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## Article

# New Evidence on Appeal

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### INTRODUCTION

Appellate review is limited, almost by definition, to consideration of the factual record as established in the trial court.<sup>1</sup> This limitation, along with deferential standards of review on findings of fact, respects trial processes for presenting, evaluating, and admitting evidence, protects the fairness of the system to the parties, and helps ensure accuracy through the advocacy of counsel and the evaluation of impartial judges and juries.<sup>2</sup> The limitation also focuses appellate courts on their area of expertise—the resolution of questions of law—while recognizing the superior experience of trial courts (or, in some cases, agencies) in resolving questions of fact. Consistent with this traditional understanding of appellate review, appellate courts typi-

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1. DANIEL J. MEADOR & JORDANA S. BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 2 (1994) (“In deciding cases, American appellate courts consider only those facts that were determined by the judge or jury in the trial court. They rarely receive additional evidence, relying instead on the ‘record’ made at trial.”); *id.* at 55 (“[A]n important characteristic of American appellate practice is the controlling force accorded to the record, the documents and formal written transcript from the trial proceedings. The general proposition, subject to qualifications discussed below, is that an appellate court considers only those facts that were established at trial and reviews only those questions that were properly raised and preserved in the trial court, as evidenced by the record.”); *see also* FED. R. APP. P. 10(a) (defining the record on appeal); *infra* Part I.A.

2. *See generally* MEADOR & BERNSTEIN, *supra* note 1, at 55–56 (discussing reasons for appellate courts not deciding issues not raised at trial); STANDARDS RELATING TO APPELLATE COURTS § 3.11 cmt., at 24–25 (1994) (explaining general principles for appellate court review); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3–5 (2011) (stating some problems with appellate judges looking outside the trial record).

cally reject efforts by parties to introduce on appeal “new evidence” that could have been, but was not, presented below.<sup>3</sup>

Despite this traditional understanding and plain-language rules that echo that understanding, there are nevertheless many occasions in which federal and state appellate courts *will* consider new evidence on appeal. Whether presented through petitions for discretionary review (alleging the importance of a particular case in a broader social context), amicus briefs (explaining the broad factual or technical background of a case), social-science-laden “Brandeis briefs,” or other mechanisms for supplementing the record, appellate courts often consider and rely upon this sort of new evidence.<sup>4</sup> Indeed, in a world where volumes of information are available at the click of a mouse or swipe of a screen, some kinds of new evidence can easily find their way into a decision through a court’s own research, rather than via introduction by a party.<sup>5</sup>

Much, though by no means all,<sup>6</sup> of this new evidence falls into the category of legislative facts. Discussed in more detail below,<sup>7</sup> these are, in essence, facts that are not directly related to the specific events in a particular case.<sup>8</sup> Commentators have noted that judicial consideration of this kind of information is part and parcel of the lawmaking responsibility (or, depending on one’s perspective, impermissible activism) of appellate

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3. See, e.g., *Berger v. Bd. of Cnty. Comm’rs*, 295 Fed. App’x 42, 46 (6th Cir. 2008) (“This court does not consider non-record materials.”); *Hahn v. Diaz-Barba*, 125 Cal. Rptr. 3d 242, 255–56 n.7 (Cal. Ct. App. 2011) (rejecting effort by counsel to supplement record with affidavits, presented for the first time on appeal, seeking to “authenticate the social network profile pages” of a party).

4. See *infra* Part I.B.

5. Consider, for instance, the articles collected in the Sept.–Oct. 2006 volume of *Judicature*, which discuss the relative merits of (primarily trial) courts conducting their own research into the validity of scientific information. See 90 JUDICATURE 58–67 (2006) (collecting several articles); see also Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 142–74 (2008) (discussing current law and ethical considerations of appellate courts introducing new evidence on appeal).

6. See *infra* Part II.B.1–3.

7. See *infra* Part II.B.4.

8. See 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.5, at 937–38 (5th ed. 2010) (“Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. . . . Legislative facts do not usually concern the immediate parties but are the general facts that help the tribunal decide questions of law and policy and discretion.”).

courts.<sup>9</sup> Even that commentary, however, focuses little on the origin of the underlying principle, or the source and exercise of an appellate court's authority to ignore that principle in order to consider new evidence—whether legislative fact, adjudicative fact, or otherwise.

The lack of commentary on the fundamental principles is echoed in the written rules governing appellate court processes. Although those rules may define the creation and assembly of the particular documents that are the “record on appeal,”<sup>10</sup> those rules simply presume the underlying principle—that appellate review is limited to that record, and, in particular, that any factual information considered by the appellate court must have been presented to the trial court. The principle is an unspoken understanding, and the exceptions to it are even less clearly defined. The lack of definition allows appellate courts near-plenary control over when and whether they will consider at least certain types of new evidence on appeal.

It is this largely unconstrained control over a procedural matter at the heart of the appellate process in which this Article is primarily interested.<sup>11</sup> Through an examination of when, where, and how appellate courts examine new evidence on ap-

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9. See Kenneth C. Davis, *Judicial, Legislative and Administrative Law-making: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1986); Robert E. Keeton, Lecture, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 21–25, 31–32 (1988); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 197–98 (2000); Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 GONZ. L. REV. 157, 194 (2005) (“The idea that a court has a legislative function apart from its error-correction function has led to the development of the notion that appellate courts may seek all kinds of information unrelated to the adjudication of the case at hand.”); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114–16 (1988).

10. See, e.g., FED. R. APP. P. 10(a) (defining the record on appeal to include particular material introduced in the trial court); CAL. APP. R. 8.120 (defining the “normal record on appeal” to simply be certain records from proceedings below).

11. The absence of positive law regarding the nature of record review places it in the company of many other fundamental principles that govern the day-to-day processing of cases throughout our legal system, but that merit little discussion in the case law and only passing consideration in developing the rules (if any) that reflect those principles. Like the doctrines governing what counts as binding precedent, standards of review, or the “inherent” or “supervisory” authority to modify those underlying principles, the doctrines that govern the record on review amount to common law rules of procedure. See Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453 (2010) (regarding rules of precedent).

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peal, this Article seeks to define the principles underlying appellate record review in our court structure, and to use those principles to elucidate how appellate courts and judges function within the broader legal system, as well as how that system interacts with those appellate courts.

To that end, Part I defines the general doctrine that limits appellate review to the evidence generated in the prior proceedings and examines the origin of, and some of the justifications for, that principle. Part II examines several exceptions to the general principle, and looks at how those exceptions intersect with principles of judicial notice and the consideration of legislative facts.

Finally, the Conclusion considers those exceptions collectively in the context of the purpose of appellate courts in our legal system. That broad examination recognizes and highlights the pitfalls associated with at least some uses of new evidence on appeal. By using such information without the prior checks provided by a trial court's advocacy process, appellate courts risk drawing erroneous factual conclusions, or drawing conclusions that, while correct at the time, do not disclose their factual conclusions in a manner that permits correction (should it be necessary) at a later date.<sup>12</sup> In addition, the unthinking use of such evidence may undermine confidence in the work of both appellate and trial courts, and may draw not entirely unjustified attention as a demonstration of appellate-court lawmaking that goes beyond the appropriate scope of decision-making for appellate courts.

Nevertheless, this Article concludes, appellate courts should consider explicitly embracing the use of new evidence on appeal in certain circumstances. A review of history and these exceptions demonstrates that both the traditional rule and the exceptions to it have developed in a rather haphazard and organic manner over time; as a result, there is little in the way of positive law (meaning statutes, rules, or other written mandates) that would prohibit the use of new evidence on appeal. While appropriate safeguards would need to be established in order to avoid unfairness, this kind of appellate codification of the exceptions would have the salutary effect of making consideration of this evidence more routine, rather than something to hide. By taking such an open approach, the courts will be able

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12. See, e.g., Gorod, *supra* note 2, at 33–38 (discussing the varying reliance and use of factual findings not included in the trial court record across different courts and cases).

to address the pitfalls noted above. Furthermore, by making the gathering and consideration of legislative facts more open, and pointing out that consideration of such evidence on appeal is not so unusual as an historical matter, courts may be able to avoid the worst accusations of judicial activism that are otherwise levied when courts go beyond the record in order to decide socially, economically, or technically complex appeals. By focusing on the legislative fact problem from a broader perspective—that of appellate procedure generally and the regular use of new evidence in a variety of contexts—the concerns identified by a variety of commentators in this area can be alleviated.

There is, in short, much to be gained by recognizing, rationalizing, and codifying the use of new evidence on appeal, and the final sections of this Article outline ways in which this useful goal can be accomplished.

## I. THE PRINCIPLES & PURPOSES OF RECORD REVIEW

### A. RECORD REVIEW OF TRIAL COURT DECISIONS

The general rule<sup>13</sup> regarding record review on appeal is a familiar one: In conducting their review of a judgment below, appellate courts review only the information that was presented in that tribunal.<sup>14</sup> “An appellate court can properly consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal.”<sup>15</sup> As one appellate judge characterized the record review principle, “I can’t think of anything more fundamental than that.”<sup>16</sup>

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13. Although appellate court rules define the scope of the record for purposes of a given appellate court’s review, my reference to the general record review “rule” is intended (unless specifically mentioned otherwise) to refer not to those rules, but to the general principle or doctrine that appellate court review should be limited to the trial court record. Throughout this Article, then, the terms record review “rule,” “doctrine” and “principle” are used interchangeably to refer to the same traditional principle.

14. Statements of the principle are legion. See, for example, those excerpted in the text. *See also* *Ford v. Potter*, 354 Fed. App’x 28, 31 (5th Cir. 2009) (“Generally, we will not enlarge the record on appeal with evidence not before the district court.”); *Neeb v. Lastrapes*, 64 So. 3d 278, 283 (La. Ct. App. 2011) (“An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence.”).

15. *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 559–60 (8th Cir. 2008) (quoting *Huelsman v. Civic Ctr. Corp.*, 873 F.2d 1171, 1175 (8th Cir. 1989)); *see also* FED. R. APP. P. 10(a).

16. THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS 160 (1978) (quoting an interview with an appellate judge).

The principle is so firmly established that courts often suggest that there is something unseemly, even if not quite unethical, about an effort by counsel to introduce new evidence on appeal.

The entire system of determining disputes by trial before a court rests on the assumption that decisions must be based on the evidence submitted to (and held admissible by) the court and nothing else. In the normal situation, attempts to rely on nonrecord facts in appellate courts are “unprofessional conduct.”<sup>17</sup>

Thus, in rejecting an effort by appellate counsel to introduce new information on appeal, a California appellate court concluded that it would “disregard statements in the briefs that are based on such *improper* matter.”<sup>18</sup> The thread of moral disapproval is echoed in the reluctance of judges to mention their use of new evidence on appeal,<sup>19</sup> and it suggests the degree to which this fundamental principle of appellate practice governs the behavior of participants within it.<sup>20</sup>

The record review principle does not stand alone; it is, in a sense, a specialized form of the rule limiting appellate court consideration to arguments that were preserved below. Thus, not only is “determination of facts . . . the responsibility of the trial court, [with] the appellate court being responsible only for ascertaining that a factual conclusion is reasonably supported by the evidence” presented below, but “an appellate court should consider only those contentions that were initially made in the trial court. Observance of this rule obliges the parties to submit their cases in full in the trial court.”<sup>21</sup> As is discussed

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17. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 10.12, at 276 (2d ed. 1989) (noting also “[t]hat parties and courts, including appellate courts, are limited to reliance upon facts in the record is an accepted principle which, like most principles, is generally true but not invariably”).

18. *Truong v. Nguyen*, 67 Cal. Rptr. 3d 675, 688 (Cal Ct. App. 2007) (emphasis added).

19. See MARVELL, *supra* note 16, at 165 (“[W]ritten opinions are of no help, since judges would not be expected to announce that they were influenced by such facts.”); Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 406 (1942) (“Probably a systematic investigation of this subject would be unfruitful . . . for the general custom of judges has been to make no mention in formal opinions of extra-record sources of information.”).

20. *But see* MARVELL, *supra* note 16, at 165–66 (noting exceptions to the general principle (discussed *infra*) and suggesting that courts often had no particular problem with counsel referencing facts outside of the record).

21. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 2.

further below, the principles of record review and preservation arise out of the same historical provenance.<sup>22</sup>

Commentators describing the limitation on new evidence on appeal list a number of rationales for the principle. These justifications generally boil down to considerations of economy and fairness. Under the record review rule, primary responsibility for factual development is left to the trial court, with its accompanying rules of evidence and established processes for capturing testimony and documentary evidence; that allocation of responsibility allows an efficient division of labor between the factually oriented trial courts and law-oriented appellate courts.<sup>23</sup> Fairness, on the other hand, is enhanced by ensuring that information is initially submitted within the context of the daily adversarial give-and-take of trial court process, allowing parties who object to certain evidence to be able to challenge it via well-established mechanisms for presenting and assessing evidence.<sup>24</sup> Other principles aided by the record rule include accuracy (a principle related to fairness, since accuracy helps to ensure that all facts would be first tested, and relevance determined by, a trial court judge)<sup>25</sup> and finality (a principle related to economy, since finality limits the ability of parties to re-argue cases multiple times).<sup>26</sup>

The principle regarding record review is so well-ingrained in our system that there is little in the way of criticism. In most cases, challenges are only indirect—a commentator may note,

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22. There is another parallel between the principles of record review and preservation: like the former, there is very little that regulates the latter. “The United States Supreme Court has declined to announce any guidelines as to when appellate courts should consider arguments raised for the first time on appeal, rather than in the trial court.” DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES AND PERSONNEL* 201 (2d ed. 2006); see also *infra* text accompanying notes 105–06. For a recent discussion of the preservation rule and a fine review of exceptions to it, see Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1911455>.

