The likelihood of an intentional (strategic) deference mistake will be determined by different considerations, including a decisionmaker's desire to alter the law, its beliefs about the efficacy of deference mistakes as a mode of accomplishing legal change, and the extent to which the decisionmaker is willing to behave disingenuously.

[306] In 2013, federal district courts saw 68,080 new criminal cases, as compared with 17,722 prisoner civil rights suits. *Statistical Tables for the Federal Judiciary* at tables C-2, D (cited in note 79).

[307] A review of Federal Circuit cases on patent validity found that 73 percent of all written opinions (237 out of 324), and 80 percent of precedential opinions (181 out of 226), arose in the context of infringement actions. Ouellette, 121 Yale L J Online at 358, 358–59 (cited in note 6). The reason for this is somewhat unclear, as there are hundreds of thousands of patent applications filed every year and "only" thousands of infringement suits. See *Statistical Tables for the Federal Judiciary* at table C-2 (cited in note 79) (reporting that 6,401 patent cases were commenced in 2013); *Performance and Accountability*

In other instances, one type of case may be a subset of the other type, ensuring that asymmetric numbers of cases reach the courts. For example, within the criminal justice system, every petition for habeas corpus must be preceded by a criminal prosecution. An individual cannot petition for habeas unless she has first been convicted and imprisoned. Moreover, prisoners are required to exhaust their direct appeals before a court will entertain a habeas petition.[308] Thus, habeas petitions almost always arise only after there has been a full trial on the merits and a full complement of appeals.[309]

In sum, in the criminal procedure context, far more cases reach the courts under a nondeferential standard than under a deferential one, creating more opportunities for prorights (antistate) deference errors. In the patent context, on the other hand, far more cases reach the courts under a deferential standard than under a nondeferential standard, creating more opportunities for pro-patent errors. More generally, under any area of law that involves asymmetric deference regimes, it would be surprising (and quite coincidental) if there happened to be equal numbers of cases decided with and without deference. Accordingly, we believe that there will always be unequal numbers of cases and asymmetric opportunities for C_2 to generate false positives and false negatives.

Report: Fiscal Year 2013 *189 (US Patent and Trademark Office, 2013), archived at http://perma.cc/FAG2-F2X3 (showing that, since 2010, the PTO has received over 500,000 patent applications each year). One explanation is that, if the patent applicant eventually prevails before the PTO, there is no opposing party to appeal, whereas in patent litigation, one side or the other will always be aggrieved. In addition, the cost of pursuing a Federal Circuit appeal might exceed the expected value of the median individual patent that has not yet been granted. If patents amount to lottery tickets—with potentially great or small value—the value of a typical lottery ticket may be well below the known fixed cost of an appeal. On the other hand, once litigation has begun, the expected value of taking an appeal may far outstrip the cost of turning to the Federal Circuit.

[308] See 28 USC § 2254(b)(1). See also *Picard v Connor*, 404 US 270, 275 (1971).

[309] The exception to this rule is when the habeas petition involves a claim that the defendant has been deprived of the right to effective assistance of counsel. The Supreme Court has indicated that such claims are better heard in the context of habeas petitions than direct appeals because of the difficulty involved in bringing an ineffective-assistance claim while represented by the same attorney alleged to have been ineffective. See *Kimmelman v Morrison*, 477 US 365, 378 (1986) (determining that prohibiting criminal defendants from raising ineffective-assistance claims in habeas petitions would amount to "deny[ing] most defendants whose trial attorneys performed incompetently . . . the opportunity to vindicate their right to effective trial counsel"). Accordingly, the ineffective assistance of counsel claim is the lone type of constitutional criminal procedure claim that might arise more frequently in habeas petitions than in direct nondeferential appeals.

2. Asymmetric errors by a subsequent court.

The second assumption needed to generate unbiased (which is to say, zero net) legal change is that a subsequent decisionmaker (C_2) is equally likely to mistake a given case decided with deference for one decided without deference as it is to do the reverse. As with the prior assumption of equal numbers of cases, we believe that this assumption is entirely unrealistic. We relax it here.

We first note that it seems unlikely that C_2 would make a deference mistake involving a precedent created under the same deference regime applied by C_2. Such a mistake would require C_2 to distinguish a precedent by explicitly misstating its deference regime, such as by writing, "In the present clear and convincing evidence case, this precedent decided by C_1 is inapplicable because it was decided under a preponderance standard," when it was in fact decided under the clear and convincing evidence standard. Mistakes seem far more likely to occur when C_2 simply ignores a precedent's deference regime. But is C_2 more likely to err by relying on a clear and convincing evidence precedent in a preponderance case, or vice versa?

Although it is impossible to know for certain, we suspect that two distinct effects influence the likelihood of C_2 making a deference error. The first is the *majority effect*: C_2 is more likely to err when confronted with a case that employs a less common deference regime. This effect should seem intuitive. If C_2 is habituated to relying on precedents that use a clear and convincing evidence standard or some other deferential rule, it may come to treat that standard as a default. C_2 will reflexively expect that any case it seizes upon must have employed such a standard.

The second effect is the *nondeferential effect*: C_2 will default to believing that every case was decided by C_1 under the nondeferential legal standard. This effect draws on several related phenomena. First, it seems likely that, when a court examines a precedent, it looks first for the legal rule and holding, and only secondarily (if at all) for the operative deference regime. In the absence of any information regarding the deference standard, the court will likely default to the neutral position, which is to assume zero deference. Second, C_2 may believe, correctly or incorrectly, that deference standards are irrelevant to judicial decisionmaking and that C_1 decided its case without deference,

regardless of what C_1 wrote in its opinion.[310] Third and finally, evaluating a precedent decided under a deference standard will be more cognitively taxing for a court than evaluating a precedent decided nondeferentially. The legal result and the deference standard employed may sometimes conflict, as when C_1 decides for the party deserving deference but appears to indicate that it does not believe that party had the stronger case. There is ample psychological evidence demonstrating that individuals shy away from cognitively difficult tasks.[311] Accordingly, C_2 may attempt, consciously or unconsciously, to shirk the difficult job of navigating these two ideas. All told, courts will tend to default to viewing prior precedents through nondeferential prisms.

In some contexts, the majority effect and the nondeferential effect will point in the same direction. For instance, criminal trials are much more common than habeas and § 1983 proceedings, so questions of federal criminal procedure arise much more commonly in a nondeferential posture than a deferential one.[312] Accordingly, both the majority and nondeferential effects suggest that courts are more likely to err when confronted with deferential (clearly established) precedents, treating them as nondeferential precedents and biasing the courts in an antirights direction. In other contexts, however, these effects pull in opposite directions. As we have previously noted, the vast majority of patent cases that reach the Federal Circuit are appeals in infringement lawsuits.[313] In these cases, a defendant must advance clear and convincing evidence to prove a patent invalid. Accordingly, when the Federal Circuit (or the PTO) looks for precedents, it is more likely to find cases decided according to a deferential standard.

When these two effects conflict, which will dominate? This is a difficult empirical question, and one to which there will likely be different answers in different contexts.

