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Critical Error

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INTRODUCTION

Federal Rule of Civil Procedure 52 allows an appellate court to set aside trial court factual determinations only if it finds “clear error.”¹ In civil cases tried without a jury, Rule 52 is the lens through which it must evaluate those determinations. To some, clear error is a mere judicial fiction. Others minimize it as “irrelevant to the case merits,” a “meaningless outcome determinative exhortation,” a “post-hoc rationalization,” or “dismissively obvious.”²

Yet Rule 52’s “clear error” admonition is perhaps the most referenced rule of civil procedure.³ It is “ISSUE I” of any appellate brief worth its salt. It is the respondent’s opening salvo to the appellate bench; it is the bane of a petitioner’s colloquy.⁴

Like most other rules of procedure, Rule 52 is ostensibly trans-substantive, operating in like manner in all cases. The rule ties the hands of the appellate court, which is bound not to re-weigh, and certainly not re-litigate, any factual findings. Yet, Rule 52’s rarely considered exceptions cast doubt upon its trans-substantive nature. In particular, its constitutional fact exception, lurking *sub rosa*, is outcome determinative of the most critical rights and obligations; if an appellate court decides that a trial court’s finding is a “constitutional fact,” independent review, at minimum, follows.

It has been nearly twenty five years since the Supreme Court, in the First Amendment/actual malice setting, laid down its marker of independent appellate judgment on constitutional facts.⁵ Yet the Court has failed to clarify this important procedural exception to the clear error standard. More than this, the Court has failed to

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¹ Fed. R. Civ. P. 52(a). See *infra* at Sect. --. For the sake of simplicity, I will refer to Rule 52(a) as “Rule 52,” unless a direct quote or the specific context dictates otherwise.


³ Id. at 298 n. 77. Cf. John Blume & Steven Garvey, Harmless Error in Federal Habeas Corpus after Brecht v. Abrahamson, 35 Wm. & Mary L. Rev. 163 (1993)(arguing that *Brecht* is only modestly less onerous than *Chapman* and that any harmless error rule vests considerable discretion in the sound judgment of the reviewing court).

⁴ While questions of the applicable standard of review might be “fiendishly recondite and doctrinaire [,]” they are of no small matter. Frank Coffin, The Ways of a Judge 101 (1980). Standards of review “often impact the appeal more than the facts and substantive law issues upon which advocates spend so much time and effort.” Casey et. al. *supra note* 2 at 279. The appellate rules require advocates to articulate the standard of review in briefing. “The appellant’s brief must contain, under appropriate headings and in the order indicated :***(9) The argument, which must contain :….B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).” Fed. R. App. Proc. 28.

explain why it refuses to apply independent judgment to all constitutional facts, including those that demonstrate intentional race discrimination arising from facially neutral laws, policies, regulations, acts, or omissions. Both intentional race discrimination and actual malice are *mens rea* determinations of historical fact. While demanding a full re-evaluation of facts in the latter case, the Court invariably gives greater deference to a trial court’s findings in the former.

As a consequence, the Supreme Court forecloses the legal norming of race discrimination and inequality. This article challenges the Supreme Court’s own words: if a reviewing court must “exercise its own independent judgment” on constitutionally significant facts in actual malice cases, then appellate courts have no less a constitutional responsibility in equal protection, intentional race discrimination matters.

I situate this discussion of Rule 52 within the debate over judges’ exercising active versus passive virtues, with a specific focus upon intentional race discrimination. Proponents of judicial minimalism and popular constitutionalism urge passive virtues for judicial decisionmaking, the importance of keeping particularly weighty issues such as race and rights within the realm of deliberative politics. Those theorists urge against judicial review, and for a “far more modest role for the courts.” Perhaps not