23. See, e.g., MARVELL, *supra* note 16; STANDARDS RELATING TO APPELLATE COURTS, *supra* note 2.

24. See, e.g., MARVELL, *supra* note 16, at 161 (articulating fairness argument in favor of record review rule); See, *supra* note 9, at 184–85 (noting that the purpose of Canon Three of the Model Code of Judicial Ethics, which limits the ability of courts to consider ex parte communication, is “motivated by the concern for fairness and its appearance”); see also Gorod, *supra* note 2, at 3–5, 21–25 (discussing adversarial premise of American court system).

25. MEADOR & BERNSTEIN, *supra* note 1, at 56.

26. *Id.*

for instance, that the principle leads to a risk of injustice associated with a lack of information about what may have actually occurred in a given case—but that cost is generally seen as justified in light of the efficiency and fairness benefits associated with the rule. That said, there have been some concentrated criticisms of the record review rule, most notably the arguments, discussed in the following Section, made by Harvard Law Dean Roscoe Pound in the 1930s and 40s.

#### B. THE ORIGIN OF, AND CHALLENGES TO, THE RECORD REVIEW PRINCIPLE

Given the near-universal acceptance of the principle limiting appellate review to the factual record below, it is perhaps not surprising that the general principle is so rarely discussed or noted. While rules of court define the scope of the record on review, there is little analysis regarding the rationale for the rule, its underlying substance, or the wisdom of retaining it. The principle has been a part of American legal practice for so long that it seems a fundamental point.

There have been some exceptions. In his writings before World War II, Roscoe Pound criticized excessive attention to the record as “record worship.”<sup>27</sup> Pound’s concern was much broader than the specific form of the factual record on appeal.<sup>28</sup> Nevertheless, he believed that an excessive focus on the record—and errors on the face of the record—led courts to ignore the appropriate outcome “had it been possible to get the real case before the [reviewing] court.”<sup>29</sup> One treatment for that problem, he concluded, would be to allow appellate courts to consider new evidence on appeal.<sup>30</sup>

In suggesting an abandonment of the traditional approach, Pound found support in his historical conclusions that the record review doctrine was “an anachronism.”<sup>31</sup> The doctrine was, in essence, an historical accident, rather than a consciously de-

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27. See ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES passim* (1941) [hereinafter POUND, *APPELLATE PROCEDURE*]; ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 161 (1930) [hereinafter POUND, *CRIMINAL JUSTICE*] (“[Record worship is] an excessive regard for the formal record at the expense of the case, a strict scrutiny of that record for ‘errors of law’ at the expense of scrutiny of the case to insure the consonance of the result to the demands of substantive law.”).

28. POUND, *APPELLATE PROCEDURE*, *supra* note 27, at 35, 377–93.

29. *Id.* at 35.

30. *Id.* at 387–88.

31. *Id.* at 387.



veloped principle supported by a rational division of judicial responsibilities.<sup>32</sup>

As Pound noted, even the English courts of review would occasionally permit consideration of new evidence on appeal.<sup>33</sup> Any knee-jerk reaction against allowing such a consideration was, in his view, a reactionary and unnecessary reliance on dust-bound rules of procedure that developed out of an altogether different—and much stricter—legal system.<sup>34</sup>

Pound's understanding of the history of the record review rule is echoed in more recent writings. As Daniel Meador & Jordana Bernstein note, the principle finds its origin

in the writ of error in the English common-law courts. At common law there was no concept of an appeal like that in the modern-day United States. Instead, a party against whom a judgment had been rendered at *nisi prius* could seek a writ of error from the court at Westminster, assigning specified errors of law committed by the trial judge. The proceeding, in effect, made the trial judge a defendant. Under that procedure the judge could not have been guilty of error unless a matter had been presented to him and he had ruled on it.<sup>35</sup>

The term “appeal,” on the other hand, arose, at least in part, out of the courts of equity and emphasized the effort to reach the “right” decision, rather than adherence to the hide-bound principles of preservation and record review.<sup>36</sup> Over time, the principles of review inherent in the equity courts merged with the much stricter procedural obligations associated with the law courts' writ of error and gave rise to our modern appellate process along with the obligations regarding preservation and record review.<sup>37</sup>

It is hard to know how far Pound would press his reform proposals today. The appellate courts are, as has been pointed out repeatedly since at least the late 1960s and early 1970s,

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32. *Id.*; see also *id.* at 38–320 (discussing historical development of appellate processes); See, *supra* note 9, at 158–68 (sketching a history of record development in appellate procedure).

33. POUND, APPELLATE PROCEDURE, *supra* note 27, at 387–88.

34. *Id.* at 388.

35. MEADOR & BERNSTEIN, *supra* note 1, at 58.

36. *Id.* at 58–59; see also Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 915, 926–27 (1997). Bilder points out that the history of the “appeal” in American law is rooted in sources much broader than the equity courts considered by Pound. At the same time, however, she does not separately seek to identify a source for the now-dominant record review rule beyond that identified by Pound: the procedures associated with the common law writ of error.

37. MEADOR & BERNSTEIN, *supra* note 1, at 55–59.

faced with a “crisis of volume.”<sup>38</sup> It seems difficult to imagine allowing appellate courts to regularly consider new evidence—or to create mechanisms for doing so—when they have enough trouble processing cases under the existing and far stricter record review principle.

Nevertheless, several points can be drawn from Pound’s analysis. First, the historical examination presented by him and repeated by subsequent scholars demonstrates that the record review rule is rooted, along with its parallel preservation requirement, more in vestiges of the historical relationships between the English courts, rather than a conscious evaluation of the role of appellate courts within our legal system.

Second, the organic development of the principle limiting the scope of appellate review to the trial court record explains much about why the principle is so rarely discussed. It is part of our fundamental understanding of the relationship between appellate and trial courts. While that relationship has changed somewhat over the years, it is rare that it has done so with an exhaustive examination into this kind of fundamental relationship (particularly in light of the crowded dockets at all levels).

Third, in light of that historical development, there is very little in positive law that requires the rule to remain the same. Though unusual and creative, Pound’s modest proposal to permit appellate courts to consider new evidence was not only permissible, but entirely consistent with his effort to develop a more effective appellate process.<sup>39</sup> To the degree that alternatives to the record review rule exist, it is largely historical convention, rather than considered analysis, that prevents those alternatives from being adopted.

Finally, Pound’s prescription for change suggests that we should consider thinking about the new evidence exceptions to the general principle in a different light. Rather than consider the exceptions discussed in Part II as bizarre deviations from existing practice, they can instead be conceived of as small forays into a broader examination of how the record review rule works—and how it *should* work—in the broader appellate sys-

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38. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 n.9 (2011) (noting that the phrase “crisis of volume” regarding the appellate courts came into common usage in the early 1970s); *see also, e.g.*, Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554 (1969); Huang, *supra*, at 1112–13 & nn.7–12.

39. *See* POUND, APPELLATE PROCEDURE, *supra* note 27, at 377–93 (describing the full scope of his proposals).

tem. There are systemic alternatives to record review, in other words, that should make us think more critically of the way that record review works in our current system.

Meador and Bernstein note that there are some systems in which this kind of systemic alternative is employed. In the “German appellate courts known as *Oberlandesgerichte* and in the English Court of Appeal, Criminal Division,” the appellate courts focus their review on equitable outcomes, even if record review rules are cast aside in the process.<sup>40</sup>

Furthermore, they point out, some states permit this kind of review as well: “California statutes, for example, authorize the appellate court to receive new evidence and to make factual determinations different from those made by the trial court. That authority, however, is exercised sparingly.”<sup>41</sup> Noting docket volume concerns, they conclude that the limited use of this power is wise: “Although there may be some attraction to that role by appellate courts striving to serve the interests of justice in each case, it would raise serious questions as to the most appropriate allocation of judicial functions and resources.”<sup>42</sup>

### C. NEW EVIDENCE IN REVIEWING COURTS AND THE ADMINISTRATIVE PROCESS

Although the primary focus of this Article is on the role of new evidence in appellate review of trial court proceedings, the general rule also applies in judicial review of administrative agency decisions. As noted below, there are important differences between the record review rule in the regular judicial context and that in the administrative law context. Nevertheless, because some of the most significant observations regarding the use of extra-record evidence were initially offered as commentary on administrative proceedings,<sup>43</sup> and because the exceptions to the general rule are quite common in administrative law cases, the administrative law principle is worth noting

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40. MEADOR & BERNSTEIN, *supra* note 1, at 59.

41. *Id.*; see also CAL. CIV. PROC. CODE § 909 (West 2009) (“In all cases where trial by jury is not a matter of right . . . the reviewing court may make factual determinations contrary to or in addition to those made by the trial court . . . . The reviewing court may . . . take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal.”); *In re Zeth S.*, 73 P.3d 541, 547 (Cal. 2003) (noting “exceptional circumstances” necessary before appellate court would consider new evidence on appeal under § 909).

42. MEADOR & BERNSTEIN, *supra* note 1, at 59.

43. See Davis, *supra* note 19; see also Gorod, *supra* note 2, at 51–52.

here.

Under the federal Administrative Procedure Act (APA), as interpreted by the U.S. Supreme Court, as well as under most state-level APAs, judicial review of administrative action is limited to the factual record as developed by the agency.<sup>44</sup> “It is black letter law that, except in the rare case, review in federal court must be based on the record before the agency and, hence, a reviewing court may not go outside the administrative record.”<sup>45</sup> Whether reviewing agency action under the federal APA or under most state APAs, the general rule is that the “appellate” court (sometimes the trial court, if a petition is initially filed there, rather than the court of appeals) is limited to reviewing the agency decision in the context of the factual record considered and assembled by the agency.<sup>46</sup>

Although there are significant parallels between appellate review of agency decisions and the review of judicial decisions, those situations are not identical. First, the record review rule in the administrative context is, at least in part, an outgrowth of the oft-heated discussion regarding the proper role of administrative agencies. That discussion between politicians, administrators, attorneys, and academics, rather than an organic outgrowth of common law, led to the federal,<sup>47</sup> and later, the state, APAs.<sup>48</sup> To that degree, then, the administrative record review rule is the product of a different process than the development of the judicial rule.

Second, the record itself, particularly in informal rulemak-

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44. See MICHAEL ASIMOW & RONALD LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 578–80 (3d ed. 2009) (explaining that the federal rule is “firmly established,” while the rule in states is more mixed, with some states following the “open record” rule); PIERCE, *supra* note 8, § 11.6.

45. CHARLES ALAN WRIGHT & CHARLES H. KOCH, FEDERAL PRACTICE & PROCEDURE: JUDICIAL REVIEW § 8306, at 73 (2006).

46. See *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971).

47. For a history of the federal Administrative Procedure Act, see George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 N.W. U. L. REV. 1557 (1996); see also PIERCE, *supra* note 8, § 1.4.

48. As commentators have pointed out, the strictness of the administrative record requirement under at least the federal APA is not entirely clear from the plain language of the APA. That has not stopped courts from imposing a strict record review rule on reviewing courts, however; it may be that this is due in part to the influence of the traditional judicial record review rule.

ing and adjudication, may be much more poorly defined than is true for trial court records, which usually arise out of a much more formalized process.<sup>49</sup> Finally, the administrative law record review principle does not apply solely within the judiciary, but in cases where the decision under review comes from an executive agency. That inter-branch relationship means that the record review rule in the administrative context is at least partly motivated by considerations of separation of powers that are not present when review is occurring entirely within the judicial branch.<sup>50</sup>

There are both global and narrow exceptions to the general rule. While most states and federal agencies work under a “closed record” rule like that for appeals from trial courts, there are some states in which an “open record” principle applies.<sup>51</sup> In these states, “a court may consider new evidence regarding ‘any material fact’” not otherwise required to be generated on the record.<sup>52</sup> And even in the federal closed record system, courts have set forth specific rules regarding when evidence outside the scope of the agency-designated record can be considered.<sup>53</sup>

When compared to the management of exceptions to the judicial record review rule, the discussion and diversity of views regarding this principle in the administrative context is notable. This is due in part to both the statutory source of the

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49. See James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301, 1313–14 (2008) (discussing the range of possible ways in which the scope of the administrative record could be established).

50. Daniel J. Rohlf, *Avoiding the ‘Bare Record’: Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575, 588 (2009) (citing *Asarco, Inc. v. U.S. Env’tl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980)) (noting that courts “explain in terms of separation of powers their view of the APA as placing limitations on courts’ use of information outside the agency’s ‘whole record’”).

51. ASIMOW & LEVIN, *supra* note 44, at 579–80.

52. *Id.* (citing MODEL STATE ADMIN. PROCEDURE ACT § 5-114(a)(3) (1981); *Lake Sunapee Protective Ass’n v. N.H. Wetlands Bd.*, 574 A.2d 1368, 1373 (N.H. 1990)). Even closed record states have exceptions to the general rule. Consider, for instance, *Norden v. Oregon Water Resources Department*, 996 P.2d 958, 961–63 (Or. 2000) (concluding that under the Oregon APA, parties seeking review of an order in “other than a contested case” may present additional evidence to the trial court before that court determines whether the order was supported by substantial evidence).

53. See *Lands Council v. Powell, Reg’l Forester of Region One*, 395 F.3d 1019, 1030 (9th Cir. 2005) (new evidence permitted to determine if agency has considered all relevant factors, relied on documents not on record, or acted in bad faith, or to explain difficult technical matters).

administrative rule and the history of discussions regarding the appropriate nature of administrative processes. It is in the open nature of the discussion regarding the administrative rule that the contrast is most dramatic. The scope of the exceptions to the rule is, if anything, broader in the appellate context than in the administrative one. It is to those exceptions that we now turn.

## II. THE EXCEPTIONS: CONSIDERING NEW EVIDENCE ON APPEAL

The general rule discussed in Part I is familiar territory to those who have even a basic familiarity with appellate courts and the appellate process. There are, however, many situations in which appellate courts stray from black letter procedure and permit (or even invite) consideration of new evidence on appeal. While the most significant categories are discussed below, there are certainly more examples than those mentioned specifically in the text and footnotes. After all, “the general custom of judges has been to make no mention in formal opinions of extra-record sources of information.”<sup>54</sup> In considering these exceptions to the record review rule, then, “[w]ritten opinions are of no help, since judges would not be expected to announce that they were influenced by” new evidence on appeal.<sup>55</sup> It is nevertheless possible to broadly characterize the mechanisms that appellate courts have used to blaze their own trail through the traditional principle.