3. Effects in combination.

In combination, the breaking of both symmetries—the number of deferential and nondeferential precedents and the likelihood of a deference mistake given a particular precedent—might

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[310] If C_2 is correct, then it has effectively avoided a mistake. See note 302.

[311] See, for example, Daniel Kahneman, *Thinking, Fast and Slow* 35–70 (Farrar, Straus and Giroux 2011).

[312] See note 306 and accompanying text.

[313] See note 307 and accompanying text.

produce counterintuitive results. Asymmetries in case numbers and in types of deference mistakes will not necessarily be mutually reinforcing. Rather, in some cases they may mitigate one another.

The example of federal criminal procedure questions arising in the context of habeas and § 1983 illustrates this point. As we noted above, many more criminal procedure cases reach the courts under a low deference regime than a high one. Accordingly, there are many more opportunities for C_2 to generate prorights deference mistakes. However, both the majority effect and the nondeferential effect would seem to make it much more likely that C_2 would err when faced with a deferential precedent than when faced with a nondeferential one. A deferential precedent from C_1 is much more likely to lead to an antirights deference mistake than a nondeferential precedent is to lead to a prorights deference mistake. On the side of prorights errors, then, there is a low probability of error coupled with a large number of opportunities to err; on the side of antirights errors, there is a higher probability of error coupled with a smaller number of opportunities to err.

Which of these effects will dominate is ultimately another empirical question, and it is one that we are not yet prepared to answer. Based on the discussion above and the examples presented in Part II.A, it seems likely that there will be more antirights deference mistakes than prorights deference mistakes.[314]

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[314] It is worth noting that a false positive will not drive the law in the direction that one might expect. In criminal procedure cases, deference (if appropriate) is awarded to state actors—police and state courts, for the most part—that are opposing the right in question in a § 1983 lawsuit or a habeas petition. Consequently, a predominance of false positives will lead to a contraction in the underlying criminal procedure right.

This gives rise to an interesting set of hypotheses regarding the expansion and contraction of criminal procedure rights in the United States. During the 1960s, the Warren Court engaged in a well-documented expansion of substantive criminal procedure rights. See, for example, Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich L Rev 1319, 1341–44 (1977). This expansion was accompanied by a concomitant growth in individuals' rights to bring habeas and § 1983 lawsuits. See Jeff Bleich, *Actual Innocence: How Supreme Court Reforms Have Changed States' Conception of Justice*, 64 Or St Bar Bull 13, 14 (2004) ("Beginning with the Warren Court's reform of criminal procedure in the 1950s, the number of habeas corpus petitions soon grew substantially."); Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Georgetown L J 1493, 1537 (1989) (noting that the Warren Court "essentially converted § 1983 into an all-purpose constitutional litigation statute" in *Lynch v Household Finance Corp*, 405 US 538 (1972)). These procedural mechanisms often served as the vehicles for bringing substantive constitutional claims into federal court, particularly in the face of hostile state actors. Since the end of the Warren Court era, criminal procedure rights have gradually contracted along nearly

But the more general observation is that it would be quite a remarkable happenstance if these factors canceled each other out and resulted in zero net legal movement. It is almost certain that, for any such regime involving biased, deferential legal standards, deference mistakes will drive the law in one direction or another.

C. Unitary Deference Regimes

We now turn to the possibility that deference mistakes might occur even if every single case on a given legal question is governed by the same deference regime. Again, it may be that no legal issue is ever limited to a single deference regime. There is always the possibility that a party will fail to preserve its objection at trial, leading to review for plain error. Our point is simply that courts can generate deference mistakes even if they see only cases governed by a single deference regime. In addition, the model that we present here will serve as the foundation for our model of symmetric deference regimes in Part III.D.

Consider a legal issue that is decided in the first instance by a district court (C_0) and then reviewed by an appellate court (C_1). Our paradigm is a motion for change of venue or dismissal for forum non conveniens, though the possibilities are legion. C_1 will have its own idea of what the law should be—its own view as to when the plaintiff should prevail and when the defendant should prevail. That is, it will have in mind some legal cutpoint that divides the two sets of cases. We use the words "case," "plaintiff," and "defendant" for ease of explication, but more generally, the appellate court will have a view regarding which *issues* (rather than cases) should be decided in favor of the *moving party*

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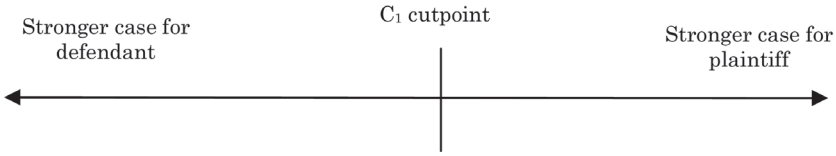
every dimension. Scholars have attributed this contraction to the work of more ideologically conservative subsequent Courts, which disagreed with the Warren Court and sought to undo much of its work. See, for example, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich L Rev 2466, 2467, 2470 (1996) (summarizing the scholarly debate over the Burger and Rehnquist Courts' contraction of criminal procedure rights and arguing that these Courts engaged in a "counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions"). This is very possible, but it is also possible that the trend was helped along by the types of deference mistakes that we describe here. The growth of § 1983 and habeas cases could have introduced into the case law ever-increasing numbers of deferential precedents. Those precedents could then have given rise to false positives. Those deference mistakes would then have led, over time, to contraction in the underlying substantive criminal rights.

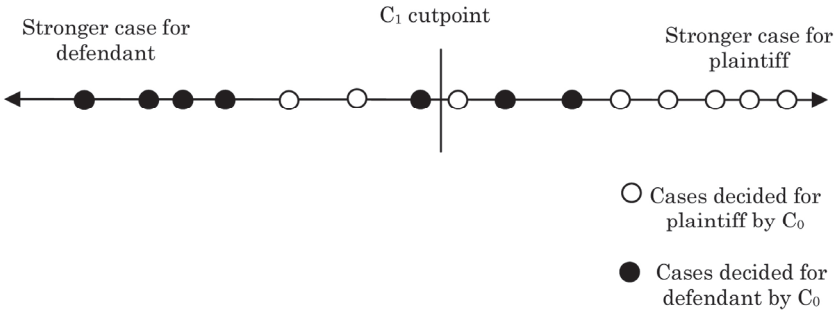
(rather than the plaintiff), and which issues should be decided in favor of the *nonmoving party* (rather than the defendant).

FIGURE 2. THE APPELLATE COURT'S CUTPOINT



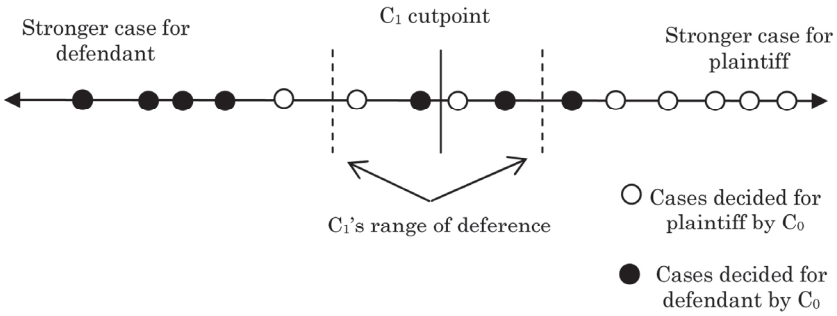
If C_0 has a different cutpoint—or simply if there are random errors or assignments to different district judges—C_0 may not decide every case in the same way that C_1 would. C_0 may decide in favor of the plaintiff in a few cases in which C_1 would decide in favor of the defendant, and vice versa.