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6 Other scholars have noted this fact, but none have given it extensive consideration. Nicki Herbert, Appellate Review of a “Strong Basis in Evidence” in Public Contracting Cases, 77 U. Colo. L. Rev. 193, 213 (2006) (*Bose* “does set forth principles that arguably could be applied more broadly to cases in which the ultimate decision regards a constitutional right”); Ronald J. Allen & Michael S. Pardo, Essay: The Myth Of The Law-Fact Distinction, 97 Nw. U.L. Rev. 1769, 1786 (2003) (the Court has applied the constitutional fact doctrine in an “ad hoc, unrefined manner”); Scott Matheson, Jr., Procedure in Public Defamation Cases: The Impact of the First Amendment, 66 Tex. L. Rev. 215, 272 (1987) (asking the question the *Bose* majority did not answer: “Are appellate courts required to conduct an independent examination of the record in all cases involving constitutional issues, or only when the Supreme Court has recently formulated a broad constitutional standard, or only in First Amendment cases?”). But see Robert E. Keeton, Keeton on Judging in the American Legal System (1999) §19.7.3, pp. 545-559 (“The implications of the Supreme Court’s practice of independent determination are of great potential significance in the legal system generally and not alone in the precise contexts in which this practice has developed.” *Id.* at 556) (hereinafter “Keeton on Judging”).

7 This article considers intentional discrimination in the subjectivist sense—motive, purpose, mens rea. This Article considers the “animus” or “illicit motive” type of discrimination, which calls for direct or circumstantial evidence regarding an actor’s state of mind. Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 290 (1997). Included is intentional discrimination contingent upon proof inferred through negligence or impact (i.e., race discrimination was a foreseeable consequence, or a course of action that was taken in spite of possible adverse effects, viz., disparate impact). Cf. Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). I do not address intentional discrimination as *causation*. Under a causal claim, the inquiry is not into the subjective state of mind, but whether objective evidence supports an inference that “impermissible factor such as race served as the impetus for the challenged action.” *Id.* at 290.

8 *Bose*, 466 U.S. at 501 n.17.

9 This analysis and critique take intentional race discrimination through a Rule 52 analysis. However, my approach would apply equally to intentional discrimination towards any member of a suspect class. See text and notes, *infra*. Furthermore, while I examine intentional race discrimination from a constitutional vantage point, I am willing to assert that appellate courts should make independent judgments upon statutorily-proscribed discrimination as well.

surprisingly to some, judicial decisions regarding race and rights are offered as Exhibit A in support of their arguments.  

On the other hand, scholars such as Gerald Gunther, John Hart Ely, or Cass Sunstein might ask: when is it appropriate to engage in law (or for our purposes, rule) interpretation to do substantive justice, i.e., to exhibit active virtues? And once the Supreme Court decides to actively apply a procedural tool such as Rule 52’s constitutional fact exception, should not that application be consistent?

Many scholars have examined doctrines of abstention, standing, ripeness, mootness, subject matter jurisdiction, and political question. While Rule 52 has

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14 See, e.g., Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1433-34 (1988)(discussing use of standing as means to decline exercising proper jurisdiction); Nancy C. Staudt, Modeling Standing, 79 N.Y.U.L. Rev. 612 (2004)(arguing that federal standing outcomes are not inevitably political and at times politics appear to play no role whatsoever); Frank B. Cross, Shattering The Fragile Case For Judicial Review Of Rulemaking, 85 Va. L. Rev. 1243 (1999)(arguing against judicial review of agency rulemaking); Girardeau A. Spann, Color-Coded Standing, 80 Cornell L. Rev. 1422 (1995) (concluding that the Court is stingier on standing for racial minorities than for the white majority); Laura A. Smith, Justiciability And Judicial Discretion: Standing At The Forefront Of Judicial Abdication,” 61 Geo. Wash. L. Rev. 1548 (1993)(asserting that the D.C. Circuit has made decisions unduly influenced by the ideological beliefs of the members of the court); Gene R. Nichol Jr., Abusing Standing: A Comment On Allen v. Wright, 133 U. Pa. L. Rev. 635 (1985)(discussing standing in cases in which minorities have challenged exclusionary zoning practices, patterns of police brutality, and judicial or administrative bias); Roy Brooks, Critical Race Theory: A Proposed Structure And Application To Federal Pleading, 11 Harv. Black Letter J. 85 (1994)(analyzing the effects of race in federal pleading).

come in for analysis from a pragmatic perspective, it has not been the subject of much serious scrutiny. Moreover, few commentators have considered intentional race discrimination or its permutations such as unconscious/unexamined bias or aversive racism explicitly from a “clear error” or constitutional fact perspective.