### A. WHAT IS “NEW EVIDENCE” ON APPEAL?

What is “new evidence” for purposes of this Article? The basic definitions provide a starting point. First, evidence is “[s]omething (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact.”<sup>56</sup> In turn, a fact is “[s]omething that actually exists; an aspect of reality.”<sup>57</sup> For purposes of this piece, new evidence is

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54. Davis, *supra* note 19.

55. MARVELL, *supra* note 16, at 165; *see also* Gorod, *supra* note 2, at 50–53 (noting “existential crisis” associated with conceding that appellate courts make law, and that they consider new legislative facts in doing so).

56. BLACK’S LAW DICTIONARY 635 (9th ed. 2009).

57. *Id.* at 669. While a rich jurisprudential and philosophical literature delves into the question of whether even adjudicative facts presented at trial have any hope of revealing “reality,” *see generally, e.g.*, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985), this Article focuses on the problem of evidence as

information regarding “an aspect of reality” that was not presented to the trial court, but that is presented to the appellate court.

So defined, there are some categories of new evidence that are intentionally excluded from the discussion below. The focus of this Article is on evidence that *could have been* but was not submitted to the trial court. This focus therefore excludes information regarding facts that may have changed in the period between the trial court’s judgment and the appellate court’s consideration; for instance, allegations that a case is moot on appeal will often require an appellate court to consider what is technically new evidence. Because the trial court could never have considered that information, however, such evidence presents a different problem than is true for information that could have been, but was not presented to the trial court.<sup>58</sup> While there is some new evidence that is truly new—in the sense that it could not have been presented to the trial court because it was unavailable for legitimate reasons<sup>59</sup>—the problem of changed evidence is not the focus of this Article.<sup>60</sup>

Also excluded from consideration below is new evidence as it is introduced into the record through Federal Rule of Civil Procedure 60(b)(2) and state-level equivalents.<sup>61</sup> When a party

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managed by attorneys, courts, and parties.

58. See, e.g., *Clark v. K-Mart Corp.*, 979 F.2d 965, 967 (3d Cir. 1992) (en banc) (despite normal rule that the appellate court is “limited in our review to those facts developed in the district court . . . because mootness is a jurisdictional issue, we may receive facts relevant to that issue; otherwise there would be no way to find out if an appeal has become moot”); see also *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n.11 (10th Cir. 2010) (rejecting party’s effort to supplement the record in order to challenge a finding of mootness because their argument (and evidence) was available to them, but not made, at the trial court level). *But see Brody v. Spang*, 957 F.2d 1108, 1114 (3d Cir. 1992) (supplementing record with information disproving mootness where parties stipulated to the truth of the matter).

59. See generally Stuart M. Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 272 (1999) (discussing “the various choices available to appellate courts faced with potentially outdated factual findings from a trial court,” including problems of mootness as well as changed facts in cases involving injunctions).

60. Because mootness raises jurisdictional issues, allowing new evidence to be considered regarding mootness might be seen as a subset of those cases that permit appellate courts to consider new evidence regarding their jurisdiction over the case. That broader point is discussed further *infra*.

61. See FED. R. CIV. P. 60(b) (discussing circumstances in which a judgment may be vacated in order to address “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial”); OR. R. CIV. P. 71B(1)(b) (same). This type of evidence overlaps, but is

seeks relief from judgment in light of new evidence, the resulting trial court ruling is generally reviewed on appeal for abuse of discretion on whether the relief was properly granted (or not). This is not new evidence on appeal; rather, it is evidence that is now in the trial court's record. The focus of this Article is the situation where an appellate court considers and relies upon new evidence in order to make its own determinations regarding a question presented on appeal—a situation that is largely unmediated by the rules of appellate procedure.

Finally, new evidence for purposes of this Article does not include evidence that was considered and relied upon by the trial court, but was inadvertently left out of the formal record below (because, for instance, the parties failed to either have the evidence admitted or at least proffer the information). While there are some exceptions (as noted *infra*), the general understanding is that rules permitting supplementation of the record on appeal are intended to “allow[] amendment of the record on appeal only to correct inadvertent omissions, not to introduce new evidence.”<sup>62</sup> Such evidence is not, at least in the sense of this Article, truly new because it was reviewed in the trial court.

If a party does not seek supplementation of the record, but the trial court decision nevertheless reveals information about facts considered but not formally part of the record, an appellate court may choose to review the information revealed by the trial court rulings without sidestepping the record review rule. In *Kimball Glassco Residential Center, Inc. v. Shanks*,<sup>63</sup> for instance, the Mississippi Supreme Court struck from the excerpts of record on appeal copies of correspondence that were not made part of the official record in the case.<sup>64</sup> The Mississippi Supreme Court agreed, based on discussion in the trial court order, that the trial court *had* considered the correspondence, but the parties did not seek to supplement the record and so the copies of the correspondence were struck. Notably, however, the court still considered the correspondence to the degree that its content was revealed in the trial court order.<sup>65</sup>

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not coextensive with, “changed” evidence on appeal. For instance, changed facts that cause an appeal to become moot are generally not addressed via Rule 60(b).

62. *In re Application of Adan*, 437 F.3d 381, 388 n.3 (3d Cir. 2006); *see also* FED. R. APP. P. 10(e)(2).

63. 64 So. 3d 941 (Miss. 2011).

64. *Id.* at 945 n.3.

65. *Id.* This “back door” mechanism allowing review of information that



In the end, when an appellate court considers information relied upon by the trial court (whether that information was part of the formal trial court record or not),<sup>66</sup> the result is appellate court review of the same information presented to the trial court, and this Article does not count it as new evidence on appeal.

#### B. APPELLATE COURT CONSIDERATION OF NEW EVIDENCE ON APPEAL

The exceptions to the traditional rule barring record review can be characterized both by the type of new evidence being considered, and by the method through which courts access that evidence. The following look at appellate consideration of new evidence on appeal is primarily arranged by method, which permits something of a chronological evaluation of the circumstances in which this information may be considered.<sup>67</sup> Part II.B.4 deviates somewhat from this method-based list, focusing on the important distinction between adjudicative and legislative facts. Adjudicative facts are specific to the parties

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was presented to, but not made part of the formal record of, the trial court proceeding, seems to be a particularly good example of the unnecessarily stark “record worship” that Pound so vocally criticized. See POUND, CRIMINAL JUSTICE, *supra* note 27. Where all parties agree that the information was reviewed and relied upon by the trial court, even if the particular evidence was not formally submitted, it should be an easy case for supplementing the record on appeal. For that reason, *Kimball-Glassco* is by no means the last word on treatment of this kind of extra-record evidence. More typical is the outcome in *United States v. Barrow*, 118 F.3d 482, 487 (6th Cir. 1997), in which the court of appeals allowed the record on appeal to be supplemented with segments of depositions that “had been submitted to and considered by the [district] court” but not added to the formal record. *Id.* Similarly, in *Ross v. Kemp*, the Eleventh Circuit allowed deposition material to be admitted to the record under Rule 10(e) because (1) it had been considered at trial, and (2) both parties had a valid belief that, under procedural rules in place at the time, the court clerk would automatically file the depositions. 785 F.2d 1467, 1471 (11th Cir. 1986).

66. See FED. R. APP. P. 10(e).

67. By focusing on the procedural mechanisms by which new evidence is introduced to the appellate courts, I hope to articulate the full range of circumstances by which appellate courts accept (or generate) new evidence on appeal. I do not explicitly theorize the circumstances in which new evidence should or should not be considered, focusing instead on the counterintuitive fact that it *is*.

Although done in the context of new *arguments* on appeal, Joan Steinman has begun to articulate important theoretical grounds upon which this kind of “new” information is appropriately considered by appellate courts. See Steinman, *supra* note 22 (manuscript at 5, 32–38, 44–66). More remains to be done in extending these considerations into the context of new evidence on appeal. My thanks to Professor Steinman for her insights on this point.

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and circumstances connected with a particular case, while legislative facts involve conclusions about policy, technology, and economics that may have had no reason to be discussed or even anticipated at trial. As these examples demonstrate, appellate courts regularly permit, and occasionally even invite, consideration of new evidence on appeal.

### 1. Simple Agreement

One of the most common ways in which new information is conveyed to appellate courts is through the normal process of communication with the appellate court: through briefs and oral argument.<sup>68</sup> Although these are, of course, formal modes of communication, the process by which this information enters the record is quite informal; it amounts to the quiet willingness of parties and the court to consider specific facts that are helpful to the court's analysis in the case, even if they fall outside the scope of the formal lower court record.<sup>69</sup> Appellate courts take great advantage of this largely uncontrolled mechanism.<sup>70</sup> As Thomas B. Marvell's study of appellate processes showed, a significant majority of appellate briefs and arguments, apparently relying on these principles, include discussions about facts that are outside the scope of the record below.<sup>71</sup>

While this kind of sub silentio consideration of new evidence on appeal is common, it is rarely commented upon. As Marvell notes, "written opinions are of no help, since judges would not be expected to announce that they were influenced by such facts."<sup>72</sup> Typically, such evidence is simply accepted without comment.<sup>73</sup> In the end, "appellate judges have and use

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68. See MARVELL, *supra* note 16, at 70.

69. See *id.* at 162–67.

70. See *id.*

71. *Id.* at 164–65 (noting that "counsel and the court quite often violated" the record review rule since, out of the 112 appeals studied, "attorneys mentioned facts clearly outside the record in the great majority" of the appeals and the courts regularly asked for (and received) information that was outside the scope of the trial court record).

72. *Id.* at 165.

73. Judicial notice is not the answer. See FED. R. EVID. 201; discussion *infra* Part II.B.4. As Marvell notes, much of this "new evidence"—whether presented by the parties or considered sua sponte by the courts—is not an appropriate subject for judicial notice. See MARVELL, *supra* note 16, at 163 ("Facts used in . . . situations [where the court reads between the lines of the record] certainly do not fall within the allowable limits of judicial notice."); see also *id.* at 161 (noting that awareness of judicial notice does not mean that such restrictions are followed).

considerable discretion as to whether they will use or ignore supporting case facts not in the record and falling outside the judicial notice restrictions.<sup>74</sup>

Courts and commentators will occasionally suggest that stipulation by the parties can permit a court to consider evidence that was not before the trial court. Thus, “the appellate court has discretion to consider, in the interest of justice, a fact not in the record that is conveyed by counsel during oral argument and not disputed by opposing counsel.”<sup>75</sup> Furthermore, “a statement of fact asserted in one party’s brief and conceded as true in the opposing party’s brief may be considered as though it appears in the record.”<sup>76</sup> In essence, “if everyone agrees, and we want to consider it, we will.” On the other hand, there is plenty of case law supporting the traditional rule, under which appellate courts will refuse to consider supplemental evidence on appeal even when the parties are willing to stipulate to its accuracy and to its inclusion in the appellate record.<sup>77</sup> This perspective is entirely consistent with at least one of the rationales behind the traditional record review rule: that principles of economy justify requiring the trial court, not the court of appeals, to have the first shot at incorporating information into the outcome of the case.<sup>78</sup>

Few courts attempt to reconcile these strains of analysis.<sup>79</sup> Almost none offer any coherent discussion of the justification for allowing new evidence in this kind of situation, or for the contrary cases, declining to consider it.<sup>80</sup> The closest some courts come to offering specific justification for considering new

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74. MARVELL, *supra* note 16, at 162.

75. MEADOR & BERNSTEIN, *supra* note 1, at 55–56.

76. *In re Trust of Nitsche*, 46 S.W.3d 682, 684 (Mo. Ct. App. 2001) (citing *Robinson v. Empiregas, Inc. of Hartville*, 906 S.W.2d 829, 835 n.6 (Mo. Ct. App. 1995)).

77. *See, e.g.*, *Shahar v. Bowers*, 120 F.3d 211, 213 n.4, 214 (11th Cir. 1997) (refusing to permit the parties to supplement the record on appeal, even though the parties stipulated to the new evidence, and rejecting the application of judicial notice to the stipulated facts); *S&E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982) (holding that the district court may not supplement the record with stipulated information that was not submitted and considered at trial); *Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F.2d 920, 922 (9th Cir. 1958) (“Matters which were not before the trial court will be stricken on motion, even if they have been included in the record on appeal by stipulation.”).

78. *See United States v. Barrow*, 118 F.3d 482, 487 (6th Cir. 1997).

79. *See* MARVELL, *supra* note 16, at 162 (documenting the uncertainty in this area of law).

80. *See id.*

evidence in this kind of situation is their reliance, discussed in the next Section, on rules regarding supplementation of the record and, more importantly, the inherent power of appellate courts.<sup>81</sup>

## 2. Supplementing the Record and the Inherent Powers of the Appellate Court

Federal Rule of Appellate Procedure 10(e), as well as similar state law rules governing the supplementation of the record, permit parties to correct “errors or omissions” in the trial court record.<sup>82</sup> The traditional application of this rule is to ensure that the appellate court considers the same information that the trial court considers, even if the formal record from the trial court fails to accurately reflect what the trial court knew about the case.<sup>83</sup> As noted in the prior Sections, if material was considered by the trial court, the appellate court may, under these rules, consider it as part of a “corrected” appellate record.<sup>84</sup> Consistent with the traditional record review rule, however, the standard interpretation of the rules holds that fairness and finality principles prevent parties from supplementing the record with material that was neither filed with the trial court nor brought to that court’s attention.<sup>85</sup>

As one practitioner noted, however, “[i]n addition to *correction* of the record, the court of appeals has the authority to permit *supplementation* of the record.”<sup>86</sup> This authority “either is implicit in Rule 10(e) . . . or is part of the court’s inherent equitable powers.”<sup>87</sup>

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

82. See *S&E Shipping Corp.*, 678 F.2d at 641.

83. See *MARVELL*, *supra* note 16.

84. See *supra* note 62 and accompanying text.

85. See *Henn v. Nat’l Geographic Soc’y*, 819 F.2d 824, 831 (7th Cir. 1987); *S&E Shipping Corp.*, 678 F.2d at 641 (“The purpose of . . . [Rule 10(e)] is to allow the district court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals.”); *United States ex rel. Kellogg v. McBee*, 452 F.2d 134, 137 (7th Cir. 1971).

