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THE COURT OF CRIMINAL APPEALS VERSUS THE CONSTITUTION: THE CONCLUSIVITY QUESTION

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I. INTRODUCTION

Article V, section 6 of the Texas Constitution provides that decisions of the courts of appeals are to be conclusive on all questions of facts. Since its adoption in 1891, this provision has been consistently interpreted by the Texas Supreme Court to mean that the decisions of the intermediate appellate courts in civil cases are final when issues of factual sufficiency are raised. The Texas Court of Criminal appeals has not adopted this interpretation in regard to appellate review of criminal cases by the courts of appeals.

In 1981, the Texas Constitution was amended to confer criminal jurisdiction on the former courts of civil appeals. Since that time, the court of criminal appeals has wrestled with the meaning of the word "conclusive," as it is used in article V, section 6. However, that court has been reluctant to accept the constitutionally mandated authority of the courts of appeals to act as the final arbiters of fact questions. Instead, in spite of a constitutional mandate to the contrary, that court continues to refuse to recognize the authority of the courts of appeals to determine questions of factual sufficiency of the evidence. There is no sound basis for the disparate interpretations of a single constitutional provision based on whether the matter on appeal is civil or criminal in nature.

This article examines the Texas Constitution's grant of authority to appellate courts to review fact questions and the Texas Supreme Court's treatment of that authority. It then contrasts that treatment with the contrary position taken by the Texas Court of Criminal Appeals since 1981. The sentiments of the courts of appeals themselves are examined. The decisions which are analyzed readily demonstrate that the constitutional provision in question is not viewed uniformly

by the highest courts of Texas; that much confusion and dissatisfaction have resulted; and that a better, more logical approach in interpreting the constitution is demanded of the court of criminal appeals. Also illustrated is that court's tenacious refusal to acknowledge, as has the Texas Supreme Court, that the article V, section 6 factual conclusivity clause is a limitation on its authority. Finally, this article suggests an appropriate solution to the problems resulting from the different interpretations of one constitutional provision.

II. THE CONSTITUTIONAL PROVISION RELATING TO APPELLATE COURT FACT JURISDICTION

The Texas Constitution of 1876 created an intermediate court of appeals with appellate jurisdiction in all criminal and civil cases where the county courts had original jurisdiction.[1] Due to growing congestion in the appellate system, article V, section 6 was amended in 1891 to establish intermediate courts to decide civil cases only—the courts of civil appeals.[2] This amendment converted the old Texas Court of Appeals—the only appellate court then determining appeals in criminal cases—into the Texas Court of Criminal Appeals and elevated it to the same level as the supreme court.[3] Furthermore, section 6 was amended to read: "Said Court[s] of Civil Appeals shall have appellate jurisdiction . . . under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts

1. TEX. CONST. art. V, §§ 2, 6 (1876, amended 1891); *see also* Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 550 (1983). The next step was the creation of a commission of appeals to which the supreme court and the court of appeals could transfer cases if the parties agreed. Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34 §§ 1, 7, 8, 1879 Tex. Gen. Laws 30, 30-31, 9 H. GAMMEL, LAWS OF TEXAS 62, 62-63 (1898).

2. *See* TEX. CONST. art. V, § 6 (1891); *see also* 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 398-99 (1977) (most significant portion of 1891 reform package was creation of courts of civil appeals). The establishment of a system of intermediate appellate courts was a predictable resolution of the backlog of cases then pending in the supreme court since federal courts of appeals were also initiated in 1891. *Id.*; *see also* CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 8 (3rd ed. 1976) (circuit courts of appeals created in 1891 after century of dissatisfaction with prior court structure).

3. *See generally* TEX. CONST. art. V, §§ 1, 4-6 (1891, amended 1981); Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 549-50 (1983) (amendment also eliminated commission of appeals). Despite the creation of the intermediate appellate court, the commission of appeals was reestablished in 1918 due to the backlog of cases in the supreme court. *Id.* at 550-51.

shall be conclusive on all questions of fact brought before them on appeal or error."[4] Over the years, the number of intermediate appellate courts has grown from the original three to fourteen.[5] Additionally, the number of judges authorized to sit on each court has been increased.[6]

Due to congestion and delay[7] in the court of criminal appeals, in 1979 the legislature adopted Senate Joint Resolution 36 which pro-

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4. TEX. CONST. art. V, § 6 (1891, amended 1981); *see* 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 400 (1977) (provision interpreted as limitation on supreme court's scope of review). However, this provision is not viewed as a specific grant of power to the courts of appeals. *Id.* The courts of civil appeals were created on the theory that "they should be really great courts and their decisions final in a large class of cases from which no appeal would lie." M.M. Crane, *Suggestions for Improving Court Procedure in Texas*, 5 TEX. L. REV. 285, 286 (1927). The purpose behind the establishment of the intermediate appellate courts was to restrict the jurisdiction of the supreme court to maintaining uniformity of decisions between those courts and to preventing those courts from creating any precedent that would be against the public interest. *See id.*

5. *See generally* W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 270, 324 (1962) (reviewing history of Texas appellate courts). When the 22nd legislature met at its first called session in 1892, it divided the state into three supreme judicial districts and situated a court of civil appeals in each district. The first district court of appeals was to sit in Galveston, the second in Fort Worth, and the third in Austin. *Id.* at 270, 324. The following year, two additional districts were created and the courts for those districts were located at San Antonio and Dallas. The state was redistricted again in 1907, with the sixth district being located at Texarkana, and again in 1911, with the seventh and eighth districts being placed at Amarillo and El Paso, respectively. *Id.* at 324. The Ninth Supreme Judicial District was created in 1915, and that court was situated at Beaumont, and in 1923 the legislature established the tenth district located at Waco. The Eleventh Court of Civil Appeals was created in 1925 and was to hold its sessions at Eastland. *Id.* at 325. In 1957, the Court of Civil Appeals for the First District was given legislative permission to sit at either Houston or Galveston. Act of June 6, 1957, 55th Leg., R.S., ch. 421, § 2, 1957 TEX. GEN. LAWS 1263, 1263. The last three courts of civil appeals were created in 1963 and 1967. *See generally* Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 551 n.12 (1983). The Twelfth and Thirteenth Supreme Judicial Districts were established at Tyler and Corpus Christi, and the Fourteenth Supreme Judicial District was created and authorized to sit at either Galveston or Houston. *Id.*

6. *See* TEX. CONST. art. V, § 6 (1978, amended 1980); *see also* Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 551 (1983).

7. *See generally* Carl E.F. Dally & Patricia A. Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 ST. MARY'S L.J. 211, 213 (1981) (constitution amended to create intermediate level of appellate review of criminal cases in order to relieve congested docket of court of criminal appeals); Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 553 (1983) (before 1981 amendment, average time of pendency from notice of appeal to denial of discretionary review more than three years). The American Bar Association recommends that such appeals be disposed of within six months. AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.52 (1977).

posed a constitutional amendment to provide for intermediate appeals in criminal cases.[8] With the implementation of this amendment in 1981, the jurisdiction of the intermediate appellate courts was expanded to include criminal cases.[9] This was accomplished by the simple deletion of the word "civil" from the jurisdiction granting portion of section 6.[10] The critical portion of section 6—the essence of which has remained unchanged for one hundred years—is the proviso which makes decisions of the courts of appeals conclusive on all questions of fact.[11]

III. THE TEXAS SUPREME COURT'S VIEW

A. *Early Cases*

1. *Choate v. San Antonio & A. P. Ry.*[12]

Since 1898 in the early case of *Choate v. San Antonio & A. P. Ry.*, the supreme court has recognized that the Texas Constitution confers upon the courts of appeals "appellate jurisdiction, under such restrictions and regulations as may be prescribed by law."[13] In that case,

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8. Tex. S.J. Res. 36, §§ 5-6, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223, 3224-25 (adopted as TEX. CONST. art. V, § 6).

9. TEX. CONST. art. V, § 6; *see* Carl E.F. Dally & Patricia A. Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 ST. MARY'S L.J. 211, 213 (1981) (amendment transformed courts of civil appeals into courts of appeals and broadened their jurisdiction to include criminal as well as civil appeals).

10. *Compare* TEX. CONST. art. V, § 6 (1978, amended 1980) *with* TEX. CONST. art. V, § 6.

11. TEX. CONST. art. V, § 6; *see* Mike McColloch, *Criminal Procedure, Annual Survey of Texas Law*, 38 SW. L.J. 529, 579-82 (1984) (noting Texas Supreme Court and Texas Court of Criminal Appeals cases in historical progression of courts of appeals' fact jurisdiction). *But see* 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 400-01 (1977) (provision interpreted as meaning intermediate appellate court decisions on factual matters not conclusive when matters arise in original proceeding). This exception has little significance because these courts have no general power to find facts. *Id.*

12. 91 Tex. 406, 44 S.W. 69 (1898).

13. TEX. CONST. art. V, § 6; *see also* 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 401-02 (1977) (intermediate courts' jurisdiction derived from first and second paragraphs of article V, section 6). The first paragraph of section 6 grants the courts of appeals jurisdiction over all civil cases wherein the district or county courts have either original or appellate jurisdiction. *Id.* The next paragraph dictates that these courts are to have such other jurisdiction, either original or appellate "as may be prescribed by law." *Id.* at 402 (quoting TEX. CONST. art. V, § 6). Braden indicates that there is case law which suggests that this second grant of jurisdiction is controlled by the legislature. However, the first paragraph is seen as a constitutional grant of authority which the legislature may regulate but not deny. *Id.*; *see also* Outlaw v. Gulf Oil

the court interpreted the newly adopted article V, section 6 as a means to "restrict, in express terms, the jurisdiction of the supreme court, and to confine it to questions of law."[14] In so stating, the supreme court recognized that the same amendments which created the intermediate appellate courts also acted to divest the supreme court of its jurisdiction to hear questions of factual sufficiency. In *Choate*, the court stated that the "action [of the courts of civil ap-

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Corp., 137 S.W.2d 787, 796-97 (Tex. Civ. App.—El Paso 1940), *rev'd on other grounds*, 136 Tex. 281, 150 S.W.2d 777 (1941) (constitutional right of appeal from final judgment may not be denied by legislature, but manner of appeal may be regulated). *But see Ex parte* Lewis, 663 S.W.2d 153, 154 (Tex. App.—Amarillo 1983, no writ) (jurisdiction established by constitution and statutes enabling jurisdiction on a limited basis should not be construed as including matters statute does not specifically cover).

14. Choate v. San Antonio & A. P. Ry., 91 Tex. 406, 410, 44 S.W. 69, 69 (1898). In the first *Choate* case, the court of civil appeals determined that Choate's jury verdict was not sustained by the evidence. San Antonio & A. P. Ry. v. Choate, 35 S.W. 180, 181 (Tex. Civ. App.), *aff'd*, 90 Tex. 82, 36 S.W. 247, *rev'd on reh'g*, 90 Tex. 82, 37 S.W. 319 (1896). It, therefore, reversed and remanded the case with special instructions that, if the same evidence was presented at a new trial, the court should direct a judgment for the defendant. *Id.* On appeal to the supreme court, Choate maintained that these directives amounted to the court of civil appeals rendering a judgment against him even though there was some evidence which supported the jury's verdict. Choate v. San Antonio & A. P. Ry., 90 Tex. 82, 85, 36 S.W. 247, 249, *rev'd on reh'g*, 90 Tex. 82, 37 S.W. 319 (1896). The supreme court at first affirmed, determining that there was no evidence of negligence by the railroad as a matter of law. *Id.* at 249-50. However, on motion for rehearing, the supreme court determined that the evidence did not preclude a difference of opinion, and that the directions which accompanied the court of civil appeals' opinion amounted to that court's rendering a judgment and were, therefore, erroneous. Choate v. San Antonio & A. P. Ry., 90 Tex. 82, 89, 37 S.W. 319, 319 (1896).