FIGURE 3. C_0'S ADJUDICATION OF CASES



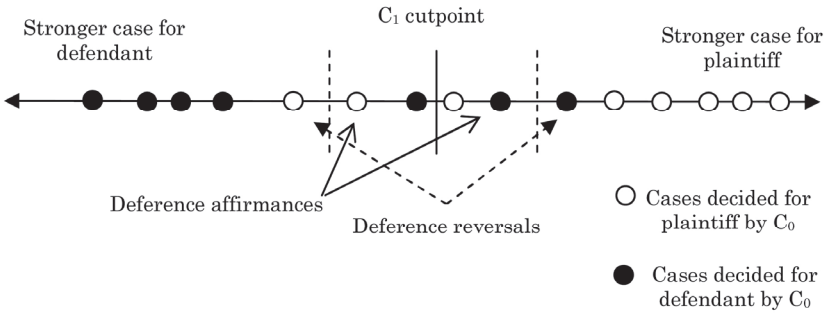
Part III.B focused on deferential legal standards, under which C_1 effectively has two cutpoints. Deference mistakes can also arise out of C_1's deference to the initial decisionmaker, C_0. Even if C_0 does not decide every case as C_1 would, C_1 may have some range of outcomes within which it will defer to C_0's decision and affirm its outcome, even if C_1 would have reached a different decision were it writing on a clean slate.

FIGURE 4. C_1'S ZONE OF DEFERENCE



If C_1 affirms a decision by C_0 despite the fact that C_1 would have decided the case differently in the absence of deference, we label that decision a "deference affirmance." This type of case is represented in Figures 4 and 5 by the black circles to the right of C_1's cutpoint and the white circles to the left of C_1's cutpoint that fall within C_1's range of deference. White circles to the left of the cutpoint and black circles to the right of the cutpoint that fall outside C_1's range of deference will be reversed. These reversals—which occur despite the deference afforded C_0's decision by C_1—are "deference reversals."

FIGURE 5. DEFERENCE AFFIRMANCES AND REVERSALS



Each time C_1 affirms a case that it would have decided differently under a de novo standard, it should write an opinion explaining that its decision is based at least in part on the fact that it was obliged to defer to the lower court, C_0. And each time C_1 reverses a case despite the fact that it is affording deference to C_0, it should write an opinion explaining that it has reversed despite that deference. A subsequent court (C_2) that reads the opinion carefully should have a good sense of where C_1 stood on

the underlying issue. However, deference affirmances and reversals also represent opportunities for C_2 to err. If C_2 reads a C_1 deference affirmance and mistakenly believes it to be an unqualified affirmance—the outcome that C_1 would have reached if deciding the case de novo—C_2 has misunderstood the underlying law. Likewise for a deference reversal: if C_2 believes that the reversal is an unqualified statement of C_1's own view of the law, rather than the much-stronger statement that the case must be reversed despite C_1's deference to C_0, it has misunderstood the import of C_1's precedent.

Suppose that C_1 affirms a dubious ruling in favor of a plaintiff. If C_2 believes that this reflects C_1's unqualified view of the law, it will have misinterpreted the law as more plaintiff-friendly than C_1 meant it to be. The same is true if C_1 reverses a ruling in favor of a plaintiff and C_2 misunderstands this as C_1's de novo view, rather than the very strong prodefendant statement that it is—that too means that C_2 will have interpreted the law as more plaintiff-friendly than C_1 meant it to be. In very concrete terms, C_2 might think to itself: "I see that C_1 affirmed a ruling in favor of the plaintiff in an analogous case. C_1 must have believed that the plaintiff deserved to win given the operative law and facts." Or, in the case of a deference reversal: "I see that C_1 reversed a ruling in favor of the plaintiff in an analogous case. But here the operative law and facts are slightly more proplaintiff, so C_1 might believe that the plaintiff deserves to win on this issue." Similarly, in cases in which C_0's ruling favored the defendant, C_2 might misunderstand C_1's deference affirmance or deference reversal as more defendant friendly than C_1 meant it to be.

It may seem peculiar or counterintuitive to imagine a plaintiff losing on appeal, and that precedent then giving rise to a mistaken interpretation that *favors* the plaintiff. But such a result is entirely possible. The question is how a precedent is perceived relative to what the court actually decided. If C_1 reverses a decision favoring a plaintiff—despite the deference due to that decision—it has made a very strong statement about the wrongness of the earlier decision and how far it diverges from governing law. If C_2 then mistakenly believes that C_1 was applying something like a de novo standard, it will miss the full import of this statement—that is, C_1's judgment as to how incorrect C_0's decision really was. It is the difference between a case falling outside C_1's deference range (what has actually occurred) and,

on the other hand, believing only that a case falls to one side of C_1's cutpoint (what C_2 might think).[315]

The deference mistakes described above can give rise to erroneous outcomes in individual cases. Suppose that C_0 decides an issue for the plaintiff, C_1 upholds that judgment under a deference standard, and C_2 then commits a deference mistake by interpreting C_1's affirmance as that court's unqualified view (absent any deference). Believing that C_1's precedent is very plaintiff friendly on account of this error, C_2 might then decide its case in favor of the plaintiff. This creates a new precedent, one that would not have existed (at least in that form) but for C_2's deference mistake. Again, that new C_2 precedent will then influence subsequent decisions *even if future courts never make the same deference mistake that C_2 made*. C_2 has integrated its mistake into existing doctrine while stripping it of any outward indications of error.

As we have already described, these mistakes can systematically shift doctrine over time. Each case in which C_2 makes a deference mistake stands as a precedent for future courts, whether or not those courts make their own deference mistakes. This means that all courts that would treat C_2's decision as precedential or influential will adjust their cutpoints in light of it. In theory, if C_2 were to make repeated mistakes of a single type—either pro-plaintiff or prodefendant—these mistakes could push the law further and further in one direction.

This long-term effect on legal doctrine will materialize only if courts produce more errors of one type than another along any given legal dimension. For instance, courts could generate long-term evolution in the law if they made more pro-plaintiff mistakes than prodefendant ones (or the reverse) with respect to some aspect of the law of forum non conveniens—the importance

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[315] Courts could conceivably make equal and opposite mistakes if it is C_1, rather than C_2, that employs the incorrect standard of review. Suppose that C_1 decided (consciously or unconsciously) to review a decision by C_0 without deference, instead of affording C_0 the deference that it was due. Suppose C_2 then looked to C_1's decision as precedent, paying close attention to the standard of review that C_1 employed. This would be an error, because C_2 would have misinterpreted the holding of C_1's precedent. However, we would not exactly consider it a deference mistake, because the error would have arisen not from a failure to understand the precedent's deference regime, but rather from C_1's failure (or refusal) to apply the law correctly. Nonetheless, it is useful to bear in mind that, just as C_2 can generate errors in one direction by misunderstanding C_1's precedent, C_1 can generate errors in the opposite direction by misrepresenting exactly what it has decided.

of litigating in a plaintiff's chosen forum, for instance.[316] Indeed, one would expect there to be approximately equivalent numbers of mistakes in each direction—and thus no long-term bias in the law—so long as four assumptions hold true:

1. C_0's errors or deviations from C_1's cutpoint—what C_1 believes the law should be—are distributed evenly around C_1's cutpoint.
2. Plaintiffs and defendants appeal similarly situated cases at equivalent rates.
3. C_1's zone of deference is symmetric around its cutpoint.
4. C_2 is equally likely to make mistakes with respect to cases appealed by plaintiffs as by defendants.