86. Steven Richman, *Record on Appeal and the Joint Appendix*, in *A PRACTITIONER’S GUIDE TO APPELLATE ADVOCACY* 169, 174 (Anne Marie Lofaso ed., 2010) (emphasis added).

87. *Id.*; see also 16A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION & RELATED MATTERS* § 3956.4 (4th ed. 2008) (“In special circumstances, a court of appeals may supplement the record to add material not presented to the district court, though this is rare enough that many of the decisions noting the court’s power to do so go on to say that the power will not be exercised under the circumstances of the case. Because Rule 10 does not in its terms provide for such supplementation, some courts

The U.S. Court of Appeals for the Eleventh Circuit has a particularly rich line of cases to this effect. Consider, for instance, the court's management of new evidence on appeal in *Schwartz v. Million Air, Inc.*,<sup>88</sup> a tort action involving an airplane crash in Ecuador. Some of the plaintiffs were on the ground at the time of the crash and suffered serious injuries.<sup>89</sup> It was later discovered, however, that some of the many plaintiffs had falsified their medical records and that they had, in fact, not been injured in the crash.<sup>90</sup> The defendant moved to dismiss the claims and to award fees and costs, and the district court granted the motion.<sup>91</sup>

On appeal, the remaining victims and their attorneys "moved to supplement the record to include exhibits from the case files of their former clients. These exhibits include[d] photocopies of the altered medical records."<sup>92</sup> The court decided to permit the evidence:

We rarely supplement the record to include material that was not before the district court, but we have the equitable power to do so if it is in the interests of justice. We decide on a case-by-case basis whether an appellate record should be supplemented. Even when the added material will not conclusively resolve an issue on appeal, we may allow supplementation in the aid of making an informed decision.<sup>93</sup>

The court also permitted the parties to supplement the record with substitute versions of documents that had been submitted at trial.<sup>94</sup> The trial copies were not particularly clear, while the ones submitted in the motion to supplement were "clearer copies."<sup>95</sup>

Overall, the court concluded, the additional evidence—the new evidence on appeal—provided the court "with a better understanding of the information Appellants possessed at the time these cases were pending."<sup>96</sup> The court therefore granted the motion to supplement.<sup>97</sup>

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state that it constitutes an exercise of inherent power.").

88. 341 F.3d 1220, 1223–26 (11th Cir. 2003).

89. *Id.* at 1223.

90. *Id.* at 1223–24.

91. *Id.* at 1224.

92. *Id.* at 1225 n.4.

93. *Id.* (citing *CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

For those familiar with the appellate process and the record review rule, the entire exercise is rather shocking. The rule is that information not presented in the trial court is outside the record on appeal, regardless of whether new information might provide a better understanding.<sup>98</sup> Yet, the Eleventh Circuit was more than willing to consider the information.<sup>99</sup>

In order to justify its willingness to go beyond the trial court record, the Eleventh Circuit relies primarily on what it characterizes as its “inherent equitable authority” to supplement the record on appeal with material that was not before the district court.<sup>100</sup> In deciding whether to exercise that authority, the circuit considers three factors: (1) whether allowing the evidence would resolve the issue, (2) whether “remanding the case to the district court for consideration of the additional material would . . . be[] ‘contrary to both the interests of justice and the efficient use of judicial resources,’” and (3) whether the case is a habeas corpus proceeding.<sup>101</sup>

The Eleventh Circuit is not alone in its occasional willingness to supplement the record with new evidence. The Second Circuit also asserts expansive authority to supplement the record (although it does so by implementing a broader reading of 10(e) rather than by relying on an inherent authority).<sup>102</sup> The Eighth Circuit allowed new evidence into the record before considering a motion for a preliminary injunction in a trademark infringement suit based on “interests of justice” concerns.<sup>103</sup> According to the Eighth Circuit, because the district court only considered one of the trademarks when denying the motion when, in fact, three trademarks were at issue, it was necessary to consider all of them after finding that “misrepresentation[s]”

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98. See MARVELL, *supra* note 16, at 157–59.

99. See, e.g., *Schwartz*, 341 F.3d at 1225 n.4.

100. See *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986).

101. *Id.* at 1475 (quoting *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982)); see also *Ouachita Watch League v. Jacobs*, 463 F.3d, 1163, 1168, 1170–71 (11th Cir. 2006) (permitting new evidence on appeal regarding the issue of standing). However, these factors are guidelines, meaning they are not always used in each case. *Ross*, 785 F.2d at 1475.

102. *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980) (relying on a prior version of Rule 10(e)); see also *Ross*, 785 F.2d at 1476 n.16 (recognizing that the Second Circuit relied on Rule 10(e) to supplement the record).

103. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993).

of facts by the appellee had left the district court with an “incomplete picture of the [alleged] infringement.”<sup>104</sup>

As support for its exercise of this inherent authority to supplement, the Eleventh Circuit relies on the Supreme Court’s flexibility regarding the rules governing preservation.<sup>105</sup> In *Singleton v. Wulff*, the Supreme Court held:

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where “injustice might otherwise result.”<sup>106</sup>

As noted above, the rule regarding record review is tightly connected with the traditional rules of preservation.<sup>107</sup> It is not surprising that the Eleventh Circuit saw in the *Singleton* language some room suggesting that flexibility regarding new arguments might also be applied to new facts supporting those arguments. It is not clear, however, whether the Supreme Court would be as generous in its application of the statement to supplementation of the factual record. Unlike consideration of arguments, to which the language in *Singleton* is targeted, consideration of new evidence would appear to be a special case, particularly given the general understanding about the trial court’s specialization in the world of fact-finding, as well as principles of comity (which generally call for the trial court to be the first judicial entity to consider the effect of particular facts on the case).<sup>108</sup> That said, as discussed above, there really is very little positive law upon which the Supreme Court (or

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104. *Id.*; see also *More Light Invs. v. Morgan Stanley DW Inc.*, 415 Fed. App’x 1, 2 (9th Cir. 2011) (denying the motion to strike new evidence from excerpts of record since “this is the extraordinary case in which the documents are helpful to the court and are not prejudicial to either party”); *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199 (3rd Cir. 2009) (“[I]n exceptional circumstances a court of appeals may allow a party to supplement the record on appeal.”).

105. See *Ross*, 785 F.2d at 1475 n.15.

106. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

107. See discussion *supra* Part I.B.

108. Comity is a “practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” BLACK’S LAW DICTIONARY 303 (9th ed. 2009). For a discussion of the principles of comity, see 21 C.J.S. *Courts* § 307 (2012).

courts of appeal) might rely in order to give guidance regarding the appropriate consideration of new evidence on appeal.<sup>109</sup>

At least some state appellate courts similarly rely on inherent powers in allowing themselves to consider new evidence on appeal. The Minnesota Supreme Court, for instance, held that “[a]lthough an appellate court is ordinarily limited to a consideration of matters contained in the record before it, we think it has inherent power to look beyond the record where the orderly administration of justice commends it.”<sup>110</sup>

What lesson can we take from the willingness of these courts to exercise largely unconstrained authority to consider non-record evidence? Although the Conclusion returns to this issue, the range of cases allowing new evidence on appeal should suggest that, at least in some situations, the record review rule is not as monolithic as the traditional view suggests. These cases strongly suggest that there is room for flexibility at the appellate level, as long as considering new evidence on appeal serves the broader goals of ensuring the rapid (but nevertheless fair) resolution of the appeal or addressing impermissible strategic behavior by parties in the courts below.

### 3. Consideration of Jurisdictional Facts

The next significant means by which new evidence on appeal may be used is in an appellate court’s effort to resolve questions about jurisdiction. Almost without exception, appellate courts are willing to consider new evidence regarding jurisdictional matters, even if (and especially if) the jurisdictional concerns were not raised in the courts below.<sup>111</sup> Although nothing would prevent appellate courts from remanding a case to the trial court in order to resolve a particularly complex factual dispute relating to jurisdiction,<sup>112</sup> it is quite common for courts to consider new evidence at the appellate level—whether provided by attorneys or independently researched by the court itself.

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109. See *supra* note 11 and accompanying text.

110. *Crystal Beach Bay Ass’n v. Koochiching Cnty.*, 243 N.W.2d 40, 43 (Minn. 1976) (citing *Baker v. Aetna Cas. & Sur. Co.*, 193 S.W.2d 363, 366 (Mo. Ct. App. 1946)).

111. See *infra* notes 115–20 and accompanying text.

112. See, e.g., *Aloe Vera of Am., Inc. v. United States*, 580 F.3d 867, 873 (9th Cir. 2009) (remanding for factual determinations regarding subject matter jurisdiction); *United States v. Ceja-Prado*, 333 F.3d 1046, 1051–52 (9th Cir. 2003) (same); *E.R. Squibb & Sons v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 938–39 (2d Cir. 1998) (same).



For example, in *Belleville Catering Co. v. Champaign Market Place, L.L.C.*,<sup>113</sup> the Seventh Circuit (which is well-known for being particularly attentive to issues of subject-matter jurisdiction)<sup>114</sup> stated that while “exploring” the question of diversity jurisdiction before oral argument, it discovered that one of the corporate entities in the case was likely non-diverse vis-à-vis the defendants.<sup>115</sup> Rather than remand for further findings, the court ordered the parties to provide supplemental briefing on the subject of diversity jurisdiction and ultimately concluded that such jurisdiction was lacking.<sup>116</sup> Although the decision in *Belleville* does not reference any authority permitting the court to consider this new evidence on appeal, the circuit has, in other cases, referenced 28 U.S.C. § 1653 and interpreted it as allowing, for purposes of considering whether diversity jurisdiction exists, submission of affidavits supplying non-record information regarding citizenship.<sup>117</sup> Similarly, the Fifth Circuit has noted, in the context of determining whether an appeal was filed in a timely manner, that “this court has the discretionary power to order supplementation of the record on appeal, and may do so ‘of its own initiative.’”<sup>118</sup>

Most, though not all, state courts apply similar principles. By statute, Texas provides that “[e]ach court of appeals may, on affidavit or otherwise, as the court may determine, ascertain

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113. 350 F.3d 691 (7th Cir. 2003).

114. See, e.g., 7TH CIR. R. 28(a) (providing extensive direction to parties regarding the content of the jurisdictional statement required by parties under Fed. R. App. P. 28(a)(4)). In particular, Judge Frank H. Easterbrook of the Seventh Circuit (who is the author of the opinion in *Belleville*) is “regarded as a stickler for adhering closely to jurisdictional limitations on the power of courts.” M. Todd Henderson, *Justifying Jones*, 77 U. CHI. L. REV. 1027, 1027 (2010).

115. *Belleville*, 350 F.3d at 692.

116. The court’s dissatisfaction with the work of counsel on the jurisdictional question was represented by its conclusion that

[t]he best way for counsel to make the litigants whole is to perform, without additional fees, any further services that are necessary to bring this suit to a conclusion in state court, or via settlement. That way the clients will pay just once for the litigation. This is intended not as a sanction, but simply to ensure that clients need not pay for lawyers’ time that has been wasted for reasons beyond the clients’ control.

*Id.* at 694.

117. See 28 U.S.C. § 1653 (2006); *Stockman v. LaCroix*, 790 F.2d 584, 587 (7th Cir. 1986).

118. *In re GHR Energy Corp.*, 791 F.2d 1200, 1202 (5th Cir. 1986) (citing *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (5th Cir. 1982)).

the matters of fact that are necessary to the proper exercise of its jurisdiction.”<sup>119</sup> On the other hand, the Idaho Supreme Court insists that when sitting “in an appellate capacity . . . we are bound to consider only the record and cannot find facts during our inquiry into whether we have jurisdiction to review [the administrative decision below].”<sup>120</sup> Given its adherence to the record review rule, in the face of a significant jurisdictional question, the court will remand the case for further consideration.<sup>121</sup> Idaho is somewhat unusual; as long as the facts at issue are not complex, most courts view their jurisdictional limits as sufficient justification for considering new evidence on appeal.<sup>122</sup>

As a general matter, courts are quite willing to consider new evidence on appeal when evaluating questions of jurisdiction.<sup>123</sup> In such cases, this willingness to deviate from the record review rule is rooted in an apparent belief that, in circumstances presenting relatively straightforward jurisdictional questions, any benefits associated with a strict adherence to the rule would be outweighed by the cost of remanding the case for further proceedings.<sup>124</sup> Once again, as with the exercise of inherent power noted in the prior Section, the record review rule in these cases is brushed aside by other, apparently more practical, considerations.

#### 4. A Definitional Interlude: Legislative Facts, Judicial Notice, and the Record Review Principle

The facts considered on appeal in the prior examples are generally (although not exclusively) adjudicative. The next four

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119. TEX. GOV'T CODE ANN. § 22.220(c) (West 2011); see *Bloom v. Bloom*, 935 S.W.2d 942, 943–45 (Tex. App. 1996) (considering affidavit provided on appeal alleging that wife had accepted substantial benefits under divorce decree, and seeking application of “acceptance of benefits” doctrine to bar appellate court jurisdiction).

120. *In re City of Shelley*, 255 P.3d 1175, 1180 (Idaho 2011).

121. *Cf. id.* (emphasizing the degree to which an appellate court is precluded from finding its own facts).