16 See, e.g., Maeve Cannon, Avoiding the Pitfalls of Mootness on Appeal, 3 Wash. U. J.L. & Pol'y 99 (2003)(arguing that the regulatory taking ripeness rules are stacked in favor of regulatory agencies and are in need of critical evaluation and reform); Richard Delgado, Rodrigo’s Book of Manners: How to Conduct a Conversation on Race – Standing, Imperial Scholarship, and Beyond, 86 Geo. L.J. 1051 (1998)(discussing the appropriate way to have a scholarly discussion about race and multiculturalism); Evan Tsen Lee, Deconstitutionalizing Justiciability: the Example of Mootness, 105 Harv. L. Rev. 603 (1992)(arguing for the deconstitutionalization of the mootness doctrine).

17 See, e.g., Martin H. Redish, 90 Minn. L. Rev. 1303, 1303 (2006) (Federal Rules of Civil Procedure “have a dramatic impact on fundamental socio-political and economic concerns…and concerns of fairness and equality.”).

18 See, e.g., Gunther, supra note 12 at 10 (criticizing the use of ripeness and political question doctrines to decline exercising jurisdiction); K. Lee Boyd, Are Human Rights Political Questions? 53 Rutgers L. Rev. 277 (2001) (discussing political questions); Robert J. Pushaw, Jr., supra note 15.

19 See, e.g., Casey, et. al., supra note 2 at 279; Todd E. Petty, Federal Habeas Relief and the New Tolerance for “Reasonable Errorneous” Applications of Federal Law, 63 Ohio St. L.J. 731 (2002)(analyzing the “unreasonably erroneous” standard for courts); Richard H.W. Maloy, “Standards of Review—Just a Tip of the Iceicle,” 77 U. Det. Mercy L. Rev. 603 (2000)(exploring the standards of review in civil appellate proceedings and why we have them); Judge Paul R. Michel, Effective Appellate Advocacy, 24 Litigation 19 (Summer 1998)(identifying the elements of a good appellate brief or oral argument); Michael Bosse, Standards of Review: The Meaning of Words, 49 Me. L. Rev. 367 (1997)(demonstrating that searching for the difference between “law” and “fact” when applying a standard of review is futile); Nevin Van de Streek, Why Not “Findings of Law” and “Conclusions of Fact” and Opinions About Both?, 70 N.D. L. Rev. 109 (1994)(arguing that the judiciary is misguided in attempting to observe a rigid and artificial distinction between “findings of fact” and “conclusions of law”); Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle U. L. Rev. 11 (Fall 1994)(discussing the history and future of the standard of review); Blume, supra note 3; W. Wendell Hall, Revisiting Standards of Review in Civil Appeals, 24 St. Mary’s L. J. 1045 (1993)(discussing the updated standards of review in Texas civil appellate litigation); Edward H. Cooper, Civil Rule 52(a): Rationing and Rationlizing the Resources of Appellate Review, 63 Notre Dame L. Rev. 645 (1988)(observing how Rule 52(a) serves a vital institutional role in allocating the responsibility and the power of decision between district courts and the courts of appeals); Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506 (1963)(examining appellate review under rule 52(a) of a district judge’s findings of fact based upon documentary or undisputed evidence).

20 But see Bryan Adamson, Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?, 34 Fla. St. U. L. Rev. 1025 (2007)(examining Rule 52(a) and discussing the Supreme Court’s inconsistency in applying the clear error standard)(hereinafter “Ideological Weapon?”); Bryan Adamson, All Facts Are Not Created Equal, 13 Temple Pol. & Civ. Rights L. Rev. 629 (2004)(analyzing the Sixth Circuit Court of Appeal’s Grutter v. Bollinger opinion to determine whether invoking the constitutional fact doctrine was appropriate or necessary) (hereinafter “All Facts”); Charles Richard Calleros, Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases – Limiting the Reach of Pullman-Standard v. Swint, 58 Tul. L. Rev. 403 (1983)(arguing that whether a trial court finding is one of ‘fact’ for purposes of Rule 52(a) should be determined in light of policy considerations as well as a literal definition of the term “fact”); Hon. John F. Nangle, The Ever Widening Scope of Fact Review in Federal Appellate Courts -- Is the “Clearly Errorneous Rule” Being Avoided?, 59 Wash. U.L.Q. 409 (1981)(discussing how appellate courts are increasingly widening their scope of review beyond the strictures of the “clearly erroneous” standard); Charles A. Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957)(discussing how appellate courts use standards of review to draw judicial power into themselves and away from trial courts).
Professor Jerry Kang has persuasively critiqued several aspects of federal civil procedure. In Denying Prejudice: Internment, Redress, and Denial, he demonstrates how through segmentation, formalism and other procedural mechanisms, the Supreme Court aggressively “deployed procedure-like tools to achieve substantive results”—namely abetting the Government’s internment of Japanese Americans, and avoiding the countermajoritarian difficulty.\(^\text{21}\) Similarly, the constitutional fact exception warrants examination as to whether, through its selective avoidance, it impairs our ability to do substantive justice.\(^\text{22}\)