If the first three assumptions hold, there will be approximately equivalent numbers of deference affirmances for plaintiffs and defendants, and similarly equivalent numbers of deference reversals. And because each deference affirmance or reversal presents an opportunity for C_2 to misinterpret the law, there will be equivalent numbers of opportunities for C_2 to misinterpret the law in a pro-plaintiff direction as in a prodefendant direction. The net overall effect on the law should be neutral.

In the sections that follow, we relax these assumptions. In addition, we introduce a number of other potential complications that can give rise to asymmetries and create long-term movement in the law.

1. Biased lower decisionmaker.

We begin by relaxing the first assumption. If C_0 is a faithful agent of C_1, then C_0's deviations from C_1's cutpoint should all be random errors. That is, these errors should be randomly distributed around C_1's cutpoint. But what if C_0 is not a faithful agent and is instead biased in one direction? C_0's bias might be the result of ideological predilection[317] or a nonideological normative

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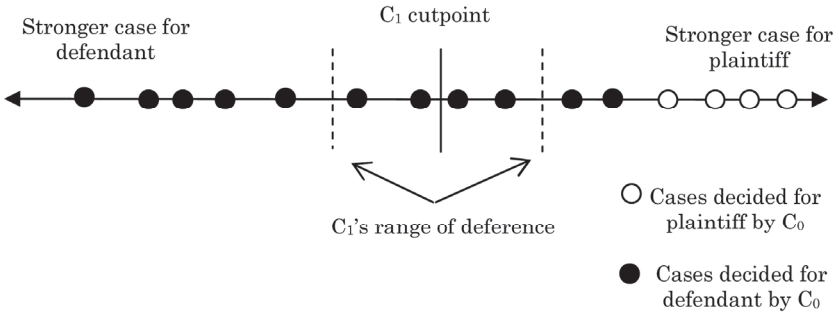
[316] See *Koster v (American) Lumbermens Mutual Casualty Co*, 330 US 518, 524 (1947) (noting that cases with only two parties should generally be tried in a plaintiff's home forum because "[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown").

[317] A geographically or politically diverse jurisdiction might have multiple subjurisdictions with widely divergent ideological or judicial philosophies. For instance, the Ninth Circuit includes both the Northern District of California and the District of Idaho. The two district courts (C_0) might have very different cutpoints, as well as cutpoints that differ from that of the Ninth Circuit (C_1). If, for instance, the District of Idaho deviates

view of what the law should be.[318] This bias could also reflect C_0's systematic misinterpretation of C_1's view of the law. C_1 may not have clearly specified the legal standard, or C_0 may simply have misunderstood C_1's holding. If C_0 is biased, its errors will be skewed in one direction. Suppose, for instance, that C_0 is more prodefendant than C_1.

FIGURE 6. BIASED LOWER COURT DECISIONMAKER



Because C_0 is prodefendant in comparison to C_1, it will tend to decide most close cases in the defendant's favor, creating far more opportunities for C_1 to issue prodefendant deference affirmances and reversals. (In Figure 6, the three black dots to the right of the cutpoint but within the zone of deference are deference affirmances, while the rightmost black dot is a deference reversal.) This skew will exist whether plaintiffs and defendants appeal all cases or only those that are relatively close to the ends of C_1's range of deference, as long as C_0's prodefendant bias is sufficiently strong that plaintiffs regularly decide that it is worthwhile to appeal cases falling to the right of C_1's cutpoint.[319]

Crucially, deference mistakes resulting from both deference affirmances and deference reversals of cases appealed by plaintiffs will operate as prodefendant errors. Regardless of how C_1

from the Ninth Circuit's cutpoints while the remaining districts adhere to it, then C_0 as a whole will have deviated from C_1's view of the law. The same could be true within a large state. The Supreme Court of Texas (C_1) might have a cutpoint that differs significantly from those of local courts in Austin (C_0) or Dallas (C_0).

[318] See *Chandler v Judicial Council of the Tenth Circuit*, 398 US 74, 137 (1970) (Douglas dissenting) ("Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like.").

[319] We are currently holding to the second assumption that plaintiffs and defendants appeal similarly situated cases at equal rates.

decides an issue that a plaintiff has appealed, its result will appear more prodefendant than it actually was if C_2 forgets that C_1 was deferring to C_0's original judgment in favor of the defendant. If C_1 affirms C_0's prodefendant ruling, C_2 may mistakenly think that C_1 actually believes the defendant had the stronger case. If C_1 reverses C_0's ruling, C_2 may fail to appreciate what a strong statement C_1 is making by reversing a case to which it owed deference.

Thus, if C_0 is biased in a prodefendant direction, this bias can generate long-term prodefendant doctrinal evolution. The equal and opposite effect would of course occur if C_0 were biased in a pro-plaintiff direction: long-term, pro-plaintiff evolution in the law. What is striking about this result is that our model generates biased legal evolution based entirely on a bias in a *lower court* (C_0), even in the presence of a neutral appellate court (C_1).[320]

2. Differential rates of appeal.

Similar long-term effects will result if parties are differentially likely to appeal decisions handed down by C_0. Consider again Figure 3, which displays approximately equal numbers of cases that C_0 decided in favor of plaintiffs and in favor of defendants that are near the outer boundaries of C_1's deference range. These are the black dots (prodefendant cases) near the rightmost dashed line and the white dots (pro-plaintiff cases) near the leftmost dashed line. This is to be expected if C_0 is an unbiased (but potentially error-prone) decisionmaker.

Consider now the possibility that plaintiffs and defendants will appeal different proportions of similarly situated cases. Scholars have suggested numerous reasons why one side might be more likely to appeal in certain types of cases. For instance, in tort lawsuits, defendants might be better capitalized than plaintiffs and thus better able to bear the costs of appeal.[321]

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[320] Note, however, that this mechanism relies on quite a strong bias on the part of C_0. In order to present a meaningfully greater number of opportunities for plaintiffs to appeal, C_0 must be deciding cases in favor of the defendant that fall at or near the rightmost boundary of C_1's deference range. These are cases in which the plaintiff would have a significant advantage under typical circumstances. Accordingly, a relatively weak bias in one direction may not be enough to generate significant, long-term, biased evolution in the law.

[321] See Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 Wm & Mary Envir L & Pol Rev 123, 125 (2001); Leslie Bender, *Feminist*

Defense attorneys typically work on an hourly fee basis, while plaintiffs' attorneys are often paid on contingency; this dynamic might alter the incentives of the attorneys and the parties to continue litigating past the initial stages.[322] More defendants might also be repeat players, giving them incentives to appeal that extend beyond the case at hand.[323] Alternatively, any number of these factors could lead to higher rates of appeal by plaintiffs. The point is that there is no reason why these rates need be the same.