122. See *supra* notes 113–21 and accompanying text.

123. See *supra* notes 113–21 and accompanying text.

124. The court may be particularly concerned with the costs associated with establishing jurisdiction, as demonstrated by Judge Easterbrook’s lament in *Stockman* that

[w]e have now done what the parties and the district court should have done—established that there is complete diversity. The exercise has consumed the time of two teams of lawyers and three judges. It could have been done more quickly had it been done right in the first place.

*Stockman v. LaCroix*, 790 F.2d 584, 587 (7th Cir. 1986).

examples involve situations in which the courts, especially the U.S. Supreme Court and state courts of last resort, find themselves considering what is typically (though not always) new *legislative* evidence on appeal.<sup>125</sup> Before discussing those exceptions, however, the distinction between adjudicative and legislative facts, and the role that judicial notice rules play in judicial consideration of these facts, should be reviewed in more detail.

*a. Adjudicative vs. Legislative Facts*

The initial distinction between legislative and adjudicative fact was first made in Kenneth Culp Davis's seminal article on the use of evidence by administrative agencies.<sup>126</sup> In that article, Davis pointed out that

[w]hen an agency finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts.<sup>127</sup>

The term adjudicative fact has largely settled into common usage,<sup>128</sup> and refers simply to “the facts of the particular case.”<sup>129</sup> It is possible to divide adjudicative facts into two further categories: historical facts (which address “who did what, when and where, and whether with or without a defined state of mind”)<sup>130</sup> and “interpretive” or “evaluative” facts (which are addressed to question “whether what was done violated a legal standard for evaluating conduct.”)<sup>131</sup>

Legislative facts encompass information that is factual, in the sense that it is amenable to proof of some kind, but that is not directly related to the facts of a given case.<sup>132</sup> Legislative

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125. See Gorod, *supra* note 2, at 34–35, 46–48 (discussing examples in which the U.S. Supreme Court and intermediate federal appellate courts relied on the use of legislative facts).

126. Davis, *supra* note 19, at 402–10; see also See, *supra* note 9, at 195 (“Legislative facts are those relevant to the court’s thinking about what the law ought to be instead of what the facts of the case are.”).

127. Davis, *supra* note 19, at 402–03.

128. *Mass. Med. Soc’y v. Dukakis*, 637 F. Supp. 684, 689 (D. Mass. 1986).

129. FED. R. EVID. 201 advisory committee’s notes.

130. *Mass. Med. Soc’y*, 637 F. Supp. at 691.

131. *Id.*

132. See *id.*

facts encompass information that is “descriptive, and sometimes predictive, information about the larger world.”<sup>133</sup>

Commentators use terms other than “legislative fact” to describe this class of information. One of the few judicial opinions that struggled intensively with the distinctions between legislative and adjudicative facts instead chose the term “non-adjudicative facts” to refer to the full scope of factual material that did not directly bear on the parties in the case and their behavior.<sup>134</sup> In his study of appellate courts and counsel, Marvell used the term “social facts,” both because he was concerned that Davis’s definition had been used in an insufficiently rigorous manner, and because he believed that the surveys he was conducting would be clearer with the term “social facts.”<sup>135</sup> In Marvell’s lexicon, historical adjudicative facts became “case facts,” while interpretive adjudicative facts were “supporting case facts.”<sup>136</sup> Although at least some commentators use Marvell’s term,<sup>137</sup> this Article uses the term legislative facts because the bulk of the legal commentary on this issue does so as well.<sup>138</sup>

*b. Judicial Notice and Legislative Facts*

The distinction between legislative and adjudicative fact is important because, as Davis noted, the rules of evidence (when Davis wrote in 1942, they were merely *proposed* rules)<sup>139</sup> were primarily designed to address the use of adjudicative fact and do not easily carry over to consideration of legislative facts.<sup>140</sup> In particular, Federal Rule of Evidence 201, governing judicial notice, applies only to judicial notice of adjudicative facts.<sup>141</sup>

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133. Gorod, *supra* note 2, at 39.

134. *Mass. Med. Soc’y*, 637 F. Supp. at 689.

135. MARVELL, *supra* note 16, at 139 & 339–40 n.2.

136. *Id.* at 139. Marvell further distinguished between “facts about the dispute only” that were used for the purpose of lawmaking (“case facts used as social facts”), and facts about more than the dispute (“social facts”). *Id.*

137. *See, e.g.*, John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 72 (2008).

138. On the general difficulty of defining legislative fact, see 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5103.2 (2d ed. 2005).

139. *See* Davis, *supra* note 19, at 405.

140. *See id.*

141. FED. R. EVID. 201(a) (“This rule governs only judicial notice of adjudicative facts.”).

The rule is intentionally silent regarding judicial notice of legislative facts that bear on questions of law or policy.<sup>142</sup>

The decision to leave a wide range of facts outside of the scope of the judicial review rule recognizes that there are some facts that courts (or, for that matter, juries) must have in order to be able to do their job, but that cannot, as a practical matter, be deemed either beyond reasonable dispute or introduced through the adversarial process.<sup>143</sup> Courts engaged in the process of interpreting the law need to be able to consider “the factual ingredients of problems of what the law ought to be”<sup>144</sup> without being required to seek that information solely through the offerings of parties at trial, or in the hands of otherwise unquestionably accurate sources.<sup>145</sup> In addition, “every case involves the use of hundreds or thousands of non-evidence facts”<sup>146</sup> that could not reasonably be introduced into evidence, even if the parties were to try.<sup>147</sup>

In sum, legislative facts in the federal system are generally not subject to the judicial notice rule. Although one might think that this means that judicial notice of such information is impermissible, as it is simply outside the scope of the rules altogether, the assumption has been that legislative facts *can* be considered by trial courts without going through formal evidentiary processes, and without that information being indisputable as a practical matter.<sup>148</sup> The lack of guidance, in other words, is interpreted to be a free-for-all.<sup>149</sup> Thus, parties may offer legislative facts as evidence,<sup>150</sup> and trial courts are enti-

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142. FED. R. EVID. 201 advisory committee’s notes.

143. *See id.*

144. *See id.* (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 83 (Roscoe Pound et al. eds., 1964)).

145. *See id.*

146. *Id.* (citing Davis, *supra* note 144, at 73).

147. *See id.*

148. *Cf.* FED. R. EVID. 201(a) (outlining the scope of judicial notice).

149. Dissatisfied with this lack of guidance, some states modified their judicial notice statutes to cover both adjudicative and legislative fact. *See* WRIGHT & GRAHAM, *supra* note 138, at § 5103.2 n.9 (noting examples of Indiana, Alaska, and Montana). As discussed below, however, the extension of the rule to legislative fact is unlikely to have had a significant effect on judicial decision making. *See infra* notes 163–64 and accompanying text.

150. There are many significant recent examples in which the trial courts took extensive evidence regarding the legislative facts underlying the adoption of the legal principles at issue. In *Perry v. Schwarzenegger*, for instance, the parties offered, and the trial court made extensive factual findings regarding, a wide range of testimony amounting to legislative facts regarding the mar-

tled to consider that information, or even to do their own research in order to resolve their own legislative fact questions.<sup>151</sup>

Appellate courts must be able to consider legislative facts as well; after all, “legislative facts are particularly conducive to the appellate courts’ task of considering normative values when creating new law.”<sup>152</sup> As with trial courts, however, there is very little guidance regarding (a) the use of such information on appeal, (b) how, where, and when to find it,<sup>153</sup> and (c) the role that the record review principle plays in appellate consideration of such facts. A default approach to managing questions of legislative fact might involve simply remanding a case to the trial court for the development of legislative facts in appropriate cases.<sup>154</sup> As the remainder of Part II notes, however, this choice is a rare one;<sup>155</sup> far more common is a willingness by appellate courts to consider new evidence on legislative facts at every turn, generally with very little attention to the role that the new information has in the case, the quality of that information, or the effect that its consideration has on the appellate process generally.<sup>156</sup>

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riage of homosexual men and women, and the ban on such marriage imposed by California’s Proposition 8. *See* 704 F. Supp. 2d 921, 956–91 (N.D. Cal. 2010); *see also* *Mass. Med. Soc’y v. Dukakis*, 637 F. Supp. 684, 692 (D. Mass. 1986) (concluding that parties could present legislative facts, and the court could consider those facts or legislative facts generated through its own research).

151. *See Mass. Med. Soc’y*, 637 F. Supp. at 692; *infra* Part II.B.8.

152. *See* A.J. Stephani, *Therapeutic Jurisprudence in the Appellate Arena: Judicial Notice and the Potential of the Legislative Fact Remand*, 24 SEATTLE U. L. REV. 509, 510 (2000).

153. STERN, *supra* note 17, § 10.12, at 278 (2d ed. 1989) (“Judges and commentators have been aware that this does not provide courts with much guidance as to how and where to find reliable legislative factual information.”).

154. *See* *Davis*, *supra* note 19, at 403 & n.79 (citing *Borden’s Farm Products, Inc. v. Baldwin*, 293 U.S. 194 (1934) (remanding for development of legislative facts)). Some commentators have argued for a much more vigorous application of this approach. Stephani, *supra* note 152.

155. *See* *Davis*, *supra* note 9, at 9 (noting that legislative fact remand “has failed to take hold, perhaps because the procedure is especially awkward”).

156. An interesting question, beyond the scope of this Article, is what standard of review appellate courts should use in reviewing trial court (or, for that matter, congressional) findings regarding legislative facts. Because the scenario under consideration in this article presumes that there were no relevant findings in the trial court (because there was no evidence), we need not address the problem here. *Cf.* McGinnis & Mulaney, *supra* note 137, at 76–81 (discussing the standard of review used by the Supreme Court in examining congressional findings).

c. *Judicial Notice and New Evidence on Appeal*

In light of the above discussion, it should not be surprising that the judicial notice rule does little to justify the use of new evidence on appeal that is discussed in the first three examples regarding simple agreement, supplementing the record, and consideration of jurisdictional facts. First, in most of these examples, the facts at issue would not fit within the scope of the judicial notice rule because they remain specific to the parties and are not “generally known” or capable of being “accurately and readily determined” by reference to indisputably accurate sources.<sup>157</sup>

Second, the judicial notice rule says nothing about whether judicially noticed evidence can be considered by appellate courts for the first time on appeal.<sup>158</sup> While appellate courts certainly do take judicial notice of some information, it is not at all uncommon for them to nevertheless refuse to consider that information if it was not presented to the trial court in the first instance.<sup>159</sup> With a few limited exceptions, judicial notice principles do not provide a clear basis for appellate courts to rely upon in considering new evidence on appeal. As one practitioner noted, judicial notice

is not an opportunity to second-guess the trial court. The appellate court may take judicial notice of appropriate items as permitted under Federal Rule of Evidence 201, but will not do so if the item was previously available but counsel, for tactical reasons, chose not to put it before the trial court.<sup>160</sup>

The point is illustrated by the California Court of Appeals’ decision in *Hahn v. Diaz-Barba*.<sup>161</sup> Adhering to the preservation rule, the California Court of Appeals refused to take judicial notice of provisions of Mexican law (though such information would generally be subject to judicial notice), concluding that “[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally when reviewing the correctness of a trial court’s judgment, an appellate court will consider only matters which

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157. See FED. R. EVID. 201(b).

158. See *id.* 201.

159. As discussed *infra*, even if parties stipulate to particular facts, they are not free of the rule requiring that those facts be presented to the district court in the first instance. See *supra* note 74 and accompanying text.

160. Richman, *supra* note 86, at 175 (comparing *In re American Biomaterials Corp.*, 954 F.2d 919, 922 (3d Cir. 1992), with *Tamari v. Bache & Co. (Leb.) S.A.L.*, 838 F.2d 904, 907 (7th Cir. 1988)).

161. *Hahn v. Diaz-Barba*, 125 Cal. Rptr. 3d 242 (Cal. Ct. App. 2011).

were part of the record at the time the judgment was entered.”<sup>162</sup>

Judicial notice on appeal of new legislative facts faces similar problems. Even if the judicial notice rule were to be applied to legislative facts (and it is, in some cases),<sup>163</sup> it would generally bar consideration of these facts, since very few of them are indisputable.<sup>164</sup> Furthermore, the record review problem remains: even if judicial notice of new information were appropriate, record review and preservation principles would (as in *Hahn*) often interfere with the appellate court’s ability and willingness to consider that new evidence on appeal.

*d. Appellate Reliance on New Evidence of Legislative Facts*

There is, therefore, no specific ground upon which appellate courts can rely in considering new evidence regarding legislative facts. Nevertheless, it is indisputable that appellate courts *do* consider it.<sup>165</sup> “One may safely venture the guess that over the centuries the judges who have produced our vast body of common law have not limited their deliberations to facts of record and facts which are ‘obvious and notorious’ or ‘of indisputable accuracy,’ within the narrow boundaries of judicial notice.”<sup>166</sup> The U.S. Supreme Court’s “implicit or explicit determination of social facts has been essential to many well known holdings.”<sup>167</sup>

There are many examples of situations in which new evidence is considered by appellate courts in determining legislative facts. In his original article defining the nature of legislative facts, Davis discussed several examples from the U.S. Supreme Court, as well as from state supreme courts.<sup>168</sup> Thirty years later, in his lecture published in *Minnesota Law Review*,

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162. *Id.* at 256.

163. *See* FED. R. EVID. 201(a).

164. *See id.* 201 advisory committee’s note (“[Legislative f]acts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.”) (citing Davis, *supra* note 144, at 82); Davis, *supra* note 19, at 403 (noting the disputability of most legislative facts).

165. *Mass. Med. Soc’y v. Dukakis* 637 F. Supp. 684, 692 (D. Mass 1986) (noting that “an appellate court, in its decisionmaking, is not confined to the record of evidence presented to the trial court,” but rather, may consider “additional sources” of evidence, including “independent library research”).