In the end, what I hope to demonstrate is that what appears on the surface as a principled, minimalist application of Rule 52’s clear error mandate to intentional race discrimination findings is doctrinally and institutionally indefensible. Furthermore, to not accord independent appellate review to such findings reinforces majoritarian interests over those of racial minorities. To paraphrase Gerald Gunther, the refusal to invoke the constitutional fact exception to intentional race discrimination findings is nothing less than “a wink” and a nod—and maybe a toast—“to the subtle vices of passive virtues.”\(^\text{23}\)

This article proceeds in five parts. In Part I, I set forth the conceptual framework needed to perform a close examination of Rule 52. In part II, I dissect the various standards of review, with a focus on the fact typology that has developed under Rule 52, and the critical distinction between independent appellate review and independent appellate judgment. In Part III, I review the institutional interests implicit in Rule 52’s clear error standard vis a vis the allocation of power and authority between the trial and appellate courts. In Part IV, I analyze how the Supreme Court has selectively applied Rule 52’s constitutional fact exception and demonstrate how the doctrine could apply to intentional race discrimination claims in a manner that enhances institutional values of decisional accuracy and doctrinal coherence. In Part V, I examine the implications of the

\(^\text{21}\) Kang, supra note 10 at 958. Professor Kang deconstructs the Japanese internment cases to demonstrate the Supreme Court’s use of procedural tools to achieve and affirm racism. Professor Catherine Struve has argued that the Supreme Court has ignored the Rules Enabling Act’s “substantive rights” provision by failing to invalidate rules of procedure which clearly impinge upon such rights, and also asserts that its interpretation of rules in a manner to avoid the operation of the a rule’s text and Advisory Notes is unjustified under the Act. Catherine Struve, The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure, 150 U.Pa.L.Rev. 1099, 1103-1119 (2002). As another example, Professors Gulati and McCauliff examined appellate use of Judgment Orders, and illustrated that as a matter of practice even stated procedural rules are not observed, and judges use informal norms to avoid opinion writing on the ‘hard’ cases. Mitu Gulati & C.M.A. McCauliff, On Not Making Law, 61 Law & Contemp. Probs. 157, 162, 164 (1998). See also, Emerson Tiller and Frank Cross, who argue that Federal appellate judges, for example, routinely choose the process instrument over statutory interpretation to reverse administrative agencies as a way to insulate their favored decisions from further review by higher courts. Emerson Tiller & Frank Cross, A Modest Proposal for Improving American Justice, 99 Colum. L. Rev. 215, 234 (1999).

\(^\text{22}\) The proposition that emerges from this Article is rooted in Professor Laurence Tribe’s structural due process considerations. Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975) and discussion infra at Sect. IV B.2.

\(^\text{23}\) It is important to note that I am not discussing, nor attempting to apply, the constitutional avoidance doctrine to rules of procedure. I am not saying that appellate courts do not address the constitutional question because it is unnecessary to reach, but that they avoid it when they should be reaching it.
Supreme Court’s refusal apply its independent appellate judgment standard to factual findings on intentional race discrimination.24

I. THE (RULE 52) STANDARD CONTINGENCIES

Before discussing Rule 52 and the constitutional fact doctrine, we must first set forth the broad concepts that provide the foundation of appellate review. Many aspects of appellate review turn on the purported distinctions between fact and law, and procedure and substance.