After a second verdict in Choate's favor, the court of civil appeals again held there was insufficient evidence to sustain the verdict. San Antonio & A. P. Ry. v. Choate, 43 S.W. 537, 538 (Tex. Civ. App. 1897), *writ dism'd*, 91 Tex. 406, 44 S.W. 69 (1898). In determining that it had jurisdiction to review the court of civil appeals' decision, the supreme court stated:

> "Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." . . . So that it is elementary that whether there be any evidence or not to support an issue is a question of law and not of fact; and it follows that the decision of the Court of Civil Appeals upon such a question is subject to review by this court.

Choate v. San Antonio & A. P. Ry., 91 Tex. 406, 409, 44 S.W. 69, 69 (1898). The court went on to state that the court of civil appeals did not, however, have the power to conclusively determine the facts of any case:

> Our bill of rights contains the emphatic declaration, that "the right of trial by jury shall remain inviolate." . . . It is the province of the jury to determine questions of fact; but it is in the power of the trial judge to set aside the finding, and to award a new trial. The Court of Civil Appeals has the same power upon appeal. . . . The [s]upreme [c]ourt, before the amendments in question had jurisdiction on appeal or a writ of error over the facts of a case. . . . This same power is conferred by the amendments upon the Court of Civil Appeals.

Id. at 69-70.

peals] upon such questions is made final, and not subject to be reviewed by this court."[15] Since *Choate*, the precise meaning of article V, section 6 has been reconsidered on occasion.

2. *In re King's Estate*[16]

In the 1951 case of *In re King's Estate*, the supreme court sought to clarify the role of the intermediate appellate courts when those courts are asked to consider questions of factual sufficiency.[17] In that decision, the court noted that while the court of civil appeals gave the correct wording of the appellant's point of error, which was one of factual insufficiency to support the jury's verdict, the intermediate court had incorrectly treated the point as being a question of law.[18]

The court directed the courts of civil appeals to consider and weigh all of the evidence in order to determine whether the evidence was insufficient or whether the verdict was so against the great weight and preponderance of the evidence as to be manifestly unjust.[19] In attempting to delineate the role of the courts of appeals when asked to

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15. *Choate*, 44 S.W. at 70.

16. 150 Tex. 662, 244 S.W.2d 660 (1951). This case involved a will contest where the appellant, Carl King, was named the independent executor. King v. King, 242 S.W.2d 925, 928 (Tex. Civ. App.—Amarillo 1951), *rev'd*, *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). At trial, the jury found that the deceased did not have testamentary capacity to write a valid will. The will was, therefore, set aside, and the estate was to vest in her heirs in accordance with the laws of descent and distribution. *Id.*

17. *See In re King's Estate*, 244 S.W.2d at 661 (appellate court required to examine and weigh all evidence presented prior to determining factual sufficiency). *See generally* W. St. John Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEX. L. REV. 803, 804-05 (1952) (discussing rules to be applied by courts of civil appeals where verdict is attacked as being against great weight and preponderance of evidence).

18. *In re King's Estate*, 244 S.W.2d at 661. The appellant complained on appeal that the jury's finding of lack of testamentary capacity was against the great weight and preponderance of the evidence. *King*, 242 S.W.2d at 929. In addressing the appellant's point of error, the court of civil appeals stated that if there is "any evidence of probative force to support this finding of the jury, such finding is conclusive and binding on both the trial court and this court." *Id.*

19. *In re King's Estate*, 244 S.W.2d at 661. The court observed that when the question of factual sufficiency is raised, the court of civil appeals is required "in the exercise of its peculiar powers under the constitution" to consider all of the evidence presented in the case. The court of civil appeals had incorrectly examined only that evidence which supported the jury's verdict. The supreme court stated that the court of civil appeals' incorrect treatment of the point of error was, in effect, a refusal by that court to rule on the point. Because the court below failed to rule on the appellants' point of error, the supreme court could properly take jurisdiction of the case in spite of the fact that judgments of the courts of civil appeals are final where questions of factual sufficiency are raised. *Id.*

determine sufficiency of evidence questions, the supreme court recognized that it was complicated to describe the intellectual process to be followed by those courts.[20]

3. *Traylor v. Goulding*[21]

The supreme court again attempted to clarify the role of intermediate appellate courts in 1973 in *Traylor v. Goulding*, by reaffirming that the decisions of those courts are final when great weight and preponderance points of error are raised on appeal.[22] The court in *Traylor* again stated the rule that the intermediate appeals courts are required to weigh all of the evidence and remand for a new trial when they conclude that a jury verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust.[23]

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20. *Id.* at 662. The court further said:

> But Article 5, [sic] § 6 of the Constitution . . . is no more to be ignored than any other part of that document, and that provision, with the decisions, statutes and rules based upon it, requires the Court of Civil Appeals, upon proper assignment, to consider the fact question of weight and preponderance of all the evidence and to order or deny a new trial accordingly as to the verdict may thus appear to it clearly unjust or otherwise.

Id. The court noted that if article V, section 6 were interpreted otherwise, "there would be no 'questions of fact' for the Court of Civil Appeals to determine." *Id.*

21. 497 S.W.2d 944 (Tex. 1973).

22. *Id.* at 945. *Traylor* was a medical malpractice case in which the jury failed to find that certain omissions on the part of the defendant, Dr. Goulding, proximately caused any damage to Traylor. *Id.* at 944-45. On appeal, Traylor contended that the jury's negative findings were so against the great weight and preponderance of the evidence as to be wrong and unjust. Traylor v. Goulding, 497 S.W.2d 468, 471 (Tex. Civ. App.—Houston [1st Dist.] 1972), *rev'd*, 497 S.W.2d 944 (Tex. 1973). The court of civil appeals determined that, absent a contention by Traylor that the evidence established affirmative findings as a matter of law, nothing was presented for review. *Id.* at 471. Traylor argued to the supreme court that the court of civil appeals' holding amounted to a refusal on its part to exercise its fact-finding jurisdiction as required by article V, section 6 and, as such, was an error of law. *See Traylor*, 497 S.W.2d at 945. The supreme court agreed and stated that, although the judgment of the courts of civil appeals is final when questions of factual sufficiency are raised, when those courts' determination of the question is based on an incorrect view of the law, it was required to remand the case to the court of civil appeals for consideration of the question based upon proper legal standards. *Id.*

23. Traylor v. Goulding, 497 S.W.2d 944, 945 (Tex. 1973). The supreme court stated that when a petitioner urges that the jury's failure to find a fact is against the great weight and preponderance of the evidence, the court of civil appeals' fact-finding jurisdiction is invoked. Therefore, the court of civil appeals' determination that it would not exercise its jurisdiction when the jury's answers were in the negative was in conflict with earlier supreme court decisions. *Id.*; *see also* Parrish v. Hunt, 160 Tex. 378, 380, 331 S.W.2d 304, 306 (1960) (appellate court erred in failing to consider points of error on jury's failure to find answers was against great weight and preponderance of evidence).

B. *Survival Against Recent Attacks on Courts of Appeals' Fact Jurisdiction*

In the past decade or so, the conclusive nature of decisions by the courts of appeals on fact questions has been attacked by civil plaintiffs who had suffered at the hands of the intermediate courts when favorable judgments were set aside because those courts found the evidence to be insufficient to support the judgments.[24] The supreme court, when asked, has declined to interpret article V, section 6 in a manner that would preclude the intermediate courts from exercising such fact jurisdiction.[25] In *Pool v. Ford Motor Co.*,[26] the supreme court set out certain guidelines to be followed by courts of appeals when reversing a trial court's judgment on "factual insufficiency of the evidence" or "against the great weight and preponderance of the evidence" grounds.[27] Following the *Pool* decision, the Texas Supreme Court was asked to hold that, even if a court of appeals could "unfind" a fact found by a jury, the intermediate court lacked authority

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24. *See, e.g.*, Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 648-49 (Tex. 1988) (ability of court of appeals to overturn jury award of $2.5 million actual damages and $250,000 in punitive damages upheld); Pool v. Ford Motor Co., 715 S.W.2d 629, 633-35 (Tex. 1986) (supreme court reaffirmed that court of appeals' exercise of fact jurisdiction does not undermine jury verdict or conflict with right to trial by jury).

25. *See Cropper*, 754 S.W.2d at 651 (courts of appeals have authority to reverse and remand upon determination that jury's failure to find is against great weight and preponderance of evidence); *Pool*, 715 S.W.2d at 633 (court rejected Pool's argument that court of appeals' exercise of fact jurisdiction was improper); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 913 (1990) (court in *Cropper* rejected challenge to courts of appeals' constitutional authority and obligation to review fact questions). In response to the petitioner's challenge that such review violated the right to trial by jury, the court stressed that the right of the appellate courts to review fact questions and the right to trial by jury had "peacefully co-existed for almost one hundred fifty years" and that both were "thoroughly rooted in our constitution and judicial system." *Cropper*, 754 S.W.2d at 652; *accord* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) (reaffirming courts of appeals' exclusive jurisdiction over questions of factual sufficiency); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 913 (1990).

26. 715 S.W.2d 629 (Tex. 1986).

27. *Id.* at 635. *Pool* directed courts of appeals to set out, in detail,

> the evidence relevant to the issue in consideration and to clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or why it clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. It is only in this way that the supreme court will be able to determine if the requirements of *In re King's Estate* have been satisfied.

Id.

to conclude that a jury's failure to find a particular fact was against the great weight and preponderance of the evidence.

In *Cropper v. Caterpillar Tractor Co.*,[28] the court declined to depart from its previous position and held that the courts of appeals have the authority to review a jury's "failure to find" a fact in the same manner in which they review a jury's findings.[29] Significant in the opinion was the painstaking review of the constitutional origin of appellate court jurisdiction over fact questions.[30] The court looked at the two clauses of section 6: the first, granting courts of appeals appellate jurisdiction as may be prescribed by law; the second, providing that the decisions of the courts of appeals are to be conclusive on questions of fact. The court observed that the former clause operates as a general grant of appellate jurisdiction; the latter clause, referred to as the "factual conclusivity clause," was pronounced to function *not* as a grant of authority to the courts of appeals, but as a limitation upon the authority of a higher court.[31] The court reviewed cases before the 1891 amendment to the constitution in which it had exercised the power to review jury verdicts on fact issues.[32] It then said that the amendment, which created the courts of civil appeals, gave those courts the same powers over fact questions as the Texas Supreme Court had exercised before the amendment.[33]

The court announced that in one of its earliest decisions, in 1841, it had held that "a court operating under a general grant of appellate

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28. 754 S.W.2d 646 (Tex. 1988).

29. *Id.* at 647 (citing TEX. CONST. art. V, § 6).

30. *Id.* at 648-49 (discussion of cases from 1841 to present that uphold right of appellate courts to review fact questions).

31. *Id.* at 648; *see also* Choate v. San Antonio & A. P. Ry., 91 Tex. 406, 410, 44 S.W. 69, 69 (1898) (purpose of amendment giving exclusive jurisdiction over fact questions to courts of appeals was to restrict jurisdiction of supreme court to questions of law). *See generally*, 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 400-01 (1977) (second clause of article V, section 6 viewed as limitation on authority of supreme court to review factual sufficiency questions).

32. *See, e.g.*, Missouri Pac. Ry. v. Somers, 78 Tex. 439, 441, 14 S.W. 779, 779 (1890) (court has power and duty to review facts of case and set aside jury verdict when against preponderance of evidence); Redus v. Burnett, 59 Tex. 576, 582 (1883) (jury verdict manifestly against weight of evidence subject to reversal by supreme court); Garvin v. Stover, 17 Tex. 292, 299 (1856) (evidence determined insufficient to support jury verdict).

33. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 649 (Tex. 1988). In its review of the jury's verdict in favor of the appellant, the court of appeals had the same authority that the supreme court possessed before the 1891 amendment. *Id.*; *see also* TEX. CONST. art. V, § 6 (defining intermediate appellate court jurisdiction).

jurisdiction had the power to review fact questions."[34] Of more than passing interest is the fact that the court also cited an 1841 case which recognized that the Texas Supreme Court could review both fact and law questions in a criminal case.[35] That decision, *Republic v. Smith*,[36] actually supports the proposition advanced in this article.