Each appeal presents an opportunity for a deference affirmance or reversal by C_1, which in turn presents an opportunity for a deference mistake by C_2. Accordingly, if defendants appeal more cases, there will be more deference mistakes involving defendant appeals. And, as we have explained, appeals by defendants will be from C_0's decisions in favor of plaintiffs and will thus lead to *pro-plaintiff* deference mistakes. If C_1 issues a deference affirmance or reversal, and C_2 then makes a deference mistake, C_2 will have mistakenly understood C_1's precedent as more *plaintiff friendly* than it actually was. Thus, by appealing with greater frequency, defendants may actually end up nudging the law in a more plaintiff-friendly direction. Plaintiffs would create the opposite effect if they were to appeal more frequently.

Of course, that effect would have to be balanced against any overall movement in the law that plaintiffs or defendants could generate by appealing with greater frequency in the first place. That is, if parties on one side of an issue appealed more regularly and selected appeals carefully in order to generate favorable precedents, that side might be capable, over time, of shifting the law in a direction favorable to its interests. Deference mistakes might generate some contrary movement in the law, but possibly

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(Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 Duke L J 848, 881.

[322] See Robert E. Litan and Steven C. Salop, *Reforming the Lawyer-Client Relationship through Alternative Billing Methods*, 77 Judicature 191, 192 (1994).

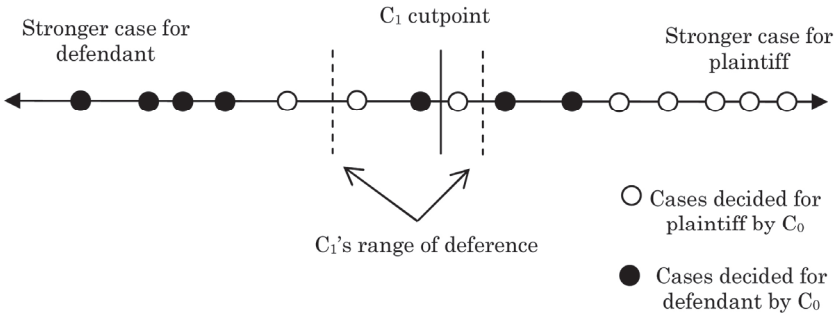
[323] See Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Georgetown L J 65, 75 (2010); Joel B. Grossman, Herbert M. Kritzer, and Stewart Macaulay, *Do the "Haves" Still Come Out Ahead?*, 33 L & Society Rev 803, 804 (1999); Susan Brodie Haire, Stefanie A. Lindquist, and Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 L & Society Rev 667, 668 (1999); Brian Ostrom, Roger Hanson, and Henry Daley, *So the Verdict Is In—What Happens Next? The Continuing Story of Tort Awards in the State Courts*, 16 Just Sys J 97, 103 (1993). See also generally William H. Simon, *The Prudent Jurist*, 4 Legal Affairs 17 (Mar–Apr 2005).

not enough to counteract the secular trend created by parties' efforts to directly affect the law.[324]

3. Asymmetric zone of deference.

Now consider the possibility that C_1 might not defer equally to decisions by C_0 in favor of the plaintiff and defendant. Suppose that C_1 is very deferential when C_0 decides a case in favor of the plaintiff and much less deferential when C_0 decides a case in favor of the defendant. This might be modeled as C_1 having a smaller deference range on the plaintiff's side of its cutpoint and a larger deference range on the defendant's side of its cutpoint.[325]

FIGURE 7. C_1'S ASYMMETRIC ZONE OF DEFERENCE



This asymmetry could arise for a variety of reasons. Perhaps most straightforwardly, it might reflect C_1's ideological preferences. Or C_1 might believe that C_0 is biased and mistrust its decisions with respect to one side. C_1 might also believe that one side generally has a more difficult time proving its cases for evidentiary reasons. Accordingly, it might be more strongly inclined to defer when parties on that side do succeed.

This asymmetry will produce results very similar to those that would occur if one party were to appeal more than the other.[326] If C_1 is less deferential to decisions favoring defendants, then plaintiffs will appeal more cases. A party will be most inclined to appeal cases that fall outside (or near) C_1's deference range, because those are the appeals that the party has the

[324] See generally Gertner, 122 Yale L J Online 109 (cited in note 233) (describing this phenomenon in the context of discrimination cases).

[325] This is functionally equivalent to symmetric deference around a cutpoint that has been shifted, but we describe it as asymmetric deference in order to better capture the reasons why C_1 might adopt such a posture.

[326] See notes 321–23 and accompanying text.

greatest chance of winning. If C_1's deference range is smaller with respect to cases decided in favor of the defendant, then there will be more promising appeals for plaintiffs to bring. As in the above analysis, this will result in more defendant-friendly deference mistakes and thus a long-term skew in the law that favors defendants. And if C_1 is more deferential to defendants than to plaintiffs, the same principle will apply, mutatis mutandis, and we should expect long-term legal evolution in favor of defendants. Of course, as before, this long-term bias will act only as a counterweight to any other secular trend that might be created by a greater number of appeals by one side.

4. Asymmetric errors by a subsequent court.

The foregoing sections have dealt with asymmetries in how C_0, C_1, and private parties make decisions. This section contemplates the possibility that C_2 may make asymmetric errors when reading and relying on prior decisions by C_1. That is, C_2 may be more likely to make a deference mistake with respect to an affirmance of a prodefendant decision than with respect to an affirmance of a pro-plaintiff decision.[327] The results dictated by such an asymmetry should be clear from the foregoing discussion: a greater number of deference mistakes in prodefendant appeals will lead to biased evolution of the law in a direction favoring defendants; a greater number of deference mistakes in pro-plaintiff appeals will lead to biased evolution in the law favoring plaintiffs.

Alternatively, it is possible that C_2 is more likely to make a deference mistake when C_1 issues a deference reversal than when it issues a deference affirmance. When an appellate court upholds a lower court decision under a deference standard, it is likely to emphasize the deference that it owes to the lower court.[328] In contrast, when issuing a deference reversal, C_1 is

[327] It is difficult to specify why this might occur, but one can speculate. C_2 might mistakenly believe that different standards exist to govern cases decided in favor of defendants or plaintiffs. There might be something about the way that those cases are written that obscures the standard of review more frequently in one type of case. C_2 might believe that C_1 is biased in favor of one side and might impute different meanings to decisions by C_1 in favor of each of the two sides. Or C_2 might be biased relative to C_1 and might be predisposed to make mistakes in the direction of its bias due to motivated reasoning; unconsciously or consciously, it might search for precedent to fit its preferences.

[328] This is one mechanism by which the court can defend its opinion in the eyes of parties who might disagree with it while avoiding taking its own strong stand. In addition, "deference," as a legal concept, generally has a positive valence. See, for example,

likely to deemphasize the deference that it owes to C_0 precisely because it is reversing C_0 despite that deference. As C_1 obscures its deferential posture, C_2 becomes more likely to miss that legal hook or misunderstand C_2's stance. The probability of a deference mistake rises.