A. THE FACT/LAW “DICHOTOMY”

Whether clear error or independent review should apply depends, in the standard view, on the fact/law “distinction.” In the adjudicative setting, there are two types of findings of fact: historical facts and evaluative facts.25 Historical facts are “assertions about acts, events, or sets of conditions of the past or present.”26 The adjudicative process entails more than identifying facts; a trial court must draw inferences from those facts. Facts so determined are then constructed into an evaluative proposition to see whether they “satisfy the requirements of an applicable” legal standards of the relevant rules.27

It is nothing new to say that any distinction between fact and law is more theoretical than real.28 There are four principal reasons. First is the epistemological quandary that emerges whenever trying to define a “fact.”29 Second, “fact” and “law” do

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24 In reaching this conclusion, I advocate for independent appellate judgment on intentional race discrimination findings whether found or not.
25 There are also predictive facts and evaluative predictions about the future. Keeton, Keeton on Judging, supra note 6 at § 2.8, p. 46
26 Id. In referring to “historical” facts throughout this article, I mean “what exists, in contrast with what should, rightfully, exist...things, events, actions, conditions, as happening, existing, really taking place” regardless of their acceptance within the adjudication context. “Historical facts” are sometimes referred to as “adjudicative” facts. Ann Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 Vand. L. Rev. 111, 113 (1988) (adjudicative facts “are the stuff of ordinary litigation.”). Historical facts have also been referred to as “pure,” “basic,” or “primary facts,” Brown v. Allen, 344 U.S. 443, 506 (1953), or “circumstantial” or “evidentiary” facts. Keeton, Keeton on Judging, supra note 6 at §2.8, p.46. See also Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE 353 (1958).
27 Keeton, Keeton on Judging, supra note 6 at §2.8, p.46.
29 Gary Larson, Legal Theory: Proving the Law, 86 Nw. L. Rev. 859, 866 (1992)(“A “fact” is a reality that exists independently of its acknowledgment by the consciousness of a perceiver.”); Henry P. Monaghan,
not occupy two separate ontological spheres (i.e., “law” is a more specific type of “fact”), nor are they truly analytically distinct. Perhaps the most apt characterization is that of Professor Henry Monaghan: “Fact” and “law” are not “static, polar opposites,” but exhibit a “nodal quality” as “points of rest and relative stability on a continuum of experience.”

Third, articulating a finding of fact is not as easy as it might seem, not only because of epistemic considerations, but the inexactness of words themselves. Fourth, some findings, such as “discrimination,” or “actual malice,” bear inherent legal consequence. It is this last characteristic that gives the clear error standard its true significance, as such findings trigger a higher level of scrutiny of ostensibly historical facts.

“Discrimination” and “actual malice” are examples of where the fact/law distinction blurs. Mixed questions of fact and law are those which have “pure” factual elements intertwined with indicia of legal principles. Thus, in a way, mixed questions are evaluative judgments of underlying factual premises. Ultimate, legislative, sociological, and constitutional facts fall into this category. Saving constitutional facts for later explication, I briefly describe ultimate, legislative, and sociological facts.

An “ultimate fact” is one that, when applied to a legal standard, directly triggers legal consequence. Such a fact “must be sufficient in itself, without inference or comparison, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case.” An ultimate fact may in turn be

Constitutional Fact Review, 85 Colum L Rev 229, 239 (1985)(“All facts are not the direct result of observation, unmodified by any act of reason.”); Walter Wheeler Cook, Facts and Statements of Fact, 4 U. Chi. L. Rev. 233, 234 (1936-7)(“Facts are coercive—they exist whether or not we will them to.”).

To be sure, “mixed” questions of law and fact highlight the “distinction’s importance and its unruly nature.” Allen and Pardo, supra note 6 at 1779 (emphasis added).