In the final analysis, the *Cropper* decision is a strong reaffirmance of the *Pool* decision. The court, recognizing that *Pool* contains language which reflects some "discomfort with the holding," nonetheless conceded the conclusivity of intermediate appeals court decisions on fact questions.[37]

IV. THE COURT OF CRIMINAL APPEALS' VIEW

A. *Background*

1. Before the 1980 Constitutional Amendment

Before legislation implemented the 1980 constitutional amendment that renamed the courts of appeals and vested them with criminal jurisdiction, the Texas Court of Criminal Appeals appeared to understand the unique appellate role of the intermediate courts. In 1980 in *White v. State*,[38] that court was called upon to consider all the evidence and to set aside a verdict because of factually insufficient evidence.[39] The court declined, saying essentially that it was not empowered to do so since it was not a court of civil appeals.[40] Then Presiding Judge Onion, writing for a unanimous court, said:

> What appellant is asking this court to do is to consider all the evidence—that which supports the verdict and that which does not—and to set aside the verdict if we conclude that it is so against the great weight and preponderance of the evidence as to be clearly wrong and

34. *Cropper*, 754 S.W.2d at 648 (citing Bailey v. Haddy, Dallam 376 (Tex. 1841)).

35. *Cropper*, 754 S.W.2d at 649 (citing Republic v. Smith, Dallam 407 (Tex. 1841)).

36. Republic v. Smith, Dallam 407 (Tex. 1841).

37. *Cropper*, 754 S.W.2d at 651. In *Cropper*, the supreme court confronted the apparent conflict between article V, section 6 and article I, section 15, which provides for the right to trial by jury. *Id.* at 647-49. It then determined that the intermediate appellate court's review of cases for factual sufficiency does not conflict with the constitutional right to a jury trial. *Id.* at 647. In concluding its discussion on the question, the court said that, "Aside from the inescapable fact that this court cannot amend the constitution, we are not prepared to sacrifice either for the benefit of the other." *Id.* at 652.

38. 591 S.W.2d 851 (Tex. Crim. App. 1980).

39. *Id.* at 854. The appellant in *White* contended that the jury's verdict at his competency hearing was contrary to the great weight and preponderance of the evidence. *Id.*

40. *Id.* at 855.

> manifestly unjust, regardless of whether there is evidence of probative force to support it. This is the standard of review requested. . . . This court has no jurisdiction to do what the appellant requests as would a Court of Civil Appeals because of a somewhat peculiar constitutional provision applicable to Courts of Civil Appeals. Article V, § 6 (Courts of Civil Appeals), states in part: "Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error."[41]

The court continued at length to explain why it could not exercise fact jurisdiction before concluding that: "After an examination of the constitutional and statutory provisions relating to the jurisdiction of the court of criminal appeals, we conclude that this court has no fact jurisdiction as do the Courts of Civil Appeals, and cannot 'unfind' a vital fact finding by a jury."[42] Effective September 1, 1981, with the amendment to article V, section 6, the court of criminal appeals apparently changed its mind about the unique fact jurisdiction vested in the courts of appeals.[43]

2. Opposition to Vesting Criminal Jurisdiction in Intermediate Courts of Appeals

Perhaps the change in attitude resulted from a reluctance on the part of the court of criminal appeals to accept the reality of the passage of the 1980 amendment. Members of that court have been called intensely possessive of the criminal law as they have defined it.[44] Historically, the judges of that court have not favored measures such as the legislative efforts in the early 1970s to reform the Texas Penal Code and they opposed the 1975 proposed constitutional amendment of article V.[45] And it is fair to say that at least some of the members

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41. *Id.*

42. *White*, 591 S.W.2d at 856.

43. This being when the courts of appeals were vested with criminal jurisdiction.

44. Paul Burka, *Trial by Technicality*, TEXAS MONTHLY, Apr. 1982 at 127, 127-28, 216. Burka maintains that the result of the court of criminal appeals' specializing in criminal cases is that it is often unable to deal practically or realistically with the law. *See id.* at 127, 216. Burka states that: "[T]he court frequently insists on applying highly technical, formalistic rules of law that have no relation to individual rights or, equally important, common sense." *Id.* at 127.

45. *Id.*; *see* John F. Onion, Jr., *The Proposed Constitution: What's Wrong with Article V*, VOICE FOR THE DEFENSE, Fall-Winter 1975 at 2, 2-3 (discussing various objections to the proposed amendment). Judge Onion expressed the opinion that, by allowing the intermediate appellate courts to review criminal cases, appeals would be delayed, unnecessary appellate judgeships would be created, and the independence of the judiciary would be challenged. *Id.*

of that court did not welcome the 1980 constitutional amendment with open arms.[46]

3. Reluctance Since 1980 to Accept Intermediate Courts' Role

After the courts of appeals were granted criminal jurisdiction, the court of criminal appeals found, for the first time, that it was not the only court in Texas empowered to review criminal cases on appeal. Already unable to cooperate productively with the Texas Supreme Court,[47] the Texas Court of Criminal Appeals was perhaps not ready to share its exclusivity over criminal cases. In any event, following September 1, 1981, when the court of criminal appeals was again

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46. *See Amendment 8*, 43 TEX. B.J. 908, 908-18 (1980) (discussions "for" and "against" amendment 8 to amend article V and change names of courts of civil appeals and grant those courts criminal jurisdiction). Former Chief Justice Robert W. Calvert of the Texas Supreme Court and Dallas County Criminal District Attorney Henry Wade favored the amendment. *Id.* at 910-14. Attorneys James L. Branton and Charles D. Butts were against it. *Id.* at 915-18. Interestingly, the arguments previously advanced by Presiding Judge John Onion of the Texas Court of Criminal Appeals appear in Butts' opposition to the 1980 proposed amendment. Both Onion and Butts urged that the proposed amendments would lengthen "the delay in disposing of criminal appeals"; cause "the creation of numerous additional appellate judgeships"; add a "second step" in the criminal appellate process; and result in a loss of appellate "specialization" in criminal cases. Commenting on the purposes behind the amendment to improve the judicial system, both Onion and Butts cautioned that, "A reform is not a reform if it does not solve or remedy the problems at hand." *Compare* John F. Onion, Jr., *The Proposed Constitution: What's Wrong with Article V*, VOICE FOR THE DEFENSE, Fall-Winter 1975 at 2, 2-3 *with Amendment 8*, 43 TEX. B.J. 908, 917-18 (1980). A fair deduction would be that the views expressed by Butts in 1980 represented those of Judge Onion also.

47. The fact that the two high courts did not work together sufficiently in order to adopt a uniform set of rules of evidence for civil and criminal cases demonstrates the separate identities that the courts have maintained. *See, e.g.*, Jack Pope, *Foreword* to HULEN D. WENDORF & DAVID A. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL at xvii (1988) (discussing background of adoption of two different sets of rules of evidence). Initially, in 1980, the Supreme Court Advisory Committee rejected recommendations that Texas adopt a uniform set of rules of evidence. *Id.*; *see also* Thomas Black, *The Texas Rules of Evidence—A Proposed Codification*, 31 SW. L.J. 969, 1016 (1977) (authoritative codification particularly helpful since rules must often be hastily applied). In 1981, the Texas Senate adopted a resolution that joined members of the supreme court, the legislature, and the state bar in a working group to produce an evidence code to be promulgated under the court's rule-making powers. Jack Pope, *Foreword* to HULEN D. WENDORF & DAVID A. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL at xvii (1988). That group at first proposed a single set of rules that integrated both the civil and criminal rules of evidence. The criminal law section of the state bar opposed the proposal. The group, therefore, eliminated the criminal rules and recommended the adoption of a code of civil evidence. *Id.* The Texas Supreme Court promulgated the Texas Rules of Civil Evidence in November of 1982. After the court of criminal appeals was granted rule-making authority, that court adopted the Texas Rules of Criminal Evidence in December of 1985. *Id.*

called upon to interpret article V, section 6, that court went awry. Rather than view the article V, section 6 constitutional mandate as a restriction upon its authority by confining its jurisdiction to questions of law and not of fact, the court of criminal appeals seems to have taken the view that, in criminal cases, all issues are questions of law.

B. *Early Decisions*

1. *Combs v. State*

The 1982 *Combs v. State*[48] decision represents the first misstep taken by the court of criminal appeals. In that case, a jury convicted Combs of murder.[49] On appeal, Combs contended that the State had not proven the cause of death.[50] The court of appeals agreed and reversed and remanded the case for a new trial.[51] In reviewing the lower appellate court's decision, the court of criminal appeals first had to determine whether it had jurisdiction to review questions of sufficiency of the evidence once they had been passed on by a court of appeals, in light of the article V, section 6 conclusivity provision.[52] The court acknowledged that if sufficiency of the evidence is a question of fact, then decisions of the courts of appeals on sufficiency questions "would appear to be binding" on it.[53] With that acknowledgment made, the court proceeded to review decisions of the Texas Supreme Court that had interpreted article V, section 6.[54]

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48. 643 S.W.2d 709 (Tex. Crim. App. 1982).

49. *Id.* at 710.

50. Combs v. State, 631 S.W.2d 534, 537 (Tex. App.—Houston [1st Dist.]), *rev'd*, 643 S.W.2d 709 (Tex. Crim. App. 1982).

51. *Id.* at 537-38. Combs, who was mentally retarded, gave conflicting accounts of what had occurred. *Id.* at 535. At one point, he stated that he held the deceased, a two-year-old child, under the water in the bathtub. Later, he said that he left her alone in the tub to search for her clothing and that after the incident she seemed fine. He put her to bed and found her dead the next day. *Id.* In addition to Combs' conflicting testimony, two of the victim's siblings testified that, after Combs took the child out of the tub, she seemed fine and that she had stood and walked prior to Combs putting her to bed. *Id.* at 538. A pathologist who testified that the cause of death was drowning stated that he came to that conclusion based on his autopsy and a report furnished to him that "a suspect drowned the child in a bathtub." He further stated that had he received information that the victim stood and walked after the incident, he might have found a different cause of death, such as heart attack. The court of appeals reviewed all of this evidence and concluded that the trial court should have granted a mistrial. *Id.*

52. Combs v. State, 643 S.W.2d 709, 714 (Tex. Crim. App. 1982) (citing TEX. CONST. art. V, § 6).

53. *Id.*

54. *See id.* at 714-15 (decisions of supreme court examined to determine intent of framers

The *Combs* court first reviewed *In re King's Estate*[55] noting that this decision is still followed.[56] The court then recognized that in civil cases the supreme court apparently exercises authority over *no evidence* or *legally insufficient* points of error, but that decisions of the courts of appeals are conclusive over *factually insufficient* or *against the great weight* points.[57] The court acknowledged that in deciding the latter types of points, a court of appeals does not find a fact, it "only 'unfinds' a vital fact."[58] The court gave no explanation as to why the role of the courts of appeals would not function that same way in reviewing criminal cases under the identical constitutional provision.

Contrasting its role with that of courts of appeals, the court said that, "*[O]ur* court does not have jurisdiction to pass upon the weight and preponderance of the evidence or 'unfind' a vital fact."[59] Then it said it had never passed on the weight and preponderance of the evidence, evincing a misperception with footnote 1 of the opinion.[60] That footnote pronounced, simply, "We perceive no other standard may be utilized by the Court of Appeals in reviewing criminal convictions other than sufficiency of the evidence to support the conviction," meaning the same legal sufficiency standard applied by the court of criminal appeals.[61] Why the court could not accept that the courts of

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of amended version of article V, section 6 as it applied to question before court). The court pointed out that the only change in the amended version that was significant to the determination of the issue before it was that the earlier version applied to the courts of civil appeals, which did not have criminal jurisdiction, and the current version applies to the courts of appeals, which now have criminal, as well as civil, jurisdiction. *Id.* The court then quoted TEX. REV. CIV. STAT. ANN. art. 1820, as it was amended in 1981, which provided that the judgments of those courts are to be "conclusive in all cases on the facts of the case." *Combs*, 643 S.W.2d at 714-15; *see also* Act of June 8, 1981, 67th Leg., R.S., ch. 291, § 39, 1981 Tex. Gen. Laws 761, 781, *repealed by* Act of June 12, 1985, 69th Leg., R.S., ch. 480, § 22.225, 1985 Tex. Gen. Laws 1721, 1730-31 (current version at TEX GOV'T CODE ANN. § 22.225 (Vernon 1988).