Of course, this might be entirely incorrect, and C_2 might be more likely to err with respect to deference affirmances. Regardless, this particular asymmetry by itself will not suffice to generate long-term legal evolution. The reason is that both proplaintiff and prodefendant errors can arise from either deference reversals or affirmances. However, if any other factor were to disturb the equilibrium between deference reversals favoring plaintiffs and those favoring defendants, that asymmetry—in combination with the greater propensity of reversals to generate mistakes—could lead to long-term, biased development in the law. For instance, suppose that C_1 is more deferential to plaintiffs than defendants, as in Part III.C.3. Suppose further that C_2 is more likely to err with respect to deference reversals by C_1. Many of the additional appeals that plaintiffs bring will result in reversals. The counterintuitive result is that this will accentuate the long-term legal bias favoring defendants.

5. Effects in combination.

It is important to note that the mechanisms described in the previous four sections are all independent of one another and conceivably complementary. That is, consider an evidentiary objection related to hearsay, which is reviewed for abuse of discretion.[329] It is possible that (1) the trial courts (C_0) that consider these objections in the first instance are biased in favor of nonmoving parties (non-objectors), (2) moving parties (objectors) appeal more frequently, (3) the appellate court (C_1) affords more deference to nonmoving parties, and (4) a subsequent court (C_2) is more likely to make deference errors with respect to deference affirmances than reversals. These mechanisms would cumulatively bias doctrine in favor of nonmoving parties, with each mechanism reinforcing the others.

Hernandez, 603 F3d at 272–73 (emphasizing the deference owed to the district court's application of the Sentencing Guidelines).

[329] See *United States v Cash*, 266 F3d 42, 44 (1st Cir 2001) ("The admission into evidence of hearsay statements . . . is reviewed for abuse of discretion.").

D. Symmetric Deference Regimes

Finally, we turn to legal issues governed by symmetric deference regimes: situations in which either side might receive greater or lesser amounts of deference. Our canonical example is an evidentiary objection. A trial court's decision to admit or bar evidence is normally reviewed on appeal for abuse of discretion,[330] but the decision is reviewed only for plain error if the losing party failed to properly preserve its objection below.[331] This creates a situation in which either party might be the beneficiary of lesser (abuse of discretion) or greater (plain error) degrees of deference on appeal. In some respects, this functions as a combination of the asymmetric and unitary regimes described above. Our analysis combines elements of those two discussions.

The added complication is that the direction in which a deference mistake shifts the law will depend on both the party that appeals and the degree of deference afforded. Suppose that a party fails to object to the introduction of evidence at trial (C_0) and then later appeals C_0's decision to allow the evidence. C_1's review is for plain error. Suppose further that C_2 later relies on C_1's opinion as precedent. Regardless of what C_1 decided, if C_2 makes a deference mistake, that mistake will shift the law in a pro-evidence-admission direction. This is because failing to recognize the plain error standard will make it appear as though the objecting party's argument was weaker than it really was, as C_2 will believe that the objecting party lost (or won) on an abuse of discretion standard (rather than the more stringent plain error standard).

The inverse is true as well. If, in this example, the party seeking to block the evidence *does* object at trial, loses, and appeals, a later deference mistake will shift the law in an anti-evidence-admission direction. This is because C_2 will mistakenly believe that the standard was plain error (rather than abuse of discretion) and will thus judge the result reached by C_1 as more favorable to the objecting party than it actually is.

A parallel analysis applies when the party seeking to introduce evidence loses at trial and appeals. If the party failed to preserve its argument and a plain error standard applies, a later deference mistake by C_2 will shift the law in an anti-evidence-admission direction. If the party introducing evidence preserved

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[330] See note 176 and accompanying text.

[331] See note 297.

its argument and an abuse of discretion standard applies, a later deference mistake by C_2 will shift the law in a pro-evidence-admission direction.

To state the intuition somewhat more succinctly: the higher the apparent deference standard, the stronger the apparent case for the party forced to overcome that standard. Whether that party wins or loses on appeal, the higher deference standard will make it appear as if that party faced long odds due to something other than the merits. Thus, a deference mistake will shift the law toward a given side of an issue if C_2 mistakes a lower deference standard for a higher one. And a deference mistake will shift the law away from one side of an issue if C_2 mistakes a higher deference standard for a lower one.

In sum, then, the number of pro-evidence-admission deference mistakes will be:

> The number of cases in which an objecting party fails to object, loses, and appeals × the probability that C_2 relies on a plain error case and makes a deference mistake
>
> +
>
> The number of cases in which a party introducing evidence loses and appeals × the probability that C_2 relies on an abuse of discretion case and makes a deference mistake

On the other hand, the number of anti-evidence-admission deference mistakes will be:

> The number of cases in which a party introducing evidence does not preserve an argument, loses, and appeals × the probability that C_2 relies on a plain error case and makes a deference mistake
>
> +
>
> The number of cases in which an objecting party loses and appeals × the probability that C_2 relies on an abuse of discretion case and makes a deference mistake

Accordingly, there will be no net movement in the law so long as the following conditions hold:

1. C_0's errors or deviations from C_1's cutpoint are distributed evenly around C_1's cutpoint.
2. Both sides appeal cases at equivalent rates.
3. C_1's zone of deference is symmetric around its cutpoint.

4. C_2 is equally likely to make mistakes with respect to cases appealed by each side.
5. Each side fails to preserve issues at trial at the same rate.

The first four of these conditions should be familiar from our discussion of unitary deference standards.[332] The first condition affects how many opportunities there will be for one side or the other to appeal.[333] The second and third determine the rate at which a given side will appeal when presented with an appealable case.[334] The fourth condition is the likelihood that any given precedent will result in a deference mistake.[335] We have already discussed these points in depth and will not repeat our analysis except to say that the points we made in Part III.C are equally applicable here.

As to the fifth condition,[336] there is every reason to believe that the two sides to a given issue will not preserve their arguments at the same rate. The principal reason is structural. When a party seeks to introduce evidence, it is necessarily making an argument as to why that evidence is admissible. The very fact of seeking to introduce the evidence preserves at least one argument as to admissibility. It is thus much easier for a party seeking to block evidence to forfeit a key argument than for the party introducing it to do so. A quick empirical check confirms this conclusion. We ran the following search on the Westlaw database of federal courts of appeals opinions: [evidence /s exclu! /s "plain error"]. We looked for cases in which evidence had been excluded but the review was for plain error. This search returned approximately five hundred results. When we replaced "exclu!" with "admi!" in order to find cases in which evidence was admitted and the standard of review was plain error, the number of results jumped to approximately three thousand. We take this as a structural asymmetry in the number of times that

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[332] See Part III.C.

[333] See Part III.C.2.

[334] See Parts III.C.2, III.C.3.

[335] See Part III.C.4.