Mixed statements of law and fact can be “described as a question in which historical facts are admitted or established, the rule of law is not in dispute, and the issue is whether the facts satisfy the statutory standard. In other words, whether the rule of law as applied to the established facts is or is not violated.” Pullman-Standard, 456 U.S. at 286 n. 16 (“a ‘fact that is of consequence to the determination of the action.’”). Judge Weinstein, for example, sees the term as synonymous with “operative fact,” “material fact,” and “consequential fact.” Honorable Joseph M. McLaughlin & Jack B. Weinstein, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS 401.4 (2d ed. 2001); Baumgartner v. United States, 322 U.S. 665, 670-671 (1944)(“Finding so-called ultimate ‘facts' more clearly implies the application of standards of law”); Martin B. Louis, Allocating Adjudicative Decisionmaking Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question,
one that compels a constitutional determination, a legislative or sociological judgment, or a judgment that a statutory, regulatory, or common law rule was or was not violated.\textsuperscript{35}

Legislative facts can be of three types: 1) facts that govern the process by which a judge or jury decides cases;\textsuperscript{36} 2) those that play an adjudicatory function within a settled legal context (what I will call adjudicative-legislative facts); and 3) those which are used to make law (law-legislative facts).\textsuperscript{37} An adjudicative-legislative fact is one that decides an issue in a way that would have “no substantive implications beyond the specific case in which [it is] introduced.”\textsuperscript{38} A law-legislative fact might influence case-specific outcomes and seek normative recognition as law.\textsuperscript{39}

Adjudicative and law-legislative facts transcend ordinary factual determinations, and can be sociological,\textsuperscript{40} political,\textsuperscript{41} economic,\textsuperscript{42} scientific,\textsuperscript{43} historical,\textsuperscript{44} or legislative.\textsuperscript{45}

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and Procedural Discretion, 64 N.C.L. Rev. 993, 994 (1986)(“Ultimate facts …combine elements of law and fact.”)(hereinafter “Allocating Adjudicative Decisionmaking”).\textsuperscript{35}

Adamson, Ideological Weapon?, supra note 20 at 1056.

36 The first category of legislative facts informs and guides the trier’s reasoning toward a particular conclusion. For example, a jury instruction that reads “In determining whether the defendant was negligent, you must first determine whether defendant’s actions were those of a reasonable person” is a legislative fact that guides juror decisions.


38 Stephani, supra note 37 at 520-521.

39 Keeton, Keeton on Judging, supra note 6 §19.6.4, p. 540-41. Of course, the distinction between adjudicative and non-adjudicative legislative facts (also called “premise facts”) can be a fine one. For example, legislative facts introduced to prove case-specific propositions will take on normative characteristics if used to support a new legal norm. See Brown v. Board of Education, 347 U.S. 483 (1955). See also Henry Wolf Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6 (1924).

40 See, e.g., the Brandeis Brief in Muller v. Oregon, 208 U.S. 412 (1908) (holding, based on sociological studies, that because of “inherent” differences between the sexes, factories could limit women’s work hours).


A legislative fact is introduced into controversies either by the litigants through evidentiary proffers of expert opinion or by judicial notice. In addition, trial or appellate judges themselves may inject legislative facts into the cases on their own.

Federal Rules of Evidence 201 and 702 are particularly relevant to legislative facts. Evidence Rule 201 allows for judicial notice of a legislative fact so long as it is not “subject to reasonable dispute.” Rule 201 uses the word “adjudication,” but does not contain the word “legislative.” However, the Advisory Committee Comments to the rule envision facts subject to “judicial notice” in a broader sense. For Rule 201 purposes, “whether a fact is adjudicative or legislative depends not on the nature of the fact, but rather the use made of it (i.e., whether it is a fact germane to what happened in the case, or a fact useful in formulating common law policy or interpreting a statute).”

Evidence Rule 702 allows for expert testimony. It states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Like Rule 201, Rule 702 makes no mention of legislative facts. And, like Rule 201, findings that emerge through Rule 702 testimony can illuminate issues in the case or establish a legal norm to guide future controversies.

Adjudicative-legislative and law-legislative facts move trial court findings down the continuum, and away from clear error. Appellate courts may then review trial such findings de novo or independently.


“Historical” facts as used here refer to a body of knowledge. See, e.g., Standard-Vacuum Oil Co. v. United States, 339 U.S. 157, 159 (1950) (“It might be assumed in favor of petitioner's pleadings what is judicially known, that the Japanese were, for all practical purposes, in complete control of the Philippine Islands by May 1942 and continued in control until sometime subsequent to October 1944, when the United States Army returned.”); Erin Martin, In re Simone D., 52 N.Y.L. Sch. L. Rev. 309, 314 (2007-2008) (discussing a case in which the court took judicial notice of the effects of the September 11, 2001 terrorist attacks on certain New York communities).