55. 150 Tex. 662, 244 S.W.2d 660 (1951).

56. Combs v. State, 643 S.W.2d 709, 715 (Tex. Crim. App. 1982). *Combs* cited a recent Texas Supreme Court decision reaffirming the holding in *In re King's Estate*. *Id.* (citing Hall v. Villareal, 522 S.W.2d 195, 196 (Tex. 1975)).

57. *Combs*, 643 S.W.2d at 715.

58. *Id.* at 716 (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 368 (1960)). The court noted Justice Calvert's article is "cited almost as frequently as *In re King's Estate*" in regard to appellate court fact jurisdiction. *Id.*

59. *Id.* (emphasis in original).

60. *Id.* at 716 n.1.

61. *Combs*, 643 S.W.2d at 714.

appeals might function differently from the court of criminal appeals is not apparent. It would seem that the court might have perceived that the courts of appeals could be conclusive on factually insufficient points or points against the great weight much as they had been in civil cases under the same constitutional provision.[62] But such a notion, logical and sensible as it may be, apparently was not considered by the court. Rather, the court said that sufficiency of the evidence to sustain criminal convictions "as determined by this Court is a question of law," not one of fact.[63] Thus, the court held that it had jurisdiction to review sufficiency of the evidence questions, completely oblivious to the idea that there may be a distinction between evidence that is legally insufficient from that which is factually insufficient.[64] The court proceeded to review the evidence concerning cause of death, disagreed with the court of appeals, and reversed.[65] This decision began a period of differing views on the meaning of section 6 between the Court of Criminal Appeals of Texas on the one hand, and

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62. *See, e.g.*, Harmon v. Sohio PipeLine Co., 623 S.W.2d 314, 314 (Tex. 1981) (well settled that supreme court has no jurisdiction to review question of factual sufficiency of evidence); Glover v. Texas Gen. Indem. Co., 619 S.W.2d 400, 402 (Tex. 1981) (supreme court may not review sufficiency of evidence); Maxey v. Texas Commerce Bank, 580 S.W.2d 340, 340 (Tex. 1979) (court without jurisdiction to pass on fact question of great weight and preponderance of evidence); Tippett v. Brannon, 493 S.W.2d 511, 511 (Tex. 1973) (supreme court may not pass on fact questions of sufficiency of evidence or great weight and preponderance of evidence).

63. *Combs*, 643 S.W.2d at 716. The court went on to say that it was irrelevant whether it believed certain evidence or believed that evidence presented on behalf of a defendant outweighed the state's evidence. The only question properly before the court was whether there was any evidence which established the defendant's guilt beyond a reasonable doubt and whether the trier of fact believed that evidence. If so, the court stated that *it* could not reverse the judgment on the grounds that the evidence was insufficient. *Id.*

64. *See id. See generally* William Cornelius, *Appellate Review of Sufficiency of the Evidence Challenges in Civil and Criminal Cases*, 46 TEX. B.J. 439 (1983). Legal insufficiency of the evidence means that there is no evidence to support a finding or that a certain issue of fact is conclusively established or that a finding of fact is only supported by a scintilla of evidence. *Id.* at 440. Factual insufficiency exists when the evidence in support of a finding is factually too weak to support it or, when weighed against the opposing evidence, the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.* at 441.

65. Combs v. State, 643 S.W.2d 709, 717 (Tex. Crim. App. 1982). The court of criminal appeals, after reviewing all of the evidence in the case and after discussing the standard of review employed by the supreme court, concluded that sufficiency of the evidence to sustain criminal convictions was a question of law and not a "question of fact" under article V, section 6 of the Texas Constitution. The court determined that it had jurisdiction to review questions of sufficiency of the evidence to support a criminal conviction even in those cases where the question had already been addressed by the courts of appeals. *Id.*

on the other hand, the Supreme Court of Texas and those courts of appeals which were called upon to address the issue.

2. *Van Guilder v. State*[66]

Several years later, in *Van Guilder v. State*, the court of criminal appeals again decided to address the issue because it recognized that the proper standard of review in criminal cases was muddled. Opening its discussion on the issue, the court noted: "There appears to be substantial confusion in the Courts of Appeals over the proper standard of review in criminal cases. This is due to their reading of Art. 5, Sec. 6 of the Texas Constitution and a recent decision of this Court, *Combs v. State*."[67]

The court continued, acknowledging that, "It is true that as amended, Art. 5, Sec. 6 of the Texas Constitution reads, 'that the decisions of said Courts [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.' "[68] Then the court held that under its decision in *Combs*, the Texas Constitution did not mean what it says.[69] The court indicated that it could not allow "the courts of appeals to evaluate the facts."[70] *Combs*, it said,

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66. 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1169 (1986).

67. *Id.* at 180 (citing TEX. CONST. art. V, § 6); *see also* Combs v. State, 643 S.W.2d 709, 715 (Tex. Crim. App. 1982).

68. *Van Guilder*, 709 S.W.2d at 180 (citing TEX. CONST. art. V, § 6).

69. *See id.* (decision in *Combs* did not dictate that courts of appeals be granted fact jurisdiction). The court relied on the 1981 amendment to TEX. REV. CIV. STAT. ANN. art. 1820 as well as its own opinion in *Combs* to support its determination that article V, section 6 of the constitution was inapplicable in criminal cases. The court went on to state that the *Combs* opinion did not grant fact jurisdiction to the courts of appeals, and, therefore, those courts were not permitted to evaluate the facts of a case. *Id.*

70. *Van Guilder*, 709 S.W.2d at 180. The court said that the effect of allowing a court of appeals to reverse a conviction in a criminal case, if it determined that a jury finding is against the great weight and preponderance of the evidence, would be to usurp the function of the jury. The result of allowing these courts to review a case and to determine that the evidence is factually insufficient would make them a "thirteenth juror with veto power." The court then stated that "neither the Texas Constitution nor *Combs*" supports that standard of review. *Id.*

In making its determination that the Texas Constitution does not support the courts of appeals' sitting as a "thirteenth juror," the court of criminal appeals surely overlooked about one hundred years of decisions to the contrary by the Texas Supreme Court. *See, e.g.*, Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988) (when court of appeals properly concludes jury verdict is against great weight of evidence, returning case for retrial before different jury does not violate right to trial by jury); Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex. 1986) (court of appeals "unfinding" fact not an unconstitutional usurpation of right to trial by jury); Choate v. San Antonio & A. P. Ry., 91 Tex. 406, 410, 44 S.W. 69, 69 (1898)

did not "grant" the courts of appeals fact jurisdiction.[71]

The court expressed the opinion that the confusion demonstrated by the court of appeals in *Van Guilder* stemmed from the fact that the defendant relied on an affirmative defense.[72] The court explained that in such cases, the burden of proof is on the defendant to prove the defense by a preponderance of the evidence.[73] The court proceeded to establish a separate standard of review when facts concerning an affirmative defense are under consideration; the courts of appeals were to review the evidence in the light most favorable to the implicit finding of the jury respecting the affirmative defense and then determine, by examining all the evidence, whether any rational trier of fact could have found that the defendant failed to prove his defense by a preponderance of the evidence.[74] With this pronouncement, the court apparently envisioned that it had laid the matter to rest.

(court of appeals empowered with "unique" authority to review jury finding and reverse judgment and remand for new trial).

Although there has been considerable discussion and disagreement as to how article V, section 6 can best be harmonized with article I, section 15, which provides that "the right of trial by jury shall remain inviolate," the supreme court has, time and again, maintained that article V, section 6 means precisely what it says, that decisions of the courts of appeals are conclusive on all questions of fact. *See, e.g.*, *Cropper*, 754 S.W.2d at 651; *Pool*, 715 S.W.2d at 634; *In re* King's Estate, 150 Tex. 662, 666, 244 S.W.2d 660, 661 (1951); *Choate*, 44 S.W.2d at 69.

71. *See* Van Guilder v. State, 709 S.W.2d 178, 180 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1169 (1986). This assumes, apparently, that court of criminal appeals might somehow have authority to "grant jurisdiction" to courts of appeals.

72. *Id.*

73. *Id.* at 180-81 (when defendant relies on affirmative defense, burden of proof is different than when he raises any other defense). *Compare* TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1974) (defendant required to prove affirmative defense by preponderance of evidence) *with* TEX. PENAL CODE ANN. § 2.03(d) (Vernon 1974) (court required to charge jury that reasonable doubt as to existence of a defense requires acquittal). *See generally* GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 110 (1987) (detailing differences between defenses and affirmative defenses). When a defense is raised by the defendant, the burden of persuasion remains with the prosecution. The defendant must only raise a reasonable doubt in the mind of the trier of fact in order to be acquitted. *Id.* In the case of an affirmative defense, however, the defendant is required to convince the jury by a preponderance of the evidence that he is entitled to the affirmative defense. *Id.* at 111.

74. *Van Guilder*, 709 S.W.2d at 181. The court specifically limited the courts of appeals to reviewing only the evidence submitted on the issue of the affirmative defense in question. The courts of appeals are to review the evidence in this manner when a defendant asserts on appeal that the evidence is insufficient to support his conviction because he adequately proved his affirmative defense. The court further emphasized that "this analysis does not involve the appellate court in any fact finding function." The court further clarified what it considered to be the appropriate parameters of the courts of appeals' review by stating that those courts are not to reweigh or reclassify the evidence. *Id.* The appellate court is restricted to determining if the jury finding on the issue of the affirmative defense in question was rational. *Id.* at 182.

3. *Schuessler v. State*[75]

Three years later, in *Schuessler v. State*, the court of criminal appeals continued on the route it had established in *Combs*.[76] *Schuessler* involved a review of the jury's rejection of an insanity defense. The court of appeals reversed the conviction, holding that the defendant had established his defense by a preponderance of the evidence.[77] Approaching the case chiefly on the basis of facts which are set out in the opinion, the court of appeals noted that the State had presented no evidence of sanity and that there was substantial evidence of insanity, and, therefore, determined that the jury's implicit rejection of insanity was against the great weight and preponderance of the evidence.[78] The court of criminal appeals, after outlining the evidence, disagreed, noting that the court of appeals improperly evaluated the weight and credibility of the evidence on the insanity question.[79] It then reiterated the pronouncements of *Van Guilder*,[80] proceeded to apply those standards, and found that a rational trier of fact could have resolved the conflicting testimony against the defendant.[81]

These cases reflect the initial approach taken by the court of criminal appeals regarding the meaning of the conclusivity provision of article V, section 6. Interestingly, by the time the court decided *Schuessler*, it saw fit not to mention the constitutional provision which lies at the heart of the controversy over intermediate appellate court review of the facts in criminal cases.

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75. 719 S.W.2d 320 (Tex. Crim. App. 1986).

76. Combs v. State, 643 S.W.2d 709 (Tex. Crim. App. 1982).

77. Schuessler v. State, 647 S.W.2d 742, 749 (Tex. App.—El Paso 1983), *rev'd*, 719 S.W.2d 320 (Tex. Crim. App. 1986).

78. *See id.*

79. Schuessler v. State, 719 S.W.2d 320, 328 (Tex. Crim. App. 1986). In reversing the El Paso court's decision, the court stated that it could understand that the court of appeals might disagree with the jury's resolution of conflicts in the evidence. *Id.* However, the effect of that court interfering with the jury's verdict would be that of acting as a "thirteenth juror with veto power." *Id.* at 330 (citing Van Guilder v. State, 709 S.W.2d 178, 180 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1169 (1986)).