166. Davis, *supra* note 19.

167. McGinnis & Mulaney, *supra* note 137, at 72.

168. Davis, *supra* note 19, at 403–06.



Davis identified yet more.<sup>169</sup> The “use of ‘legislative fact’ in constitutional litigation is so common that one could cite any of a number of Supreme Court decisions.”<sup>170</sup> In *Ballew v. Georgia*, for instance, the Court considered whether a five-person state criminal jury provided the necessary constitutional protection.<sup>171</sup> In conducting that review, Justice Blackmun’s plurality opinion examined “a quantity of scholarly work” regarding the effect of jury size on the quality of the decision; notably, much of that work had been generated in response to earlier Court decisions on jury size.<sup>172</sup> Almost without exception, the Court’s consideration of the results of these new studies amounted to reliance on new evidence on appeal.<sup>173</sup>

The Court is not unaware of the difficulties posed by the use of legislative facts. Justice Harry Blackmun, whose opinions regularly relied to a great degree on legislative facts as found by his own studies, once noted that the Court “face[s] institutional limitations on [its] ability to gather information about ‘legislative facts.’”<sup>174</sup> Chief Justice Warren Burger conceded that the truth of facts as to legislative or policy matters “cannot be tested by conventional judicial processes.”<sup>175</sup>

This tension between the regular use of legislative facts and the procedural limitations associated with considering them is echoed in the academic literature. Professor Davis, for instance, argued that “[m]uch of our law is based on wrong assumptions about legislative facts,” and complained that “[n]o one has planned the present system under which the procedure of appellate courts, designed for *adjudication* of questions of law, is used for a large portion of all the *lawmaking* that is

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169. Davis, *supra* note 9, at 9–10.

170. WRIGHT & GRAHAM, *supra* note 138.

171. 435 U.S. 223, 224 (1978) (plurality opinion).

172. *Id.* at 232–39. Justice Powell concurred in the judgment alone, believing that the studies did not prove the majority’s point—thus proving the point that most legislative facts are themselves subject to dispute. *See id.* at 246 (Powell, J., concurring).

173. *See, e.g., id.* at 224 (plurality opinion) (noting that the primary issue at trial was certainly guilt or innocence—petitioner was accused of distributing obscene materials—rather than an academic discussion regarding the effect of jury size on its deliberations).

174. *United States v. Leon*, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring).

175. *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Burger, C.J., dissenting) (arguing that legislative action is preferable when the dispute is rooted in factual claims that “cannot be tested” by judicial process).

done in the whole society. No one would plan such a system.”<sup>176</sup> By contrast, John McGinnis and Charles Mulaney were more enthusiastic about the role of courts in evaluating legislative facts; they even suggested that the courts are just as well-positioned as legislatures in evaluating the validity of legislative facts because courts, unlike legislatures, have experience as an unbiased adjudicator engaged in an effort to dispassionately evaluate the various factual claims that are made in most disputes regarding legislative fact.<sup>177</sup>

With this grounding in the underlying principles and problems associated with the judicial consideration of legislative fact, we are in a better position to consider the final four mechanisms by which appellate courts are introduced to new evidence on appeal.

##### 5. “Brandeis Briefs” and Legislative Facts on the Merits

In seeking a court’s approval for a new proposition of law, or in defending (or attacking) a legislative action as unconstitutional, parties will often need to rely upon references to social, political, economic, and technical facts.<sup>178</sup> Unless the proposition of law in question was a significant issue at trial, parties often find that the first real opportunity to present this evidence to the courts is in their appellate brief on the merits.

Prior to becoming a Supreme Court justice, Louis Brandeis was a respected, progressive attorney who was particularly well-known for writing just this kind of policy-oriented brief.<sup>179</sup> The prototypical “Brandeis brief” was the merits brief he drafted for the State in *Muller v. Oregon*.<sup>180</sup> In order to defend the validity of Oregon’s law limiting the work hours of women, Brandeis included in his brief on the merits an exhaustive discussion of the economic and social science literature, all intended to demonstrate that the State’s legislation was an “appropriate and legitimate” effort to protect the health and safety of female workers. The brief included well over 100 pages of discussion about industrial studies.<sup>181</sup> In ruling for Brandeis’s client, the Supreme Court reasoned that taking judicial notice of

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176. Davis, *supra* note 9, at 15, 7.

177. See McGinnis & Mulaney, *supra* note 137, at 73.

178. See Margolis, *supra* note 9, at 210–13.

179. See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 201–27 (2009).

180. 208 U.S. 412 (1908); see also UROFSKY, *supra* note 179, at 212–19 (describing development of the brief).

181. UROFSKY, *supra* note 179, at 212–19.

“expressions of opinions from other than judicial sources” could be an aid to their understanding of the case.<sup>182</sup> This was true even though the information cited by Brandeis was subject to dispute, and even though none of the information had been introduced at the trial level.<sup>183</sup>

Brandeis’s success in *Muller* guaranteed that his extra-record, social science-laden brief—the first Brandeis brief—would be modeled in a number of subsequent cases.<sup>184</sup> Almost by definition, those briefs rely heavily on the use of social science information that was probably not introduced in the trial court, and which would, if it had been presented in the trial court, likely have been disputed.<sup>185</sup> Nevertheless, the Brandeis brief is a widely accepted model for merits briefing in cases that present significant policy questions. Even Kenneth Davis, who was quite critical of the unconstrained use of new evidence on appeal by courts, argued that “Brandeis briefs should be encouraged; the Court now welcomes them, but not many are filed.”<sup>186</sup>

Despite the long history of new evidence in Brandeis briefs, appellate litigator Robert Stern has noted that the use of new evidence in appellate briefs is no guarantee that it will be considered, given the record review rule:

Just when in a particular litigation legislative facts can be so established, or whether the safer course would be to include them in a trial record, is a matter for the judgment of the litigating lawyer in the first instance. I suspect that the Brandeis brief technique is often employed by lawyers newly brought in on appeal, after it is too late to introduce the facts into the trial court record.<sup>187</sup>

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182. *Muller*, 208 U.S. at 419.

183. UROFSKY, *supra* note 179, at 214–16 (noting the research work that was conducted in order provide Brandeis with the necessary facts, as well as the general record review rule); *id.* at 221–22 (noting significant technical and scientific problems that have been identified in the original Brandeis brief); *see also* STERN, *supra* note 17, § 10.12, at 279 (“[F]acts not of record which one party might call to a court’s attention might not necessarily be indisputable on their face or by resort to sources whose accuracy cannot be reasonably questioned.”).

184. UROFSKY, *supra* note 179, at 219 (noting use of such a brief in *Brown v. Board of Education*, 347 U.S. 483, 494–95 & n.11 (1954)).

185. *Id.*; *see also* STERN, *supra* note 17, § 10.12, at 279.

186. Davis, *supra* note 9, at 15; *see also* Margolis, *supra* note 9, at 219 (arguing for the use of legislative fact in merits briefing).

187. STERN, *supra* note 17, § 10.12, at 279.

Stern identifies an important problem of timing. Presenting legislative facts at trial is both possible and preferred,<sup>188</sup> and parties who can anticipate the need for legislative facts in their litigation may well be able to offer evidence regarding them at trial.<sup>189</sup> Nevertheless, the focus of an appellate case is often quite different than the focus at trial, and if the need for legislative facts is not apparent at the trial level, no choice remains but to offer new evidence on appeal.

The primary concern associated with the use of the evidence presented in these briefs is the lack of vetting through the normal evidentiary process in the trial court and subsequent reliance, by both counsel and court, on erroneous conclusions or bad research.<sup>190</sup> The public nature of merits briefing, along with the back-and-forth of filing answering and reply briefs, can help alleviate these concerns. For that reason, courts relying on merits briefs may be on more solid factual ground than if they were researching legislative facts on their own.<sup>191</sup> In the end, however, there can be no guarantee that appellate consideration of new evidence will reach accurate conclusions. The best cure for error is for the court to set forth, in its opinion, those facts upon which it is relying, as well as the source(s) of those facts. If subsequent analysis reveals factual errors, such a transparent opinion should ensure that the effect of those errors on the decision will be apparent.

## 6. Amicus Briefs as a Source of New Evidence on Appeal

Although briefs filed by parties can be a source of new information, it is briefs filed by nonparties that have proved to be a particularly significant source of new evidence on appeal. The amicus brief has become an important part of appellate prac-

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188. See, e.g., Davis, *supra* note 9, at 11. Davis notes that [w]hen legislative facts are needed for a sound decision, a trial court can do better than an appellate court, because it is free to take evidence on questions of legislative facts. Some trial courts do so, with creditable results. Even so, I have to point out that the normal evidence-taking process may be a total misfit for legislative facts.

*Id.* (citing as an example *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 243 n.50 (5th Cir. 1976) (excluding relevant and important legislative facts as hearsay)).

189. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932–938 (N.D. Cal. 2010) (detailing the evidence introduced in the trial court concerning the legislative intent regarding California’s gay marriage initiative).

190. See Margolis, *supra* note 9, at 232.

191. See *infra* Part II.B.8 (discussing independent research by judges as a source of new evidence).

tice, particularly before the U.S. Supreme Court,<sup>192</sup> and as one recent article noted, “in many instances the Court has not confined its review to evidence introduced in the district court, instead relying on evidence submitted by amicus briefs at the Supreme Court level.”<sup>193</sup>

More than any other type of brief filed at an appellate court, those drafted by amici contain a significant portion of new evidence. Amici are newcomers to the case, and because they were typically not involved at the trial court level, they may feel particularly unconstrained by the record review rule.<sup>194</sup> In addition, because amici often have specialized knowledge and interests on the matters presented in a case, they are often a particularly rich source for new evidence on appeal.<sup>195</sup>

The resulting reliance on amicus briefs is entirely consistent with their historic purpose. “The role of the original [Roman] amicus was to provide a court with legal information that was beyond its notice or expertise.”<sup>196</sup> This historical responsibility is still a very important function:

Informing the Court is not limited to a restatement of record facts, but includes relating other circumstances that should be considered in resolving the controversy. Amici can supply nonrecord facts of which the court may take judicial notice. . . . This function, that of

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192. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PENN. L. REV. 743, 744 (2000) (noting that, in “recent years,” amicus briefs were filed in nearly eighty-five percent of the U.S. Supreme Court’s argued cases); *id.* at 751–57.

193. McGinnis & Mulaney, *supra* note 137, at 82.

194. See REAGAN WILLIAM SIMPSON & MARY VASALY, *THE AMICUS BRIEF: HOW TO WRITE IT AND USE IT EFFECTIVELY* 31 (ABA ed., 3d ed. 2010) (“The facts an amicus intends to present may not be contained in the record of the case, and may extend beyond the facts of the particular case at issue.”). As representatives of constituencies who will be affected not by the judgment, but by the precedential value of the court’s decision in the case, *amici* are particularly interested in communicating with the court on broad policy issues (which require the use of legislative facts). See SCOTT A. COMPARATO, *AMICI CURIAE AND STRATEGIC BEHAVIOR IN STATE SUPREME COURTS* 62–65, 105–110 (2003) (noting that amicus briefs may provide more and/or different information than is contained in litigant briefs).

195. See, e.g., PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT* 70–71 (2008) (describing a number of cases in which amici presented the Court with additional evidence that would not have been presented in the trial court); SIMPSON & VASALY, *supra* note 194, at 35 (noting role of “expert” amici).

196. REAGAN WILLIAM SIMPSON & MARY R. VASALY, *THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT* 1 (ABA ed., 2d ed. 2004).

supplementing the record to help persuade the Court, is still one of the amicus's most important role[s].<sup>197</sup>

It should come as no surprise, then, that the Supreme Court may rely heavily on amicus briefs as support for “factual contentions that were not introduced in the adversarial proceedings in the lower court.”<sup>198</sup> McGinnis and Mulaney point out, for instance, that in *Grutter v. Bollinger* (addressing the validity of the University of Michigan's diversity admissions program),<sup>199</sup> the Court “relied on factual assertions in the amicus briefs . . . in finding that diversity in education is a compelling state interest, although these claims had never been subject to cross examination or other procedural scrutiny.”<sup>200</sup>

Thus, while the information in amicus briefs often includes the same kind of legislative facts that one finds in Brandeis briefs,<sup>201</sup> the outsider status of amici may lead them to present

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197. John Howard, *Retaliation, Reinstatement, and Friends of the Court: Amicus Participation in Brock v. Roadway Express, Inc.*, 31 HOW. L.J. 241, 253–54, 255–56 (1988).

198. McGinnis & Mulaney, *supra* note 137, at 82. Amicus briefs are also valuable to the Court at the petition stage because they provide additional information about which interest groups believe a particular case is important, and why. See COLLINS, *supra* note 195, at 29 (noting that, according to one study, the presence of amici in support of a petition for certiorari was one of the three most important factors governing whether the Court would grant the petition); Lee Epstein & Jack Knight, *Mapping out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215, 221–22 (Cornell W. Clayton & Howard Gillman eds., 1999) (amicus briefs provide the court with information allowing the justices to make “precise calculations” regarding the nature of the political environment). The effect of such information is debatable; some commentators believe that amicus briefs are most significant because of the information they convey regarding interest group attention to a case, not because of “new evidence” or legal arguments. See Kearney & Merrill, *supra* note 192, at 782–86 (describing the “interest group” model of amicus influence on the Supreme Court). Notably, Kearney and Merrill's study of amicus brief influence at the U.S. Supreme Court concluded that the “legal model” of such influence—the one that presumes the importance of “new . . . background factual material” and “Brandeis Brief”-type information, is the model that is best supported by data regarding the impact of such briefs at the Court. *Id.* at 748, 778, 816.

199. 539 U.S. 306, 343 (2000).

200. McGinnis & Mulaney, *supra* note 137, at 82 (citing *Grutter*, 539 U.S. at 330–32). McGinnis and Mulaney also point out a similar reliance on amicus briefs in *United States v. Virginia*, 518 U.S. 515 (1996), specifically in the Court's conclusion that the state's justification for excluding women from the Virginia Military Institute was not sufficient. McGinnis & Mulaney, *supra* note 137, at 82 (citing *United States v. Virginia*, 518 U.S. at 585–86 (1996) (Scalia, J., dissenting)).

201. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 741 (9th ed. 2007).

a particularly wide range of new evidence on appeal, and the independence of the amici may well persuade a court to rely on that new evidence to a particularly substantial degree.<sup>202</sup>

#### 7. New Evidence and Petitions for Discretionary Review

The next mechanism for introducing new evidence on appeal is found almost exclusively in courts of last resort. In particular, those courts often ask parties seeking discretionary review to demonstrate that the issues presented in their petition are important in a broader legal or social context.<sup>203</sup> This example is particularly unique, in that it is one of the few areas in which appellate courts almost explicitly require parties to present the courts with information that is outside the scope of the trial record.<sup>204</sup>

Consider, for instance, Rule 10 of the U.S. Supreme Court, which calls for a party filing a petition for certiorari to demonstrate in the petition that the petition presents questions regarding an “important matter” (Rule 10(a)), an “important federal question” (Rule 10(a) and (b)), or an “important question of federal law” (Rule 10(c)).<sup>205</sup>

Parties seeking discretionary review in the state courts are generally called upon to make the same showing. In California, for instance, the Supreme Court may grant review in order to

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202. See SIMPSON & VASALY, *supra* note 196, at 10 (noting that from 1985–1995, “more than 35 percent of Supreme Court opinions in which amicus briefs were filed contained reference to at least one amicus brief.”); *id.* at 10–16 (collecting case references to amicus briefs).

203. See, e.g., MINN. R. APP. P. 117(2)(a), (d)(2) (including “importance” and “possible statewide impact” among criteria considered in evaluation of a petition for discretionary review); N.Y. CT. APP. R. PRAC. 500.22(b)(4) (requiring motions for permission to appeal to include statement regarding why issue is of “public importance”); OR. R. APP. P. 9.07(3) (noting that number of people affected, and consequence of the decision to the public, is a criterion considered in evaluating a petition for review); *cf.* *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 896 (D.C. Cir. 2006) (finding, on petition to allow discretionary interlocutory appeal, the “importance” requirement satisfied where “the privacy and competitive interests of the SBIC applicants . . . overcome the interest in finality”).

204. See See, *supra* note 9, at 176.

205. SUP. CT. R. 10; see also GRESSMAN ET AL., *supra* note 201, at 262–63 (noting “major significance” of “importance” to whether petition is granted, and how the “nature and number of persons affected” influences that determination); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 253 (1991) (noting that “certworthiness” of petition to U.S. Supreme Court depended, in part, on whether petition presented issues “important to the polity . . . of huge political and social importance . . . emanat[ing] from their impact on society”).

“settle an important question of law.”<sup>206</sup> Oregon’s Supreme Court is even more explicit in its invitation to parties to offer evidence beyond the scope of what parties might have offered in the trial court: not only are parties required to demonstrate why their petition presents a question that has “importance beyond the particular case,”<sup>207</sup> but parties are explicitly told that importance may turn, for instance, on “[w]hether the issue or a similar issue arises often,” “[w]hether many people are affected by the decision in the case,” and “[w]hether the consequence of the decision is important to the public, even if the issue may not arise often.”<sup>208</sup>

In order to adequately meet this sort of request, parties must generally look well beyond the scope of the trial court record. Demonstrating importance requires parties to place the questions for review into a broader legal, political, social, or economic context.<sup>209</sup> While some of the facts showing that context may well be part of the trial record, it would be rare for the record to have focused on importance to any substantial degree.

This is true for at least three reasons. First, trial attorneys have little reason to think that importance (as a factual matter) will ever have a bearing on their case, not least because they would hope to win at trial and avoid a need to appeal at all. Second, even if the parties presciently believed that their case might one day require a petition for discretionary review, most trial judges would (properly!) reject as irrelevant a party’s ef-

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206. CAL. APP. R. 8.500(b)(1); *see also id.* at R. 8.504(b)(2) (requiring petition for review to state reasons for review under 8.500(b)).

207. OR. R. APP. P. 9.05(4)(c).

208. *Id.* 9.07(2)–(3).

209. *Cf. Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 896–98 (D.C. Cir. 2006) (referring to the privacy and competitive interests of applicants as the basis for a finding of sufficient importance to merit interlocutory review). Amicus briefs (and their accompanying introduction of new evidence on appeal) can serve an important role in signaling the importance of a case to a court. Several commentators encourage parties seeking certiorari in the U.S. Supreme Court to solicit amicus support at the certiorari stage in order to improve the chance of a petition being granted. *See GRESSMAN ET AL.*, *supra* note 201, at 263; PERRY, *supra* note 205, at 135.

Admittedly, an important question of law might be important in an academic or legal sense (it might affect the way a large number of cases are processed, for instance) without necessarily being important as a political, economic, or social matter. A party might, therefore, be able to demonstrate importance without a clear need to resort to new information at the petition stage. In many other cases, however, a party will necessarily have to refer to new evidence on appeal if they hope to demonstrate the importance of their petition.



fort to offer evidence in order to demonstrate the future importance of certain issues—particularly issues that the trial judge (presumably) thought were decided correctly in the first instance. Finally, because issues meriting discretionary review are often not sufficiently defined until after a decision by the intermediate appellate court, even prescient parties and willing trial judges would generally often guess incorrectly if they attempted to develop evidence about the importance of a case several procedural steps before review by a court of last resort.

For all these reasons, then, the record will generally include very little information regarding the importance of the issue in a wider social context. In order to meet their obligations under the relevant court rules, the parties are therefore required to offer the court new evidence supporting the petition's claims of importance.<sup>210</sup> This is significant not merely because it affects the decision on whether to review a case, but because such information may carry over into a subsequent discussion on the merits.<sup>211</sup> This is particularly true when an appellate court is presented with a facial challenge to the validity of a given statute. Such facial challenges necessarily present questions regarding legislative meaning and the likely effect of a particular law or judicial decision—questions that implicate facts reaching well beyond the parties and events connected to a specific application of the law.<sup>212</sup>

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210. Although not as clear an example, a similar consideration is found in the collateral order doctrine, which treats certain interlocutory decisions as “final” for purposes of an appeal as of right under 28 U.S.C. § 1291. *See generally* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949) (announcing the doctrine); 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3911 (2d ed. 1992). Although an appeal from a collateral order is not discretionary, in the sense that the Court of Appeals cannot decline jurisdiction in a case where the relevant conditions are met, the court of appeals nevertheless remains responsible for determining whether those factors are met in the first instance. In making that assessment, at least some courts have concluded that a party must show the “importance” of their case, demonstrating that it is something more than a run-of-the-mill erroneous decision by the court below. *But see* 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3911.5 (Supp. 2011) (noting that the “importance” showing under the collateral order doctrine has something of a “checkered career”).

211. *See, e.g.*, Gorod, *supra* note 2, at 4–5 (recounting Supreme Court oral argument in which Chief Justice John Roberts referenced his independent internet research when posing questions to counsel).

212. For a discussion of statutory facial challenges involving scientific evidence, see Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 U. PA. J. CONST. L. 671, 672–73 (2009). “[R]esolutions can be especially complicated where statutory

## 8. Independent Research as a Source of New Evidence

Perhaps the most common mechanism for the discovery of new information on appeal is independent research into issues in the case conducted by judges and their staff. As one commentator noted (paraphrasing the findings in Marvell's study), the "judiciary's current method of absorbing scientific information on legislative facts is haphazard, unruly and unreliable. One study of appellate litigation reported that forty percent of the cited references to the scientific literature came via the court's independent research, unaided by the lawyers or the record made in the lower court."<sup>213</sup>

With the advent of the internet and the breadth of information available online, judges are not only much more able to access legal information, but it is much easier to access information that has relevance to a given case—whether that information is deemed adjudicative, legislative, or otherwise.<sup>214</sup> Given the pervasiveness of the internet, it would be surprising if

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challenges arise facially because the science before the courts can involve legislative facts beyond those concerning the immediate parties in the case." *Id.*

213. Maurice Rosenberg, *Improving the Courts' Ability to Absorb Scientific Information*, in SCIENCE AND TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS, AND JUDICIARY 480, 482 (William T. Golden ed., 1988) (citing MARVELL, *supra* note 16, at 192).

214. See generally Richard B. Cappalli, *Bringing Internet Information to Court: Of "Legislative Facts"*, 75 TEMP. L. REV. 99 (2002). While the primary issue for this Article is independent research by judges, the problem is, perhaps, even more significant when it comes to inexperienced jurors who are used to seeking out information on the internet. Much has been written on the risks presented by independent research by jurors into case information, and the scope of appropriate efforts to prevent it. See Daniel W. Bell, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 83 (2010) (asserting that incidents of unauthorized juror research "have dramatically increased since the advent of the Internet"); George L. Blum, *Prejudicial Effect of Juror Misconduct Arising from Internet Usage*, 48 A.L.R. 6TH 135, 141–44 (2009) (collecting cases); Laura W. Lee, *Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181, 186 (2010) (discussing jurors' problematic use of Twitter); Susan Macpherson & Beth Bonora, *The Wired Juror, Unplugged*, TRIAL, Nov. 2010, at 40 (noting the "new challenges" to the modern jury system as communication habits change in an increasingly electronic environment); Caren M. Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1581 (2011) (noting a growing trend of jurors "conducting unauthorized online research"). It is worth considering why the legal system's rules regarding independent research by jurors is so much stricter than for judges. The answers likely lie in (a) an implicit assessment of judicial, as opposed to juror, competence in evaluating the quality of legislative facts, and (b) concern that judges may be marginally less likely to seek out participation by the parties in the event that a factual dispute regarding the relevant information becomes apparent.

law clerks in appellate courts did *not* occasionally inform themselves about the basic information in a case by referring to Google Maps or Wikipedia.

Of course, a court is unlikely to stray into independent research of adjudicative facts. The Model Code of Judicial Conduct provides that judges “shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”<sup>215</sup> For this reason, judges are well aware of constraints on independent research into adjudicative facts. When it comes to legislative facts, however, neither the code, the rules of evidence, nor any other positive law places significant limits on the ability of the court to investigate and rely upon such evidence.<sup>216</sup>

Courts take advantage of this flexibility. In *Singh v. Ashcroft*, for instance, the Ninth Circuit reversed a Board of Immigration Appeals decision rejecting an application for asylum.<sup>217</sup> The applicant alleged that he feared retaliation by a former employer, a CIA-like entity within the Indian national government called the Research and Analysis Wing (RAW).<sup>218</sup> The BIA concluded that there was insufficient evidence presented of the RAW’s existence, but the Ninth Circuit reversed, stating that “[t]he RAW does exist”:<sup>219</sup>

The existence and operations of the RAW are readily known by the employment of an accessory tool as familiar in legal research today as Shephard’s Citations were half a century ago. A *simple Lexis search* reveals over 1,500 articles on the RAW from reputable international media sources including the BBC. . . . If this case had involved an agent’s claimed membership in an agency more well-known in the United States . . . [this] issue simply would not have arisen because the IJ or BIA would have unconsciously taken notice of the fact of those agencies’ existence. Judicial notice is appropriate in exactly this circumstance—to ensure that administrative or judicial ignorance is

215. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C) (2007). Neither the comments nor the rule define “facts in a matter.” *See id.* & cmts. 1–7.

216. *See* Thornburg, *supra* note 5, at 136 (“But they *may* independently ascertain and use information that meets the requirements for judicial notice, and they may investigate ‘legislative facts’—those that inform the court’s judgment when deciding questions of law or policy—to their hearts’ content, bound by no rules about sources, reliability, or notice to the parties.”); *cf.* George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 39 (“Whether an appellate court will take judicial notice of a fact on appeal which was not noted by the trial court, or called to that court’s attention, rests largely in the discretion of the appellate court.”).

217. *Singh v. Ashcroft*, 393 F.3d 903, 907 (9th Cir. 2004).

218. *Id.* at 904.

219. *Id.* at 905.

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not insulated from review through hyper-technical application of the general rule that the court can consider only evidence considered by the Board.<sup>220</sup>

This is not a new issue for the courts. Even before the internet was so pervasive, there was “no reason to suspect that justices, just like other Americans, do not obtain information about current events from television, the radio, and newspapers.”<sup>221</sup> Professor Davis reports that after his lecture published in *Minnesota Law Review*, he spoke with the Congressional Research Service and learned that “[a] Supreme Court law clerk sought CRS assistance in *Bowen v. American Hospital Association* . . . and the Court cited a CRS study in footnote 30, using the names of authors but not mentioning the CRS. The record shows no predecision chance for the losing party to respond to the study.”<sup>222</sup> And it should be no surprise that, after becoming a Supreme Court Justice, Louis Brandeis “continued his extensive factual studies and wrote many opinions saturated with facts brought to light through his own researches.”<sup>223</sup> Independent research has long been a source of new evidence on appeal; the internet just makes it that much more common.

While independent research is perhaps the most typical way for new evidence to make its way before the appellate courts, it is also the mechanism that causes the most concern.<sup>224</sup> When new evidence is considered as a result of the stipulation of parties (and a flexible appellate court),<sup>225</sup> or when it is introduced via Brandeis briefs, amicus briefs, or petitions for review, the nature of the new evidence is clear. If the parties disagree with a particular conclusion, they can challenge

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220. *Id.* at 906–07 (emphasis added); see also *Baptist Health v. BancorpSouth Ins. Servs., Inc.*, 270 F.R.D. 268, 276 n.5 (N.D. Miss. 2010) (relying on “simple Google and Yahoo! searches . . . [as well as] searches . . . performed on both Westlaw.com and Lexis.com” to reveal that information claimed as privileged was already in the public domain); *Muehlbauer v. Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at \*3 (N.D. Ill. Mar. 31, 2009) (finding facts, based on a “simple Google search,” contradicting plaintiff’s argument that public safety required release of defendants’ “confidential” documents because the information was already available online).