“Legislative” facts, as used here, refer to those that comprise a statute’s or regulation’s history, or a judicial opinion. A.J. Stephani, supra note 37 at 510; Keeton, Legislative Facts and Similar Things, supra note 37 at 27; McCORMICK ON EVIDENCE Sect. 335 (5th ed. 1999).

Federal Rule of Evidence 701.

Laws of other jurisdictions, special rules, ordinances, and judicial opinions are also termed legislative facts, even though they are treated as adjudicative facts for judicial notice purposes. See Federal Rule of Evidence 201; 60 Am. Jur. 3d Proof of Facts §10. Such facts have also been classified as judicial notice of law. Advisory Committee Notes. Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE, 261, 294 (2d ed. 1994).

Federal Rule of Evidence 201.

Mueller and Kirkpatrick, supra note 47 at 555; Keeton, supra note 37 at 10.

United States v. Bellow, 194 F.3d 18, 22 (1st Cir. 1999) (emphasis added).

Federal Rule of Evidence 702.

See also Rule 703, 704.

Lockhart v. McCree, 476 U.S. 162, 168-69 n. 3 (1986)(without deciding the standard of review, stating that “we are far from persuaded” that Rule 52(a) would apply to the social science evidence admitted at trial to demonstrate juror biases).
A sociological fact is a “proposition[ ] that [is] general in nature and describe[s] the status or condition of a subject.”\textsuperscript{54} As adjudicative and non-adjudicative legislative facts presume no pre-existing legal norm,\textsuperscript{55} sociological facts carry profound implications for choice of review standard for the same reason. The \textit{Brown v. Board of Education}\textsuperscript{56} litigation provides a clear illustration. In \textit{Brown}, the socio-scientific facts offered at trial were not, in the strictest sense, historical. They were, however, adjudicative-legislative facts of a sociological nature. That social science data proved famously compelling, decisive in the appellants’ ultimate victory against the appellee school districts. Moreover, the socio-scientific factual conclusion, i.e., racial segregation and discrimination have a demonstrated adverse impact on African-Americans, became a normative policy proposition that influenced subsequent challenges to racial segregation in other aspects of life.

B. THE PROCEDURE/SUBSTANCE DICHOTOMY

The “nodal quality” attending the fact/law distinction also applies to the procedure/substance dichotomy. The drafters of the Rules Enabling Act\textsuperscript{57} were very intentional about distinguishing procedure from substance. While neither term is intuitively accessible, procedure is best characterized as processes that govern the function and administration of courts and cases.\textsuperscript{58} Substance—or more specifically, the “substantive rights” identified in the Act refer to the law, and the application of the law to the facts in controversy.\textsuperscript{59} If the procedure/substance distinction did not seem fallacious at the time, in hindsight it is clear that any distinction lies only at the margins.\textsuperscript{60}