80. Van Guilder v. State, 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1169 (1986).

81. *Schuessler*, 719 S.W.2d at 330. While holding that the court of appeals did not have authority to review factual sufficiency, the court of criminal appeals stated, "We find that a rational trier of fact could have resolved the conflicting testimony on legal insanity against appellant." *Id.*

C. *Courts of Appeals Decisions*

In *Combs*[82] the court of criminal appeals indicated that the courts of appeals appeared to be confused about the proper standard of review for sufficiency of the evidence. However, shortly after its pronouncement, the *Combs* decision itself was soundly criticized.[83] Chief Justice Carlos Cadena of the San Antonio Court of Appeals wrote in *Minor v. State*[84] that the holding in *Combs*—that a court of appeals lacked authority to reverse a criminal conviction when it determined that such a conviction was against the overwhelming preponderance of the evidence—indicated "a clear misinterpretation of TEX. CONST. art. V, § 6."[85]

Justice Cadena then demonstrated why the *Combs* decision reflected a misinterpretation of article V, section 6. His reasoning was laid out in the following manner. Before the 1980 amendment, article V, section 6 applied only in civil cases.[86] The 1980 amendment expanded the jurisdiction of the intermediate appellate courts.[87] The critical section of that amendment makes decisions of the courts of appeals "conclusive on all questions of fact brought before" them.[88] Before 1980, the Texas Supreme Court had consistently held that an intermediate court's decision was final on questions of factual sufficiency of the evidence—or questions of great weight and preponderance of the evidence.[89] Justice Cadena noted that the Texas Court of Criminal Appeals, however, had consistently concluded that it could not consider questions of factual sufficiency of the evidence. The

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82. Combs v. State, 643 S.W.2d 709 (Tex. Crim. App. 1982).

83. *See* Minor v. State, 653 S.W.2d 349, 351-55 (Tex. App.—San Antonio) (Cadena, C.J., concurring) (concurring in result only because question of whether finding of appellant's guilt was against great weight and preponderance of evidence was not before the court), *pet. ref'd per curiam*, 657 S.W.2d 811 (Tex. Crim. App. 1983).

84. 653 S.W.2d 349 (Tex. App.—San Antonio), *pet. ref'd per curiam*, 657 S.W.2d 811 (Tex. Crim. App. 1983).

85. *Id.* at 351.

86. *Id.*; *see also* Tex. S.J. Res. 45, § 1, 65th Leg., R.S., 1977 Tex. Gen. Laws 3336, 3336 (adopted in 1978 as TEX. CONST. art. V, § 6.

87. *Minor*, 653 S.W.2d at 351.; *see also* Tex. S.J. Res. 36, §§ 5-6, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223, 3224-25 (adopted in 1980 as TEX. CONST. art. V, § 6) (providing for appeal of criminal cases to intermediate courts).

88. *Minor*, 653 S.W.2d at 352. This provision was in the 1891 constitutional provision and has been in each amendment since then. TEX. CONST. art. V, § 6 (1891, amended 1978, 1980, 1985).

89. *Minor*, 653 S.W.2d at 352 (Cadena, C.J. concurring) (citing *In re* King's Estate, 150 Tex. 662, 666, 244 S.W.2d 660, 662 (1951)).

court of criminal appeals recognized that it had no fact jurisdiction, that is, no power to unfind facts or pass upon the great weight and preponderance of the evidence, as did the courts of civil appeals.[90] Justice Cadena observed that the distinction between the fact jurisdiction of the two appellate courts was that the jurisdiction of the court of criminal appeals was not defined by a constitutional provision that paralleled the language of article V, section 6, which defines the jurisdiction of the courts of appeals.[91]

As noted by Justice Cadena, the court of criminal appeals, before the 1980 amendment giving courts of appeals criminal jurisdiction, had conceded as to the distinction between its jurisdiction and that of the intermediate appellate courts.[92] Justice Cadena quoted the assurance given by the court of criminal appeals in the *Combs* decision that "[i]t *is* [thus] clear that the phrase 'questions of fact' *is*, in the context of Art. 5, Sec. 6, a legal term of art signifying 'questions of weight and preponderance of the evidence.' "[93] He then reviewed the court of appeals' decision in *Combs* to demonstrate that the intermediate court had obviously found the evidence factually insufficient to prove the offense charged.[94] By finding that the evidence was insufficient and by remanding the case for a new trial as opposed to directing an acquittal, the court of appeals did not hold that there was no evidence or legally insufficient evidence. On the contrary, it found factually insufficient evidence, Justice Cadena observed, noting that a remand for new trial would have violated the Double Jeopardy Clause of the United States Constitution had the court found the evidence legally insufficient.[95]

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90. *Id.* at 352 (citing Martin v. State, 605 S.W.2d 259, 261 (Tex. Crim. App. 1980)).

91. *Minor*, 653 S.W.2d at 352.

92. White v. State, 591 S.W.2d 851, 856 (Tex. Crim. App. 1980) (lacked jurisdiction to consider complaint that verdict was against great weight and preponderance of evidence as could courts of civil appeals); *Martin*, 605 S.W.2d at 261 (concluding no fact jurisdiction based on examination, by that court, of constitutional and statutory provisions relevant to its jurisdiction); *see also Minor*, 653 S.W.2d at 352 (before 1980 amendment court of criminal appeals consistently held it had no power to consider questions of fact).

93. *Minor*, 653 S.W.2d at 352 (quoting Combs v. State, 643 S.W.2d 709, 715 (Tex. Crim. App. 1982)).

94. *See Minor*, 653 S.W.2d at 353 (Cadena, C. J., concurring) (review of Houston court opinion demonstrates its dissatisfaction with judgment of conviction); *see also* Combs v. State, 631 S.W.2d 534, 538 (Tex. App.—Houston [1st Dist.]) (inconsistencies in testimony of witnesses led to conclusion by court of appeals that state had not proven cause of death), *rev'd*, 643 S.W.2d 709 (Tex. Crim. App. 1982).

95. *Minor*, 653 S.W.2d at 352-53; *see also* Greene v. Massey, 437 U.S. 19, 24 (1978) (sec-

On the other hand, Justice Cadena added, when a conviction is supported by some evidence but is found by an appellate court to be against the great weight and preponderance of the evidence, a remand for a new trial is appropriate.[96] Justice Cadena indicated that the court of criminal appeals might be paying lip service to the article V, section 6 constitutional grant of jurisdiction to the courts of appeals. He observed that, "Since, as the Court of Criminal Appeals recognizes in *Combs*, the phrase 'questions of fact' as used in § 6, signifies questions concerning weight and preponderance of the evidence, it appears that *Combs* fails to give the decision of the Houston Court that finality and conclusiveness which is clearly mandated by § 6."[97]Although the court of criminal appeals subsequently referred to Justice Cadena's opinion as "thoughtful" and noted that the question he raised had been given little attention, the court initially demonstrated an absence of open-mindedness.[98]

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ond trial precluded by Double Jeopardy Clause once reviewing court determines evidence at trial insufficient to support verdict); Burks v. United States, 437 U.S. 1, 10-11 (1978) (Double Jeopardy Clause precludes retrial once reviewing court finds evidence insufficient).

96. *Minor*, 653 S.W.2d at 354; *see also* Tibbs v. Florida, 457 U.S. 31, 45 (1982) (Double Jeopardy Clause does not preclude retrial when reversal based on weight of evidence).

97. *Minor*, 653 S.W.2d at 354.

98. *See generally* Minor v. State, 657 S.W.2d 811, 811-12 (Tex. Crim. App. 1983). Quoting extensively from the Texas Bar Journal, the court hinted that the matter was simply overlooked, that those responsible for the constitutional changes were unaware of what they were doing, and had the effect of the changes been known, the outcome might have been different. So that there is no mistake about what was indicated, footnote 1 in the *per curiam* opinion in *Minor v. State* is set out verbatim:

> Perhaps as a constitutional problem the matter was simply overlooked. For example, former Chief Justice Calvert discerned:
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> "The change of real significance is in appellate court jurisdiction in criminal cases. Whereas appeals in all criminal cases are now to the court of criminal appeals, only appeals in death sentence cases will be to the court of criminal appeals if this amendment is adopted, and all others will be to the intermediate courts . . . to be renamed Court of Appeals, with subsequent review by the court of criminal appeals as may be provided by law." [citation omitted]
>
> And in urging that time is of the essence, Chief Justice Calvert thought that after the amendment was adopted all that remained "to stop the overflow of cases to the court of criminal appeals will be delineation by the regular session of Legislature in 1971 [sic] of the respective jurisdictions of the courts of appeals and the court of criminal appeals," [citation omitted]
>
> For his part, Honorable Henry Wade saw sound conceptual changes in the prospective roles of the respective appellate courts, *viz*:
>
> "The role of the court of criminal appeals would be to fix or change policy and precedent. The role of the Courts of Appeals would be to apply those precedents to the record on appeal. Separating the precedent *making* function from the precedent *following* function is conceptually sound." . . .

Following decisions of the court of criminal appeals in *Van Guilder*,[99] *Schuessler*,[100] and other cases, the intermediate courts continued to demonstrate dismay at the higher court's view of the section 6 conclusivity provision. In 1986, two courts of appeals' decisions vehemently criticized the high court's decisions.

The El Paso Court of Appeals in *Meraz v. State*[101] was presented with an assigned error that a jury's finding of competency to stand trial for criminal charges was against the great weight and preponderance of the evidence.[102] The State argued that on the basis of authorities such as *Van Guilder* and *Schuessler*, this was a fact question which the court lacked jurisdiction to consider.[103] Chief Justice Stephen Preslar, before examining the court's fact jurisdiction, expressed the dilemma facing all courts of appeals: "The courts of appeals are caught in a conflict between those holdings of the court of criminal appeals and the legion of cases to the contrary by the Supreme Court of Texas."[104] Noting that in article V of the Texas Constitution, sections 4, 5, and 6, respectively, delineate the jurisdictions of the three separate appellate courts, Preslar wrote that each portion of the constitution is equal to the other and that no portion can be ignored.[105]

In a bold manner, the court proceeded to emphasize persuasively that the courts of appeals are granted exclusive fact jurisdiction; that

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> The opponents, James L. Branton, Esq. and Charles D. Butts, Esq., expressed concerns more about practical effects of the proposed changes than such technical matters now raised by Chief Justice Cadena. [citation omitted]
>
> Not one of those distinguished advocates so much as hinted at the prospect of a conviction in a criminal case being set aside by a court of appeals upon a determination that the judgment "is so against the great weight and preponderance of the evidence as to be manifestly unjust—this regardless of whether the record contains some 'evidence of probative force' in support of the verdict." *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). Indeed, given that understanding, one or more might well have switched sides.

Minor, 657 S.W.2d at 811, n.1 (quoting Robert W. Calvert, *For Amendment No. 8*, 43 TEX. B.J. 910, 910-11 (1980) and Henry Wade, *For Amendment No. 8*, 43 TEX. B.J. 912, 914-918 (1980)).

99. 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1169 (1986).

100. 719 S.W.2d 320 (Tex. Crim. App. 1986).

101. 714 S.W.2d 108 (Tex. App.—El Paso 1986), *aff'd*, 785 S.W.2d 146 (Tex. Crim. App. 1990).

102. *Id.* at 109 (principal question before court was proper standard of review on issue of competency).

103. *See id.* at 111 (state contended court lacked jurisdiction to consider great weight and preponderance questions when case involved affirmative defense of insanity).