[336] We note that it is neither a necessary nor a sufficient condition for generating zero net movement in the law that C_2 make deference mistakes with respect to plain error cases and abuse of discretion cases. Even if this were true, unequal numbers of cases of each type would still lead to long-term doctrinal evolution. And even if this is not true, there will still be no net doctrinal evolution if each side appeals equal numbers of plain error and abuse of discretion cases. Of course, as we will describe, it is unrealistic to believe that all these conditions hold.

a party will fail to preserve an objection and thus an indication that deference mistakes may induce a long-term trend toward greater permissiveness in the rules of evidence.

* * *

In isolation, deference mistakes are interesting and notable; in combination, they can influence the law in significant and perhaps pernicious ways. Our objective in this Part has been to demonstrate that deference mistakes can generate long-term evolution in the law if they fall unequally on one side of a legal issue. We cannot prove definitively that deference mistakes have had this effect, as it is difficult to separate the operation of deference mistakes from other factors that affect the law over time. But in light of the theory presented above, we think that the evidence offered in Part II is at least suggestive of the influence that deference mistakes might exert. In the Part that follows, we consider what might be done to blunt this influence.

IV. AVOIDING DEFERENCE MISTAKES

If we are correct that courts have been making deference mistakes, and that these mistakes are influencing doctrine, what follows? In this Part, we offer some suggestions regarding the ramifications of deference mistakes, the ways in which they should alter our perceptions of certain legal doctrines, and potential corrective mechanisms.

As an initial matter, one might wonder whether a doctrine that has been influenced by deference mistakes is "wrong" in any normative sense, such that a "correction" should be made. We express no normative view regarding any of the doctrines that we discuss in this Article, so we do not mean to critique the development of any of those doctrines on substantive terms. Yet we nonetheless believe that the *process* of doctrinal evolution through deference mistakes is incorrect as a normative matter. Implicit in our model of deference mistakes is a model of judicial decisionmaking under which judges' decisions are influenced, to at least some degree, by the legal precedent available to them.[337] Suppose, then, that there is some normatively correct outcome in each case, but that judges are imperfect—they will err and

[337] See Masur, 121 Yale L J at 490 & n 85 (cited in note 6) (citing sources in support of such a model); Richard A. Posner, *How Judges Think* 40–43 (Harvard 2008) (describing the various processes by which judges reach decisions).

arrive at less-than-ideal outcomes. Any given judicial decision will deviate from the correct outcome by some amount in some direction.

Deference mistakes may represent a simple misunderstanding of one of the inputs to a legal decision—a technical error, more or less.[338] This technical error increases the inaccuracy of the judge's decision above and beyond whatever errors the judge might make absent a deference mistake. On this understanding, deference mistakes would reduce (or at least not increase) the degree of error in judicial decisionmaking only if they were negatively correlated with other errors the judge might be making. For instance, suppose that a Federal Circuit judge were ideologically antipatent, such that his decisions were biased against patent rights to a degree that was normatively harmful. Suppose further that this judge was prone to making deference errors, the vast majority of which were pro-patent because they involved infringement precedents decided under the clear and convincing evidence standard. In this case, the deference mistakes would mitigate the judge's tendency to err in an antipatent direction.

Yet there is no reason to believe that deference mistakes will be negatively correlated with judicial error in general. Rather, there is likely no correlation between the two. Deference mistakes will thus exacerbate the errors inherent in judicial decisionmaking and lead to even more suboptimal decisions. It is in this sense that we describe deference mistakes as normatively undesirable and search for potential correctives.

More generally, when deference mistakes occur, the evolution of doctrine is being driven by something that most observers would agree has nothing to do with the normatively correct outcomes. Regardless of one's normative view of an area of law, issues like which party appeals more frequently, whether a lower court is biased, or whether courts are more likely to make one type of error than another should play no role in that doctrine's development. If these types of factors somehow push doctrine in a desirable direction, that would be pure, fortunate happenstance. This is not the way that a well-designed legal system should operate.

So what can be done to reduce or eliminate deference mistakes?

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[338] As we have previously discussed, courts may also make deference mistakes for strategic reasons, a problem that lends itself to different solutions. See note 305.

The difficulty with legal solutions is that deference mistakes affect the evolution of doctrine through the natural, informal processes of the common law: judges read and rely on precedent when deciding cases. Eliminating deference mistakes would seem to require significant alterations to the common-law method. For instance, judges could simply do away with deferential standards of review and consider every case de novo. Yet this response seems too extreme. It may be that trial courts do not deserve as much deference as they currently receive as a substantive matter, but deference mistakes do not strike even us as so significant a problem that, on their own account, they would justify eliminating deferential standards of review.

Alternatively, one could imagine collapsing all deference regimes such that each legal question would be governed by a unitary deference standard. For instance, patent validity might be judged by a preponderance of the evidence standard—rather than a clear and convincing evidence standard—even when a patent has already been granted and is being asserted in an infringement suit. This would be operationally equivalent to eliminating the deference that the PTO receives for having examined the patent in the first instance—a result advocated by numerous legal academics.[339] Again, it may be that the PTO should not receive such deference as a substantive matter, or that it should receive deference only under certain circumstances.[340] But if deference is otherwise appropriate, deference mistakes do not strike us as a sufficiently great reason to eliminate it.

The same holds true for habeas and qualified immunity. Deference mistakes could be reduced or avoided if courts were to eliminate the requirement that a right be clearly established before it can serve as a basis for a habeas or § 1983 claim. Every case would then involve a straightforward consideration of whether the right in question exists, with no deference to state decisionmakers. Yet this would entail a tremendous alteration of

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339 See Roger Allan Ford, *Patent Invalidity versus Noninfringement*, 99 Cornell L Rev 71, 118 (2013) (arguing for "eliminat[ing] the elevated burden of proof that applies to invalidity" and citing many "[s]cholars and others [who] have long argued" the same).

340 In *Microsoft*, the Supreme Court rejected the argument that the presumption of validity should not apply when the PTO has not considered the prior art at issue, but the Court approved the use of a jury instruction stating that the PTO had not evaluated the evidence at issue. See *Microsoft*, 131 S Ct at 2244–45, 2251. It is difficult to know the consequences of using this type of nuanced instruction. See David L. Schwartz and Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 Harv J L & Tech 429, 460 (2013) (reporting the results of an empirical laboratory study on jury instructions in patent cases).

the two doctrines, one that might be warranted on substantive grounds but almost surely could not be justified merely as a means of eliminating deference mistakes.

Even if we were to eliminate some deference regimes entirely, this might not cure the problem. As we explained above, formal deference regimes typically reflect underlying functional considerations. Even without the "clearly established" language, courts may be reluctant to require the government to pay money damages in a § 1983 case, or to contradict a state court by granting a habeas petition, unless there was clear notice of the unlawfulness of the state's conduct. Similarly, judges might nonetheless feel compelled to defer to patents that have already been granted or evidentiary rulings that were not contested at the time they were made. In other words, deference regimes typically exist for a substantive reason, and courts might reach similar outcomes for this reason irrespective of the formal deference regime. This type of sub silentio deference could generate even *more* errors, and those errors would be even more difficult to detect or correct. For instance, without the "clearly established" language to serve as a flag, future courts would be at even greater risk of making deference mistakes by applying habeas or § 1983 precedents in direct appeals. In short, altering the formal legal rules in a fashion that judges are likely to disobey is not a viable option.