221. Epstein & Knight, *supra* note 198, at 220.

222. Davis, *supra* note 9, at 18.

223. Davis, *supra* note 19, at 403 (citing *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting)).

224. See Thornburg, *supra* note 5, at 132–33 (observing that the rise of the Internet has “turned a once-marginal concern into a dilemma that affects courts and litigants daily”).

225. See *supra* Part II.B.1.

its substance, move to strike the evidence, or seek remand for further development of the facts. When the court conducts and relies on its own research, however, the new evidence is often hidden (unless, as in *Belleville*, it solicits additional information from the parties).<sup>226</sup> If it is revealed in the final opinion, it becomes known only at the last possible moment in the appellate process, forcing parties to either accept the court's findings or request relief via rarely granted motions for reconsideration.<sup>227</sup> Absent great care by the appellate court, reliance on independent research risks error while undermining the confidence of the public and parties in the work of both appellate and trial courts.<sup>228</sup>

## CONCLUSION

### A. TOWARD AN OPEN AND RATIONAL CONSIDERATION OF NEW EVIDENCE ON APPEAL

Perhaps the most telling characteristic of the use of new evidence on appeal is the great unwillingness of courts to confront the conflict between their use of new evidence and the well-accepted principle of record review.<sup>229</sup> The record review rule helps to define the very nature of appellate courts and the appellate process, and while the courts are apparently willing to live with exceptions to the general rule, the exceptions often fall prey to internal inconsistencies and suffer from a lack of coherence.<sup>230</sup> The most common message that flows from the case law, then, is that appellate courts do not consider new evi-

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226. Cf. Peggy C. Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1541 (1987) (observing that current practice affords judges "a dangerous freedom").

227. See GRESSMAN ET AL., *supra* note 201, at 814–15 ("[T]he plain fact is that the Supreme Court seldom grants a rehearing of any kind . . ."); STERN, *supra* note 17, at 441 (noting that "[t]he vast majority" of petitions for rehearing "have no chance of success"); UHLRICH, KESSLER & ANGER, P.C. & SIDLEY & AUSTIN, FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 9.11 at 624–25 (2nd ed. 1999) (noting, *inter alia*, that in 1997, only 16 of 610 petitions for rehearing in the Ninth Circuit were granted).

228. See Gorod, *supra* note 2, at 68 (noting that the U.S. legal system's "adversarial myth" demands that "suitable procedures are in place to deal with all of the cases in the nation's court system, those that turn on adjudicative and legislative facts alike," but that current practice is not always sufficient).

229. See *supra* notes 17–20 and accompanying text.

230. See *supra* Part II.

dence on appeal.<sup>231</sup> As should be clear to the reader by now, that message is, in fact, incorrect. Until the courts are willing to concede the point, they are unlikely to be willing to conduct a comprehensive look at the role that new evidence plays on appeal. It is only through such a review that the courts can provide a reasoned explanation for what otherwise seems an irresolvable conflict between, on one hand, the principle of no new evidence on appeal, and the willingness, on the other, to consider such evidence whenever it aids the court in its consideration of the case. Such an inconsistent approach undermines confidence in the courts and exposes the appellate courts to criticism for acting incoherently.

This Article's review of the traditional record review principle and the many exceptions to it provides a starting point for the comprehensive review that has so far been lacking. There are several main points to draw from this review:

First, appellate courts *do* consider new evidence on appeal, and they do it regularly.<sup>232</sup> This is particularly true in the context of legislative facts, though it is also not at all rare even for adjudicative facts.

Second, the traditional rule limiting appellate review to information provided to the trial court is just that—a tradition.<sup>233</sup> While efficiency and fairness provide good justifications for adhering to the principle in most situations, no fundamental constitutional or statutory principles are undermined by variations from the traditional rule against the use of new evidence on appeal.<sup>234</sup>

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231. See *supra* notes 1–3 and accompanying text.

232. See *supra* Part II.

233. See *supra* Part I.B.

234. Joan Steinman's recent article discusses the degree to which the federal constitution may constrain federal appellate courts' authority to consider new issues on appeal under the federal constitution. Steinman, *supra* note 22 (manuscript at 20–24, 84–85). She notes that constitutional "appellate" jurisdiction is imbued with common law principles. *Id.* at 27. Even if the federal constitution imposed limits on the U.S. Supreme Court, however, there is no textual constraint on the state courts, and arguably less constraint on the intermediate federal appellate courts. Because the principle of record review rule is largely a constant across both federal and state courts, the source of the rule must substantially be systemic and historical, rather than text-based.

In certain circumstances, due process considerations may place limits on the ability of courts to consider new evidence in the absence of another party's ability to respond. This consideration is more likely to matter in the context of adjudicative facts; for legislative facts, parties are often lucky if they are even made aware of the use of legislative facts prior to the final decision, let alone given an opportunity to respond. *Cf.* Gorod, *supra* note 2, at 4–5 (noting lim-

Third, because there is flexibility in the traditional record review principle, exceptions to that rule are not ethically questionable or legally suspect.<sup>235</sup> Rather like the rule itself, the exceptions have arisen in order to address particular situations in which fundamental goals of appellate process are best met by allowing the appellate courts to consider new evidence on appeal, rather than insisting on vigorous enforcement of the general rule.

Fourth, because each exception arises out of a different procedural situation, the rationale justifying each exception should be different, although it should be clearly articulated in each case. In particular, the authority of the appellate court to consider new evidence should be most sweeping when the new evidence is being used to determine issues within the particular authority of the appellate court.<sup>236</sup>

The most obvious place for appellate courts to clarify that new evidence may be necessary is in their consideration of discretionary petitions for review. Because courts of last resort have exclusive authority to determine whether to grant petitions for certiorari (or petitions for review),<sup>237</sup> their power to consider new evidence that bears on whether to grant those petitions should be quite broad. In this area, the use of new evidence on appeal is both appropriate and consistent with the overall purposes of appellate review, and parties and the courts would benefit from explicitly noting, whether in rules or otherwise, that the appellate court anticipates the need to consider new evidence on appeal in evaluating these petitions. These statements should also establish processes to manage disputes regarding the validity of new evidence when it is introduced (whether by courts or parties) at a stage in the process that does not otherwise permit a response.

The appellate courts have significant, but not exclusive, authority over determinations of subject matter jurisdiction and the informative role of amicus briefs, followed closely by

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ited opportunity by party to respond at oral argument to new information presented by Chief Justice Roberts).

235. See *supra* Part II.

236. Cf. Steinman, *supra* note 22 (manuscript at 44) (observing that “the occasions on which appellate courts have been inclined to resolve issues that the district court did not decide correspond to the appellate courts’ competency and role, the efficiencies apparently to be gained, and the justifications for departing from the norm against deciding new issues”).

237. SUP. CT. R. 16 (explaining process of disposition of a petition for a writ of certiorari).

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consideration of legislative facts in the exercise of their law-making authority.<sup>238</sup> Appellate courts should be willing to invite the submission of new evidence in these areas, although they should tolerate less in the way of disputes between the parties before deciding to remand matters to the trial court or to altogether exclude the use of new evidence on appeal.

Least flexible of all the exceptions should be those that permit appellate courts to consider disputed—or even unsettled—questions of adjudicative fact. Those issues are best left to the trial courts and their expertise in fact-finding, although in rare cases the benefits of immediate appellate review may outweigh the value of leaving fact-finding to the trial courts.

This spectrum of appellate consideration of new evidence on appeal matches, to some degree, existing law. Any explicit acknowledgement of the use of new evidence on appeal, however, would benefit from an explicit association between appellate court authority and the exceptions to the traditional rule.

Fifth, the apparently inconsistent use of exceptions to the record review rule does not need to be inconsistent. A decision regarding whether to apply an exception should be explained not in terms of whether to apply the traditional rule or not, but rather as a determination about whether the fundamental goals of appellate review are better met by applying the exception or the default rule. If fundamental concerns about fairness are met—i.e., if parties have an opportunity to respond, if there is no showing of strategic behavior associated with the belated introduction of the new evidence, and if there is enough agreement on the substance of the new evidence (or a possibility of resolving it within the procedural constraints of the appellate process)—then the exception should be granted. Appellate courts must always be willing to recalibrate their use of exceptions so that they do not undermine the principles of efficiency and fairness that underlie the record review default rule. Nevertheless, by acknowledging both the default rule and the exception in the same discussion, courts will move toward a more candid and, with discussion, an ultimately more coherent application of both the record review default rule and the many exceptions to that rule.

Finally, the primary utility of this kind of comprehensive evaluation of new evidence on appeal comes from what Peggy Davis called the “simple acknowledgement” of the complex

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238. See *supra* Part II.B.



work conducted by appellate courts.<sup>239</sup> Although Davis's effort was focused on having appellate courts acknowledge their role in the process of lawmaking, her broader point still applies: appellate court recognition of the fundamental principles under which they function—even when those principles may vary from traditional understandings about how appellate courts should work—effectively forces courts to consider how to engage in discussions that help define and regularize the use of those principles.

By recognizing and accepting their long-standing use of new evidence on appeal, appellate courts will take a significant step toward a comprehensive understanding of how these exceptions to the traditional rule fit within the broader work of the appellate courts.

#### B. NEW EVIDENCE ON APPEAL AND THE PROBLEM OF LEGISLATIVE FACTS

One additional benefit may flow from a generalized effort to have appellate courts think about the problem of new evidence on appeal: it will distract attention from the particularly vexing problem posed by legislative facts, and may, as a result, help to accomplish the very goals that Peggy Davis and other commentators articulated in this area some twenty-five years ago.

When she wrote in 1987, Professor Davis noted that “[w]ith a few notable exceptions, courts and legislatures have failed or refused to regulate the process that has come to be known as judicial notice of legislative facts.”<sup>240</sup> Her article, as well as the contemporary pieces by Kenneth Davis, Robert Keeton, Ann Woolhandler, and others,<sup>241</sup> called for a level of attention to the

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239. Davis, *supra* note 226, at 1600–01 (discussing acknowledgment of the lawmaking function of the appellate courts). Davis argues that legislative factfinding should take place only with certain safeguards: (1) inviting all interested parties to participate in the identification and evaluation of relevant legislative facts, (2) acknowledging the legislative function of judges, and (3) being attentive to the line between adjudicative and legislative factfinding. *Id.* at 1598–1602; *see also* Gorod, *supra* note 2, at 71 (discussing the value of explicit acknowledgement of judicial use of legislative facts).

240. Davis, *supra* note 226, at 1540; *see also id.* at 1542 (the “legal enshrinement” of legislative facts “is casual and unselfconscious”).

241. *See* Davis, *supra* note 9, at 17 (proposing that Congress develop a research service for the Supreme Court in response to perceived inadequacies of current practice); Keeton, *supra* note 9, at 44–49 (offering suggestions for improving use of legislative facts by courts); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in*

use of legislative facts, but very little change resulted from their call. Federal Rule of Evidence 201 reads as it always has, and courts continue to consider new evidence regarding legislative facts on a regular basis.<sup>242</sup>

The work of those scholars may have been lost, in part, because an honest discussion about legislative facts, and particularly about those facts in the appellate process, requires appellate courts to acknowledge two indisputable points that they have difficulty acknowledging: that courts make law, *and* that appellate courts regularly consider information beyond the scope of the trial court record.<sup>243</sup>

By encouraging discussion on the latter point, and focusing attention on the appellate process, rather than the more controversial and difficult problem of legislative fact and judicial lawmaking, this Article may help “bring along” a coherent approach to appellate court consideration of legislative facts. Because most legislative facts are evaluated by appellate courts considering new evidence on appeal, attention to the broad procedural problem may provide the necessary entrée to discussing the lingering issue of legislative facts.

The self-reflection called for by this Article—paying attention to when the courts are engaged in consideration of new evidence on appeal—is an easier task than the one demanded by Peggy Davis: paying attention to when the court is engaged in lawmaking, rather than law interpreting. This provides a further benefit: To the degree that courts need a warning when they are straying into the more creative uses of their lawmaking power, their use of new evidence on appeal provides something of a canary in the mine. When courts see themselves considering a wide range of evidence that was not available to the trial court, they should recognize that they are veering farther away from the straightforward interpretive functions of appel-

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*Law*, 134 U. PA. L. REV. 477, 498 (1986) (observing that the issue of courts’ use of “empirical information after it has been obtained—by whatever means—has received remarkably little attention”); Woolhandler, *supra* note 9, at 126 (identifying the possible pitfalls of a rationalized approach to decision-making in the judicial process). Their ranks have been recently joined by Brianne J. Gorod. Gorod, *supra* note 2, at 8 (“Although it is perhaps unsurprising that courts sometimes rely on extra-record facts, it is surprising that the phenomenon has received so little attention . . . .” (citation omitted)).

242. See *supra* note 141 and accompanying text.

243. Gorod, *supra* note 2, at 50–51 (noting “existential” difficulty of appellate courts acknowledging the use of legislative facts).

late courts.<sup>244</sup> The point is not to warn appellate courts away, but simply to alert them to be particularly cautious about the use of the new evidence in order to ensure that (a) parties are able to adequately participate in the evaluation of those legislative facts, and (b) courts increase their level of caution to ensure that any independent research into legislative facts is done with great care. Taking such care would go far toward addressing the more significant concerns that commentators have noted regarding the use of legislative facts.

In these ways, the issues of new evidence on appeal may help to serve as something of a proxy for the difficult problem of how to manage the use of legislative facts. By paying more attention to how they resolve procedural problems, courts may end up doing a better job in managing their substantive work as well.

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244. As one example of this kind of “legislative fact as judicial warning” system, consider a recent draft article in which Lumen Mulligan and Glen Staszewski suggest that a need to resolve legislative facts should be a clue that certain disputes regarding the Federal Rules of Civil Procedure should be decided not by the Supreme Court, but by the notice and comment process of the Civil Rules Advisory Committee. See Lumen Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: The Lessons of Administrative Law*, 59 UCLA L. REV. (forthcoming June 2012), available at <http://ssrn.com/abstract=1897864>.