104. *Id.*

105. *Meraz*, 714 S.W.2d at 111-12 (jurisdiction of courts spelled out in constitution).

in Texas a criminal defendant is entitled to challenge the factual sufficiency of the evidence; that the legislature cannot withdraw jurisdiction given to a court by the constitution; and that the reasoning by the court of criminal appeals in the *Minor* and *Van Guilder* decisions—that legislative enactments were intended to alter the constitution—is facially fallacious.[106] Significantly, although the court of appeals discussed the differing burdens between proving facts in a criminal trial in chief, and proving affirmative defenses to criminal charges and establishing mental competency to stand trial, the court in no manner expressed an opinion that the constitutional grant of authority to the courts of appeals to review factual questions would be affected by the setting in which the factual question arises.[107]

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106. *Id.* at 112. So compelling is Preslar's writing that it is appropriate to quote. He wrote:

> The fact finding jurisdiction is lodged in the courts of appeals. It is an affirmative grant of jurisdiction. When the constitution expressly grants jurisdiction over a particular subject matter to a particular court and not to another, then it is presumed that the jurisdiction so conferred is exclusive. The defendant is entitled to this review of the sufficiency of the evidence under the Code of Criminal Procedure and the constitution and we are bound to afford him a review of his point of error. It is a due process right as such is defined. Nor can it be altered or changed by legislative enactments as is reasoned in *Minor v. State* and *Van Guilder*. This, because the legislature cannot withdraw jurisdiction given a court by the constitution.
>
> The provision of Article 5, Section 6, has been a part of our constitution since 1891. Twice, the citizens of this state have in the process of amending the constitution reenacted or retained it. Importantly, these reenactments have come with and since the courts of appeals were given criminal jurisdiction. An even more important fact is that the last reenactment came (November 1985) at a time when it served to ratify three courts of appeals cases holding that the courts of appeals had jurisdiction to consider great weight and preponderance of the evidence questions in cases involving the affirmative defense of insanity. *Van Guilder v. State*, *Schuessler v. State*, and *Baker v. State* are the cases involved. These cases were on the books and a known part of our jurisprudence when the electorate reenacted Article 5, Section 6, in November, 1985. Thus, the electorate gave its approval of the court of appeals' application of Article 5, Section 6, provisions to the criminal law. It is a principle of law that such action by the electorate shows that no departure from that practice was intended. We conclude that the jurisdiction of the courts of appeals to consider the fact question of the great weight and preponderance of the evidence in this instance exists by the terms of the constitution independent of court decisions.

Id. (citations omitted).

107. *Id.* at 114-15. In passing the court observed:

> The Texas system of split jurisdiction of appeals between the criminal and civil creates problems, except for the fact that the courts of appeals have this fact finding constitutional authority. One is reminded of the saying "Jack Sprat could eat no fat, his wife could eat no lean, so between the two of them, they licked the platter clean." The Supreme Court and the court of criminal appeals are forbidden to eat from the same

Next to assail the logic of the court of criminal appeals decisions interpreting section 6 was the Tyler Court of Appeals. In 1985, in *Hill v. State*,[108] the Tyler court delivered an opinion in a probation revocation proceeding.[109] The court concluded that "the trial court's finding that John Hill had the ability to pay probation fees and court costs was so contrary to the great weight and preponderance of the evidence as to be manifestly wrong and unjust."[110] In reviewing the sufficiency of the evidence as to Hill's affirmative defense of inability to pay, the court of appeals applied the standard of review mandated by the Supreme Court of Texas.[111] The court of criminal appeals reversed the court of appeals and remanded the case to it for reconsideration under the *Van Guilder* standard.[112] In doing so, that court observed that it had previously held that courts of appeals do not have jurisdiction to consider great weight and preponderance questions in cases involving affirmative defenses.[113] The Tyler Court of Appeals noted that its initial decision in 1985 was after the court of criminal appeals' decisions in *Combs* and *Minor*, but before that court's decisions in *Baker*, *Schuessler*, and *Arnold* in 1986.[114] Quoting from *Van*

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platter, but the dual jurisdiction of the courts of appeals in civil and criminal matters takes care of the situation. The due process rights of defendants are protected in that they can get review of all aspects of their trial. Due process might be lacking in such instance if final authority on fact questions were not lodged in the court of appeals. It would seem to be in keeping with the new rules jointly covering civil and criminal matters if the court of criminal appeals, where possible, would review courts of appeals' opinions in the same manner that they are reviewed by the Supreme Court.

Id.

108. 718 S.W.2d 751 (Tex. App.—Tyler 1985), *rev'd*, 719 S.W.2d 199 (Tex. Crim. App. 1986).

109. *Id.* at 752.

110. *Id.* at 755 (reversed and remanded).

111. *Id.* at 754-55 (following *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)).

112. Hill v. State, 719 S.W.2d 199, 202 (Tex. Crim. App. 1986).

113. *Id.* at 201; *see also* Van Guilder v. State, 709 S.W.2d 178, 181 (Tex. Crim. App. 1985) (courts of appeals not allowed to reweigh or reclassify evidence in case involving affirmative defense), *cert. denied*, 476 U.S. 1169 (1986).

114. Hill v. State, 721 S.W.2d 953, 954 (Tex. App.—Tyler 1986, no pet.) (court of appeals reconsideration under review standard of Hill v. State, 719 S.W.2d 199 (Tex. Crim. App. 1986)). The *Baker* and *Arnold* decisions mentioned refer to Baker v. State, 707 S.W.2d 893 (Tex. Crim. App. 1986) and Arnold v. State, 719 S.W.2d 590 (Tex. Crim. App. 1986). In *Baker*, the court held that the court of appeals erred in failing to follow the correct standard which was announced in *Van Guilder v. State* (decided after the court of appeals' decision in *Baker*). *Baker*, 707 S.W.2d at 894. The court again rejected the argument that courts of appeals can consider great weight and preponderance of the evidence fact questions in cases involving the affirmative defense of insanity. *Id.* *Arnold* was similar, but involved review of

Guilder, Justice Colley wrote for the Tyler court that:

> As is obvious, the real holding by the court of criminal appeals in *Van Guilder* and *Hill* is that the Texas Courts of Appeals do not have jurisdiction to consider great weight and preponderance of the evidence fact questions in criminal cases. . . . That holding appears to be in direct conflict with the plain wording of Tex. Const. art. 5, § 6.[115]

The opinion continued the attack on the foundation for the court of criminal appeals' construction of section 6 by urging that all of that court's decisions going back to *Combs* simply ignore section 6 as it applies to the courts of appeals.[116] Once again, it was pointed out that whether the Texas Constitution gave the court of criminal appeals fact jurisdiction was irrelevant to that court's consideration of the meaning of section 6 as it applies to the courts of appeals.[117] Ultimately, the Tyler court applied the standard mandated by *Van Guilder* and again reversed the order revoking probation.[118]

These decisions by the courts of appeals are representative of the numerous criticisms launched by those courts.[119] The court of crimi-

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proof of competency to stand trial. *Arnold*, 719 S.W.2d at 592. In *Arnold*, the court said that the standard in such cases was the same as in review of insanity defense cases. *Id.*

115. *Hill*, 721 S.W.2d at 954.

116. *Id.* at 955. Justice Colley went further, saying:

> Certainly the High Court may establish definitions of evidentiary sufficiency to be applied in appellate review *agreeable* to the state constitution, but not one which flies in the face of the plain, strong words of section 6 or one which operates to strip away a convicted defendant's state constitutional right to seek a new trial in the intermediate appellate courts of this state on the ground that the finding of guilt is against the great weight and preponderance of the evidence.

Id. at 955-56.

117. *Id.* at 956. Justice Colley persuasively made the point. He stated that:

> The historical fact that the court of criminal appeals has never had "fact" jurisdiction certainly should not be a consideration in the determination of whether the courts of appeals, since September 1, 1981, have had jurisdiction under section 6 to reverse any findings made by a judge or jury in criminal cases when that finding is so contrary to the weight and preponderance of the evidence as to be manifestly wrong and unjust. . . . The fact that the burden of proof for conviction or a finding of guilt is [proof] beyond a reasonable doubt instead of by a preponderance of the evidence provides no basis for such a distinction. Tibbs v. Florida,[457 U.S. 31 (1982)]. Said another way, logically, a finding of guilt based on the "beyond a reasonable doubt" standard could be found on appellate review to be against the great weight and preponderance of the evidence just as a finding, or refusal to find, that an affirmative defense exists or that a defendant is competent based on the "preponderance of the evidence" standard can be found on review to be against the great weight and preponderance.

Id.

118. *Id.* at 957.

119. *See* Barber v. State, 773 S.W.2d 631, 634 (Tex. App.—Texarkana 1989) (urging re-

nal appeals has had numerous opportunities to fully alter the path it chose in *Combs*, but as yet has not done so. The tack taken by that court, while indicating room for optimism that section 6 may ultimately be construed to mean what it says, has been more of a course alteration than it has been a course correction. In the meantime, the courts of appeals are required to parry challenges to the factual sufficiency of the evidence with court of criminal appeals' decisions which lack the rationality equal to that found in the challenges.[120]

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consideration of *Combs* bar to appellate court fact determination in criminal cases), *pet. dism'd, improvidently granted*, State v. Barber, 802 S.W.2d 696 (Tex. Crim. App. 1991). After reviewing the constitutional background of the conclusivity issue, the court of appeals looked at other courts of appeals' decisions as well as those of the court of criminal appeals and concluded that the court of criminal appeals needed to look again at its *Combs* decision. Discussing article V, section 6, the court said, "This constitutional grant of authority plainly appears to (1) grant the courts of appeals authority to review questions of fact brought to them, and (2) prohibit any other court in the state from interfering with those courts' exercise of that constitutional duty." *Id.* at 634. The court of appeals asked the court of criminal appeals to review this issue. It said, "We agree that *Combs*, insofar as it interprets Article V, § 6 of the Texas Constitution, should indeed be revisited without delay." *Id.* at 635. Although the petition for discretionary review was granted in 1989, it ultimately was dismissed in 1991. Thus, the court of criminal appeals effectively declined again to re-evaluate *Combs*. *See* State v. Barber, 802 S.W.2d 696, 696 (Tex. Crim. App. 1991) (declining to comment on language of lower court); *see also* Cooney v. State, 803 S.W.2d 422, 423-25 (Tex. App.—El Paso 1991, pet. ref'd) (more recent court of appeals decision expressing sound criticism of court of criminal appeals' position on question).

120. Today, the courts of appeals are being asked to set aside convictions because the evidence is factually insufficient. One recent example of such requests appears in a brief filed by Randy Schaffer, a Houston attorney, in a case entitled Cook v. State, No. 6-90-068-CR (Tex. App.—Texarkana, Mar. 26, 1991, pet. ref'd) (unpublished opinion). In Schaffer's brief, after demonstrating that *Combs* should be considered to be of no effect, he cogently contended that:

> Decisions of the court of criminal appeals other than *Meraz* support the conclusion that the court is prepared to reconsider *Combs* as it applies to the elements of the offense. In *Hill v. State*, 719 S.W.2d 199 (Tex. Crim. App. 1986), Judge Clinton, joined in dissent by Presiding Judge Onion and McCormick, observed that *Combs* did not delineate the standard of review to be used by the court of appeals on direct appeal, and opined that permitting a reversal on a finding that a guilty verdict is against the great weight and preponderance of the evidence will not violate due process. *Id.* at 203. In *Gold v. State*, 736 S.W.2d 685 (Tex. Crim. App. 1987), the majority observed that it might be inclined to reverse the conviction and remand for a new trial if it had jurisdiction to pass on the great weight and preponderance of the evidence. *Id.* at 690. In dissent, Judge Teague noted that the issue was really whether the courts of appeals have jurisdiction to decide factual sufficiency, asserted that he agreed with Judge Colley's analysis in *Hill* on remand and observed that the time had come to reconsider *Combs*. *Id.* at 691, 699. Finally, in *Moreno v. State*, 755 S.W.2d 866 (Tex. Crim. App. 1988), Judge Teague repeated his *Gold* dissent, prompting Judge Clinton's concurring opinion, joined by Judge Duncan, which suggested that the courts of appeals have jurisdiction to pass on factual sufficiency. *Id.* at 872 n.5. Since *Butler* has already overruled part of *Combs*, and in view of the express

D. *The Court of Criminal Appeals' Current Perspective*

As may be recalled, the initial response from the court of criminal appeals to the criticism was to label it "thoughtful" and to ignore it.[121] The next several years saw the court of criminal appeals stand firm in an attempt to justify its earlier position.