Less drastic than wholesale reformulation of deference doctrine is the possibility that courts might instead use dicta to reduce deference mistakes. Courts that decide issues of qualified immunity are already encouraged, as a matter of law, to determine whether a right exists in addition to holding whether it is clearly established.[341] This rule could be extended to the habeas context and to any number of other types of deference regimes. For instance, a court considering a patent's validity in the course of an infringement lawsuit could rule on validity under the clear and convincing evidence standard and then announce separately what decision it would have reached had it considered the question without deference. Appellate courts reviewing lower court decisions for abuse of discretion or clear error could issue their rulings and then add advisory statements explaining what they would have done were they considering the cases without deference. These measures would both reduce unintentional deference

[341] See notes 159–65 and accompanying text.

mistakes and make intentional deference mistakes more difficult to disguise (and thus less valuable). Such statements by courts would be dicta, which could introduce other sorts of problems,[342] but the statements would nonetheless constitute important information that future courts could use to make better decisions and avoid deference mistakes.

The greater problem is that courts issuing such dicta might be tempted (consciously or unconsciously) to engage in motivated reasoning, as we mentioned above.[343] A court that decides that a particular right was not clearly established might be reluctant to declare that the right exists, thus placing all the weight on its determination that it was not clearly established. A court that declares a patent valid might be loath to admit that it would have reached a different result under a preponderance standard, thereby acknowledging that the case was close and opening the door for an appellate court to disagree. Or, less consciously, a court that decides a case one way might be more focused on evidence that confirms that view and thus more inclined to announce that the result would have been the same under any deference regime.

Accordingly, a system in which courts regularly issue deference-related dicta seems inadvisable. If the number of errors due to motivated reasoning would exceed the current number of deference mistakes, courts might actually produce *less accurate decisions* if they were forced to speculate about outcomes under standards not before them. (This is, of course, one of the reasons behind the case-or-controversy requirement and the general distaste for dicta.[344]) Accordingly, it is difficult to recommend even so limited an intervention as requiring that courts issue dicta when deciding cases under deferential standards. Some of the more limited measures that we described above—such as noting the deference standard in citations to a case—seem more likely to produce net gains.

Another approach would be to discourage courts from citing cases decided under a different deference regime. This might

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342 See generally David Klein and Neil Devins, *Dicta, Schmicta: Theory versus Practice in Lower Court Decision Making*, 54 Wm & Mary L Rev 2021 (2013) (cataloguing the impact of dicta and suggesting that widespread reliance on dicta can subvert sound judicial decisionmaking).

343 See note 327.

344 See *Kastigar v United States*, 406 US 441, 454–55 (1972) ("The broad language . . . relied upon by petitioners was unnecessary to the Court's decision [in a previous case], and cannot be considered binding authority.").

lead to some of the same problems discussed above, in that courts might be tempted to base their opinions on cases decided under other deference regimes without explicitly citing those cases. But we think there could be merit to such a soft intervention in some areas; for example, the Supreme Court could announce that habeas and § 1983 cases have little relevance outside those contexts.

Placing a greater burden on parties to prevent and correct deference mistakes might also be worthwhile. For example, rules of professional conduct requiring candor toward the tribunal[345] might be interpreted or amended to require litigants relying on a case decided under a less favorable deference regime to say so explicitly.

An even more limited but potentially more effective intervention would be to simply bring the issue to the attention of judges (and their clerks) in a more systematic fashion. If judges are aware of their potential to make deference mistakes, they will likely pay more attention to the deference regimes involved in the precedents they are citing and thereby become less likely to err in the first instance. If increased awareness alone is insufficient, one could imagine a set of informal procedural norms evolving to combat the problem. For instance, it might become standard practice, when citing a case, to note parenthetically the deference regime governing the legal question at issue.

To illustrate: "A condition of supervised release that bars possession of any pornographic materials is not overbroad. United States v Ristine, 335 F3d 692, 694–95 (8th Cir 2003) (plain error)."

Or: "A medical device patent is not obvious when the record contains no motivation to combine two similar prior art references, and when the new device was widely copied after it was introduced. *Kinetic Concepts, Inc v Smith & Nephew, Inc*, 688 F3d 1342, 1369 (Fed Cir 2012) (clear and convincing evidence)."

Forcing judges to specify the deference regime will make the issue much more salient and force judges to consider whether they are using a case to support a legal proposition that it cannot sustain, given the deference regime under which it was decided. This should also limit courts' opportunities for intentional, strategic deference mistakes by highlighting the operative standard. And it might help to prevent deference mistakes from

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[345] See, for example, Model Rules of Professional Conduct 3.3 (ABA 1983).

propagating by making clear when a court is relying substantially on deferential precedents. This norm could simply be an informal practice among judges (and a requirement for the bench memos that law clerks write to help judges decide cases), or it could be instantiated in local judicial rules or even *The Bluebook*.

Finally, it may simply be appropriate for courts, legislatures, litigants, and scholars to view particular doctrines with greater skepticism because of the possibility that those doctrines have evolved in a biased fashion due to deference mistakes. This is especially true for doctrines governed by bifurcated deference regimes. Our model in Part III makes clear that deference mistakes can occur under both unitary and bifurcated deference regimes. But we suspect that deference mistakes are much more common in bifurcated deference regimes, and our examples of errors are taken almost exclusively from those types of regimes. Thus, it is possible that the bifurcated deference regime governing patent validity has expanded the boundaries of patentability and made it easier to obtain a patent. And it is possible that deference mistakes in habeas and § 1983 cases have led courts to unwittingly contract the scope of federal procedural rights. Policymakers, litigants, and scholars who examine these doctrines should not necessarily treat them exclusively as the product of years of common-law wisdom, enshrining truths that may not be visible to the human eye.[346] Rather, in many cases, these doctrines may be the product of the most human of mistakes.

We admit that it must be difficult to believe that any error that could be eliminated so easily—just pay closer attention to precedent!—really presents a significant problem. Perhaps it does not; we have no way of proving definitively to the contrary. But given the theory that predicts deference mistakes, as well as the numerous examples we have found, we believe it would be naïve to ignore the issue. Accordingly, some type of intervention—even, or perhaps especially, a very mild one—may well be warranted.

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[346] We recognize that many participants in the legal system already view existing law with a jaundiced eye, but some parties are much more deferential to the law on the books and the reasoning that underlies it.

CONCLUSION

The proposition that courts should understand the deference regimes at issue in the precedents they cite might seem banal, and the instances in which courts fail to do so might seem like minor errors. Yet we have shown that such deference mistakes are commonplace in areas ranging from criminal procedure to patent law, and that they can have pernicious effects on doctrinal development. The cumulative effect of deference mistakes may be partly responsible for doctrinal shifts such as the inflation in the boundaries of patentability, the retrenchment in the law of criminal procedure rights, and the pro-employer shift in employment discrimination law.

We have argued that requiring courts to be more explicit about deference might reduce the number of formal legal errors but also (counterintuitively) might exacerbate the underlying problem due to judges' efforts to avoid cognitive dissonance. Unless judges become more comfortable admitting ambiguities, the best solution may be to increase awareness of the problem of deference mistakes among actors throughout the legal system, helping these actors to recognize deference mistakes when they occur.