1. *Meraz v. State*[122] Creates Optimism

In 1990, the court indicated for the first time that perhaps it had begun to read section 6 in a manner similar to the other Texas appellate courts. The court chose to review the court of appeals' decision in *Meraz* and stated that it did so partly to:

> extract the courts of appeals from the quagmire they "are caught in [because of] a conflict between those holdings of the court of criminal appeals [i.e., *Van Guilder v. State*; *Schuessler v. State*; and *Arnold v. State*] and the legion of cases to the contrary by the Supreme Court of Texas."[123]

Initially the court observed that the issue had generated a substantial amount of discord between it and the various courts of appeals and called the culprit the conclusivity provision of section 6.[124] The court

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reservation of this issue in *Meraz*, this court may properly conduct its own analysis of the issue without feeling constrained by *Combs*.

Neither logic nor reason support the *Combs* holding that courts of appeals cannot consider factual sufficiency. Significant parts of *Combs* have been overruled in *Butler* and *Meraz*, and the remainder hangs by a slender thread. Although article V, § 6 of the Texas Constitution was amended once the courts of civil appeals acquired criminal jurisdiction, it was not amended in such a manner as to deprive the courts of appeals from reviewing factual sufficiency in criminal cases. It could have been amended to provide that "the decisions of said courts shall be conclusive on all questions of fact brought before them on appeal or error in *civil cases*." As written, it does not bar the courts of appeals from considering factual sufficiency in criminal cases. An interpretation to the contrary renders the constitutional mandate meaningless in criminal cases and precludes appellate courts from correcting serious miscarriages of justice which may arise when the evidence preponderates against the conviction.

Brief for Appellant at 23-24, Cook v. State, No. 6-90-068-CR (Tex. App.—Texarkana, Mar. 26, 1991, pet. ref'd) (unpublished opinion).

121. *See* Minor v. State, 657 S.W.2d 811, 811 (Tex. Crim. App. 1985) (referring to Chief Justice Cadena's concurring opinion in lower court's decision).

122. 785 S.W.2d 146 (Tex. Crim. App. 1990).

123. *Id.* at 147 (quoting Meraz v. State, 714 S.W.2d 108, 111 (Tex. App.—El Paso 1986), *aff'd*, 785 S.W.2d 146 (Tex. Crim. App. 1990)).

124. *Meraz*, 785 S.W.2d at 149. Judge Duncan, writing for the court, indicated that:

> It is also appropriate to note that the issue in this case has generated a substantial amount of discord between this Court and the various courts of appeals. The primary culprit in

noticed that since 1891, when article V, section 6 granted the courts of civil appeals jurisdiction to examine the facts, the Texas Supreme Court had consistently held that the intermediate appellate courts had the authority to determine whether findings were supported by adequate evidence; further, the court of criminal appeals had consistently held that it did not have jurisdiction to review the evidence in a similar manner.[125] In a review of its *Van Guilder*, *Schuessler*, and *Arnold* decisions, Judge Duncan, writing for the court, candidly demonstrated the folly of the rationale of the *Van Guilder* and *Schuessler* decisions and wrote that the "concrete in which *Arnold* was set obviously flowed from" those decisions, and admitted that those three decisions were erroneous.[126]

In looking at those cases, Judge Duncan noted that they presented fact questions concerning proof of an issue on which the defendant has the burden of proof.[127] The court then discussed affirmative defenses and concluded that, "it is apparent therefore that a review of the facts relative to proof of an affirmative defense does not inexorably lead to a review of facts relative to proof of the elements of the offense."[128] The holding in *Meraz* was that:

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this larceny of confusion is one sentence in Art. V, § 6 of the Texas Constitution. The relevant sentence states: "Provided, that the decision of said courts [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error." *Id.* Nearly a century ago, in *Choate v. San Antonio & A. P. Ry.*, the Texas Supreme Court analyzed this sentence and interpreted it as follows: "The purpose of that provision to amend section 6, art. 5, of the constitution . . . was not to enlarge their [courts of civil appeals'] power over questions of fact, but to restrict, in express terms, the jurisdiction of the supreme court, and to confine it to questions of law.' " 91 Tex. 406, 44 S.W. 69, 69 (1898).

Id.

125. *See id.* (supreme court has held consistently that it has no jurisdiction to review factual sufficiency of evidence).

126. *Meraz*, 785 S.W.2d at 152.

127. *Id.* More or less, the court of criminal appeals in *Meraz* adopted Judge Clinton's previously expressed views. The court said that:

Judge Clinton's perceptions in his dissenting opinion in *Schuessler*, at 330-31, now come home to roost as they clearly demonstrate that the standard of review enunciated in Jackson [v. Virginia, 443 U.S. 307 (1979)] is not a constitutional standard imperative to determining whether a defendant sustained his burden of proof in presenting an affirmative defense. . . . While some form of appellate review of the evidentiary sufficiency of an affirmative defense is necessary, it was not appropriate for this Court to create a standard of review which is in conflict with the language of our State Constitution.

Id.

128. *Id.* at 153. The court then added that, "Although a defendant certainly is not foreclosed from requesting both reviews, the former does not incorporate the latter." *Id.*

> Consequently, this Court was not constitutionally authorized to adopt a standard of review for the court of appeals concerning an evidentiary review of the insanity defense which was inconsistent with Art. V, § 6, of our Constitution. In doing so we interfered with the fact jurisdiction of the intermediate appellate courts.[129]

After this holding, the court proceeded to discuss instances in which a defendant seeks to challenge the sufficiency of the evidence to warrant a conviction—not merely that relevant to an affirmative defense. The court observed that the language of article V, section 6 has remained essentially unchanged for a hundred years and reviewed relevant recent legislative and public actions.

It noted that in 1979 the legislature proposed that the court of civil appeals become the court of appeals and be vested with intermediate criminal jurisdiction.[130] This resolution passed at the general election and became effective September 1, 1981. In two elections, within two years, the public voted to confirm the authority of the court of appeals to review factual sufficiency to the exclusion of the supreme court. "[I]n 1985, the public again voted on Art. V, § 6, . . . and again affirmed the language that the court of appeals' determination of fact shall be conclusive."[131] After further review of the Texas Supreme Court's view of the conclusivity provision, the court announced that courts of appeals have constitutional authority to determine whether a finding is against the great weight and preponderance of the evidence. At that point, the court of criminal appeals had patently expressed its agreement with the other appellate courts of Texas in viewing section 6: the courts of appeals can review for factual sufficiency of the evidence. Regrettably, the court did not stop there.

Having written convincingly and having accurately pegged the constitutional role of the courts of appeals in reviewing questions of the factual sufficiency of the evidence generally, the court inexplicably retreated from the position that had seemed obvious, even to it. The court, in its penultimate paragraph, pointedly expressed no opinion on the role of the courts of appeals in reviewing the sufficiency of the evidence relative to the proof of the elements of the offense.[132] Since

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129. *Id.*

130. Meraz v. State, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990); Tex. S.J. Res. 36, § 5, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223, 3224.

131. *Meraz*, 785 S.W.2d at 153; Tex. S.J. Res. 14, § 2, 69th Leg., R.S., 1985 Tex. Gen Laws 3351, 3356-57 (adopted as TEX. CONST. art. V, § 6 in Nov., 1985).

132. *Meraz*, 785 S.W.2d at 156.

the *Meraz* decision, the court has not expressed such an opinion, leaving the courts of appeals in the same "quagmire" they were in—except as to the review of factual sufficiency of the evidence relating to issues on which a defendant has the burden of proof.

2. Optimism Fades

Hopes that *Meraz* may have meant all that it said, not just what it held, were short-lived. In the same year that *Meraz* was decided, a unanimous court gratuitously announced that an appellate court does not engage in its own factual review of the evidence, relegating *Meraz* to footnote status applicable only in very narrow circumstances.[133]

V. Resolution of Conflict—A Proposal

A. *The Need for a Uniform View of Article V, Section 6*

By taking the view it has of the meaning of article V, section 6, the court of criminal appeals has created an intolerable situation in which the same constitutional mandate has two legal meanings within Texas' legal system. This troublesome situation calls for a better, more uniform reading of section 6.

Although the court of criminal appeals has said in the past that the courts of appeals are "constitutionally given the authority to determine if a jury finding is against the great weight and preponderance of the evidence and if this is improper it is up to the people of the State of Texas to amend the Constitution,"[134] it now seems to have withdrawn from that position. Having finally said that it too reads article V, section 6 to mean what it says with regard to the courts of appeals' jurisdiction to review for factual sufficiency of the evidence, it currently limits that holding to those factual issues on which a defendant has the burden of proof.

With regard to whether courts of appeals can review for factual sufficiency of the evidence, that is, whether they can determine that a finding of guilt of an offense is against the great weight and preponderance of the evidence, the conflict between the court of criminal appeals and the other appellate courts is as great as ever. Unless a

133. *See* Romero v. State, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990) (appellate court only decides whether trial court's findings of fact are supported by record). If there is support in the record for those findings, the court of appeals may not disturb them. *Id.*

134. Meraz v. State, 785 S.W.2d 146, 154 (Tex. Crim. App. 1990).

court of appeals is reviewing the factual sufficiency of the evidence relative to an issue on which a defendant has the burden of proof, the law of Texas is still that a court of appeals—in deciding appeals in criminal cases—is not conclusive on questions of fact; it cannot even consider questions such as the factual sufficiency, as distinguished from the legal sufficiency, of the evidence to support a verdict.[135]

The court of criminal appeals has frequently been criticized. It has been said that at times the court fails to give effect to the plain meaning of constitutional language.[136] It has also been said that the court lacks common sense.[137] By and large, such attacks are not meritorious. Here, however, these two criticisms seem to describe perfectly the court's view of article V, section 6; it shows a lack of common sense and an unwillingness to give ordinary meaning to plain words. By giving plain meaning to the constitution, the court can join all other Texas appellate courts which read the ordinary words of article V, section 6 in a uniform manner. Only when the court of criminal appeals is willing to hold that article V, section 6 means what it says, will all the Texas appellate courts be on the same wavelength. More than mere uniformity will be the end result.

B. *The Proposal: Two Degrees of Appellate Evidentiary Review*

In *Combs*, the court of criminal appeals demonstrated a continued awareness that, in civil cases, there were two distinct levels of evidentiary complaint: factually insufficient evidence (insufficient evidence) and legally insufficient evidence (no evidence). It further recognized

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135. Citing the language and logic of *Meraz*, appellants in a number of appeals have raised points challenging the factual sufficiency of the evidence to support a guilty verdict. Such points have been denied on the basis that *Meraz* was strictly limited to issues on which a defendant has the burden of proof. *See, e.g.*, Marsh v. State, 800 S.W.2d 607, 610 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (challenge of factual sufficiency of evidence to support conviction denied; reliance on *Meraz* held "misplaced"); Hunter v. State, 799 S.W.2d 356, 358 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (Hunter's claim that verdict was against great weight and preponderance of evidence rejected; *Meraz* did not generally change standard of review for insufficient evidence in criminal cases); Mason v. State, 798 S.W.2d 854, 857 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (under *Meraz* challenge of factual insufficiency limited to issues on which defendant has burden of proof).

136. J. Thomas Sullivan, *The Texas Court of Criminal Appeals: A Modest Critique of Appellate Decisionmaking*, 10 AM. J. CRIM. L. 113, 134 (1982) (discussing examples of court of criminal appeals' failure to plainly interpret statutory provisions).

137. Paul Burka, *Trial by Technicality*, TEXAS MONTHLY, Apr. 1982, at 127, 241. Burka states that, unless the court abandons its current philosophy, procedural reforms such as easing the court's workload will be pointless. *Id.*

that, by virtue of the constitution, in civil cases, decisions of the courts of appeals were final on factual insufficiency questions, while the supreme court reviewed no evidence or legal insufficiency questions. Although acknowledging that article V, section 6 applied in both civil and criminal cases, the court reiterated that it could not pass on factual sufficiency questions. Without any apparent basis, the court leaped the logic gap, saying that since it could not do so, neither could the courts of appeals.[138] This notion, ill-conceived in *Combs*, not only has never made sense, it is also plainly inconsistent with article V, section 6.

The proper resolution appears to be for the court of criminal appeals to acknowledge the constitutional authority granted to the courts of appeals by virtue of article V, section 6 and to interpret that provision as it is written—that is, to allow decisions of the courts of appeals to be conclusive on all questions of fact. This would allow for two degrees of appellate evidentiary complaint in both civil and criminal cases. This approach is legally and logically consistent with the federal and state constitutions.[139] Courts of appeals would then review for legal and factual sufficiency of the evidence in all types of

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138. This was accomplished through the infamous footnote one in *Combs*. Combs v. State, 643 S.W.2d 709, 716 n.1 (Tex. Crim. App. 1982). Although language in *Meraz* expressly disavows footnote one in *Combs*, apparently the court remains "unable to perceive" that courts of appeals might review two degrees of evidentiary complaints: questions concerning factual as well as legal sufficiency. *Cf.* Meraz v. State, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990) (disavowing footnote one in *Combs*).

139. Max Osborn, Chief Justice of the El Paso Court of Appeals, recently suggested this approach, which is consistent with a plain reading of article V, section 6. Osborn wrote for the court that:

> The existence of two degrees of appellate evidentiary complaint, with their differing concepts of error and their differing appellate procedures, is an elementary, fundamental proposition in civil cases, yet historically alien to the criminal docket. There is, however, no legal or logical basis for excluding such a dual approach in criminal cases. We referred to our opinion in *Schuessler*, 647 S.W.2d at 748-749. In rejecting our analysis in that case, and applying a modified standard of review under *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), albeit indirectly by reference to *Van Guilder v. State*, 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1169, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986), the Court of Criminal Appeals attempted to maintain a "single standard" of appellate review for sufficiency of the evidence challenges, modifying its application only slightly when dealing with an affirmative defense or other issue upon which the defense bears the burden of proof.
>
> In any event, our suggestion that two degrees of appellate evidentiary complaint are applicable in criminal cases is not inconsistent with any of the state or federal authority relied upon in *Schuessler*, *Van Guilder* and *Meraz*.

Cooney v. State, 803 S.W.2d 422, 424 (Tex. App.—El Paso 1991, pet. ref'd).

cases. When those courts determine the evidence to be factually insufficient, the appropriate remedy—in both civil and criminal cases—is to reverse and remand for a new trial; when the evidence is determined to be legally insufficient, it is proper in all cases to reverse and render. Furthermore, the court of criminal appeals would lack jurisdiction to review a court of appeals' determination on the question concerning the factual sufficiency of the evidence.

C. *Proposal Proper under Federal Constitutional Standards*

The proposal for two degrees of appellate complaint has been demonstrated to be consistent with the Texas Constitution. Perhaps one might question how the suggestion would mesh with the United States Constitution. A cursory look at United States Supreme Court decisions indicates that the suggestion is entirely consistent with federal constitutional principles. The Supreme Court has held that in reviewing an appeal from a conviction for a criminal offense, when an appellate court finds the evidence to be legally insufficient, the sovereign is constitutionally prohibited from further prosecution.[140] On the other hand, when the evidence is factually insufficient, a defendant may be retried; the appellate remedy is to reverse and remand for a new trial.[141] Thus, the procedure suggested here is entirely consistent

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140. Greene v. Massey, 437 U.S. 19, 23 (1978); Burks v. United States, 437 U.S. 1, 16 (1978). In *Burks*, the defendant offered expert testimony to support his defense of insanity to the charge of bank robbery. *Burks*, 437 U.S. at 2-3. Prior to the case being submitted to the jury, the district court denied Burks' motion for acquittal. *Id.* at 3. He was found guilty. He then filed a motion for new trial on the basis that the evidence was insufficient to support the jury's verdict. After his motion was denied, he appealed to the court of appeals, which agreed that the evidence was insufficient and reversed his conviction. *Id.* In so doing, the court of appeals conceded that Burks had raised a prima facie case of insanity and that the government had not met its burden of proving insanity beyond a reasonable doubt. *Id.* at 4. However, instead of dismissing the case against Burks, the court remanded to the district court in order for it to determine if a directed verdict of acquittal or a new trial would be proper. *Id.* The Supreme Court granted certiorari to decide the question of whether an accused may be retried when his prior conviction was reversed by an appellate court solely because there was insufficient evidence to sustain the jury's verdict. *Id.* at 2. The Court held that the Double Jeopardy Clause of the Fifth Amendment precludes retrial once the reviewing court finds the evidence insufficient to support the jury's verdict of guilty. *Id.* at 18. Under these circumstances, the only proper remedy available is for that court to direct a judgment of acquittal. *Id.*; *see also Greene*, 437 U.S. at 26-27 (inasmuch as *Burks* held that Double Jeopardy Clause precluded subsequent trial after reviewing court determines evidence insufficient to sustain guilty verdict, case must be remanded for determination of whether lower court's basis for reversal was insufficient evidence).

141. Tibbs v. Florida, 457 U.S. 31, 42-43 (1982). Tibbs was convicted of rape and mur-

with federal constitutional principles.[142]

VI. CONCLUSION

In continuing to refuse to give the state constitutional mandate—that decisions of courts of appeals "shall be conclusive on all ques-

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der by a jury and subsequently sentenced to death. *Id.* at 35. On appeal, the state supreme court reversed. A plurality of the Florida Supreme Court justices reviewed the evidence before the jury and, based on what they determined were weaknesses and inconsistencies in the state's case, they determined that a new trial was required "in the interests of justice." *Id.* (citing Tibbs v. State, 337 So.2d 788, 790 (Fla.1976) (*Tibbs I*, initial reversal by Florida Supreme Court)). The case was remanded to the trial court, which determined that a new trial would violate the Double Jeopardy Clause as well as the principles of *Burks v. United States* and *Greene v. Massey*. *Id.* at 37. An intermediate appellate court reversed the trial court's dismissal and remanded the case again for a new trial. The Florida Supreme Court affirmed. *Id.* In doing so, the court detailed the difference between a reversal based on insufficient evidence and one based on a determination by the appellate court that the verdict is against the weight of the evidence. *Id.* at 37-38. A determination by the appellate court that a lower court's holding is founded on insufficient evidence means that, when the evidence is viewed in a light most favorable to the prosecution, no rational finder of fact could have found the defendant guilty beyond a reasonable doubt. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (insufficient evidence evaluation in criminal cases centers on determination of whether or not the record evidence would support a guilty finding beyond a reasonable doubt). However, when an appellate court concludes that a case must be reversed, based on the weight of the evidence, that court is required to examine all of the evidence presented at trial. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982). The "weight of the evidence" means that the trier of fact determined that a greater amount of credible evidence supported one outcome over another. *Id.* The Florida Supreme Court then concluded that the original *Tibbs* opinion was reversed based on the weight of the evidence, since there was testimony in the record which itself would constitute legally sufficient evidence to support Tibbs' conviction under Florida law. *Id.* at 1126. Since it determined that Tibbs' previous convictions were not based on insufficient evidence, the Florida Supreme Court concluded that *Burks* and *Massey* did not preclude Tibbs from being retried. *Id.* at 1127. Those decisions only prevent a defendant from being retried when his conviction is based on insufficient evidence. The court went on to say that the principles of double jeopardy are not implicated when a reversal is based on the weight of the evidence. *Id.* In its review of the Florida Supreme Court's decision, the Supreme Court examined a long line of its prior decisions and determined that that court's interpretation of the principles of double jeopardy was correct. *Tibbs*, 457 U.S. at 39-40; *see, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 720 (1969) (guarantee against double jeopardy does not impose restrictions upon power to retry defendant whose first conviction was set aside); United States v. Tateo, 377 U.S. 463, 465 (1964) (government may retry defendant when prior conviction set aside); Ball v. United States, 163 U.S. 662, 671-72 (1896) (defendant whose previous judgment is set aside may be retried for same offense). In so determining, the Supreme Court stated its belief that the granting of immunity from punishment to every accused whose first trial was reversed due to defects would be too great a price for society to pay. *Tateo*, 377 U.S. at 466. Additionally, retrial after a conviction is reversed is not the kind of oppression that the Double Jeopardy Clause sought to abolish. United States v. Scott, 437 U.S. 82, 89-92 (1978).

142. This was quite obvious to the court of criminal appeals in the *Meraz* decision, as Judge Duncan indicated. Meraz v. State, 785 S.W.2d 146, 155-56 (Tex. Crim. App. 1990).

tions of fact"—its plain meaning, the court of criminal appeals demonstrates an inability to read plainly, a lack of common sense, and a degree of inflexibility. It is perhaps because of such traits, among other things, that in previous years the legislature, blue-ribbon panels, and others have called for the abolition of the Texas Court of Criminal Appeals and have proposed a "unified" system in which the Texas Supreme Court reviews civil and criminal appeals.[143] While a debate of the merits of such a plan is well beyond the scope of this article, two different readings of a single constitutional provision would not occur under a unified system. Until the court of criminal appeals demonstrates a more sensible approach to apparently plain questions, it subjects itself to further attacks on its intellectual integrity and on the need for its very existence.

The judicial article contemplates a system under which the courts of appeals finally decide factual questions. The system is designed to allow the highest courts in Texas to function properly to resolve conflicts in intermediate court decisions, and to supervise the orderly development of the law while determining significant legal issues.[144] If

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143. In 1918, Roscoe Pound addressed the Texas Bar Association on "Judicial Organization," after which the bar adopted a report calling for a judicial article which would unify the judicial structure in Texas under the supervision of the supreme court. Clarence A. Guittard, *Court Reform, Texas Style*, 21 SW. L.J. 451 (1967). Such Pound-style restructuring of the judicial system has been favored by such bar leaders as C. S. Potts, James P. Alexander, Robert W. Stayton, Charles T. McCormick, Robert G. Storey, Charles I. Francis, and Robert W. Calvert. *Id.* at 453. As early as 1953, a state bar constitutional revision panel proposed a "unified" system. *Should Judiciary Article Be Revised*, 17 TEX. B.J. 686, 687 (1954). In 1972, the Chief Justices' Task Force for Court Improvement recommended to the legislature a unified court system. C. Raymond Judice, *The Texas Judicial System: Historical Development and Efforts Towards Court Modernization*, 14 S. TEX. L.J. 295, 329 (1973). Raymond Judice proposed a unified court system with a supreme court exercising civil and criminal jurisdiction. *Id.* at 333. And, a constitutional amendment creating a unified system was submitted to the voters in 1975. *See* John F. Onion, Jr., *The Proposed Constitution: What's Wrong with Article V*, VOICE FOR THE DEFENSE Fall-Winter, 1975, at 2, 2-3. Others, for example Paul Burka, have suggested that the court be abolished for less compelling reasons. *See* Paul Burka, *Trial by Technicality*, TEXAS MONTHLY, Apr. 1982, at 127, 127.

144. Clarence A. Guittard, former Chief Justice of the Texas Court of Appeals for the Fifth District, testified before the Judiciary Committee of the Texas Constitutional Convention as to the proper role of a state's highest court in reviewing intermediate appellate court decisions and reduced his suggestions to writing in a letter to Representative Ben Z. Grant on February 5, 1974. Clarence A. Guittard, Unifying the Texas Appellate Courts (1974) (unpublished essay on file with *St. Mary's Law Journal*). Concerning the role of the highest state court in reviewing intermediate appellate court decisions, Guittard commented that, "Consequently, the conclusion may be drawn that the second review has only two proper functions, to resolve conflicts in the decisions of the intermediate courts and to supervise the orderly development of the law, which would be uncertain at best if left to several courts of coordinate

the court of criminal appeals were to follow the proposal suggested in this article, it would not exercise any jurisdiction over factual questions. Then it could remain aloof from matters of factual dispute, concern itself more with the truly significant questions of law, and at the same time function in accordance with the spirit and letter of the constitutional judicial article.

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rank." *Id.* at 5. This comment is consistent with views expressed earlier that the highest state court should concern itself with uniformity of the decisions of the intermediate appellate courts and matters of public interest. *See, e.g.*, A. H. McKnight, *Suggestions for Improving Court Procedure in Texas*, 5 TEX. L. REV. 285, 286 (1927) (appeals from intermediate courts to highest court should be restricted); Joe Greenhill, *State of the Judiciary*, 42 TEX. B.J. 379, 380 (1979) (intermediate courts should handle great bulk of criminal cases).