\textsuperscript{55} Woolhandler, supra note 26 at 114 (Legislative facts "do not presume a pre-existing legal norm because by definition such facts are used to create law.").
\textsuperscript{56} 347 U.S. 483 (1954).
\textsuperscript{57} Adopted in 1934, the Act gave the courts the power to create greater judicial uniformity by promulgating the Federal Rules of Civil Procedure. “The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions****Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.” Id. The Act has its roots in English equity practice which developed substantive doctrine to extend common law, as evidenced by the emergent rules’ liberal pleading requirements and class action rules. Matheson, supra note 6 at 223. See also Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 Duke L. J. 281, 286-88 (1989).
\textsuperscript{58} Martin H. Redish & Uma M. Amuluru, The Supreme Court, The Rules Enabling Act, And the Politicization of the Federal Rules: Constitutional and Statutory Implications, 90 Minn. L. Rev. 1303, 1305 (2006) (a procedural rule is “internal to the operation of the judiciary; it has no impact outside the four walls of the courthouse”).
\textsuperscript{59} That second sentence was added by Senator Albert Cummins in the early drafting stages of the Equity Act out of concerns that the Act would give courts the ability to legislate. Redish & Amuluru, supra note 58 at 1305 (adding “substantive rights” was a way “to preserve for the accountable and representative congress fundamental normative choices of social policy”). See also Stephen Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1028 (1982)("the Act's procedure/substance dichotomy was intended to allocate lawmaking power between the federal government and the states.")
\textsuperscript{60} Carrington, supra note 57 at 284 (“substance and procedure differ even if, at the margin, they become difficult to distinguish.”); Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Law, 42 Yale L. J. 333, 336 n.10 (1933)(“The distinction between substantive and procedural law is artificial and
Procedural rules can and do impact substantive rights. We see this most clearly when considering the fact typology lying beneath Rule 52. For example, to call a fact a constitutional fact gives it the highest substantive value from a jurisprudential perspective. To label it as such means to engage in a far more searching analysis of the rights and obligations being litigated. Simultaneously, substantive rights can and do animate procedural rules. To use constitutional fact again as an example: a determination that a factual finding impacts substantial constitutional rights demands the application of a procedural standard other than clear error, viz., independent judgment.\footnote{Examples of procedural and substantive rights operating interdependently appear in other civil rules. Pleading requirements and Rule 11 matters are just two examples. Traditionally, federal courts have required specificity in pleading, or heightened pleading, of plaintiffs bringing civil rights actions under 42 U.S.C.A. § 1983. Subsequent cases held that “heightened pleading was not to be applied in civil rights cases against municipalities,” but “the application of heightened pleading in actions against individual agents is inconsistent.” Paula Wolff, Propriety and Effect of Heightened Standards of Pleading or Production Required of Plaintiff in Action Under 42 U.S.C.A. § 1983, 144 A.L.R. Fed. 427 (1998). As a consequence, plaintiff’s failing to adhere to the requirements are denied their day in court. The adverse impact of Rule 11 on substantive civil rights has been distressingly powerful. “Three of the four studies found that the percentage of sanction requests in civil rights cases was disproportionately high relative to the number of civil rights cases in the total caseload. In the [Federal Judicial Center] Study, civil rights cases were targeted under Rule 11 more than twice as frequently as would be expected, based upon the number of civil rights cases filed.” Mark Spiegel, The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules, 32 Conn. L. Rev. 155, 171 (2000). See also Martin B. Louis, Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure, 67 N.C.L. Rev. 1023, 1052-61 (1989) (discussing the effectiveness of the amended Rule 11); A. Leo Levin, Sylvan A. Sobel, Achieving Balance In The Developing Law Of Sanctions, 36 Cath. U.L. Rev. 587(1987).}

**SUMMARY**

While the fact-law distinction is something of a fiction,\footnote{Allen and Pardo, supra note 6 at 1779 (“the law-fact distinction is only a functional one, determining which body does or should decide on issues and under what standard[,]”); Larson, supra note 29 at 863 (“the law-fact distinction, whatever its utility, is purely a creature of convention.”).} it is significant that the power to “type” facts lies with the appellate judges. Ultimate, legislative, sociological, and constitutional facts, while arrived at through Rule 52, require appellate courts to apply a standard of review other than clear error. Given that substantive proscriptions such as discrimination and actual malice are embedded within those categories, it is apparent that procedure and substance operate interdependently. As the reader will see, appellate power to type facts carries profound institutional and doctrinal implications. Appellate court characterization of “ultimate,” “legislative,” sociological or constitutional fact becomes particularly important when considering intentional race discrimination.

**II. RULE 52 AND STANDARDS OF REVIEW**

As imperfect as the fact/law, procedure/substance distinctions might be, Rule 52 attempts to create a bright line. As a general proposition, a rule can be relatively illusory. In essence, there is none”); Redish & Amuluru, supra note 58 at 1305 (the Congress that passed the Rules Enabling Act did so “on a misguided assumption about the completeness of the substance-procedure dichotomy when it imposed the ‘substantive right’ restriction on the Court’s rulemaking powers”).
straightforward, applying to all similarly situated. As Professor Kathleen Sullivan described, a rule “binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts” and “aims to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.”63 Rule 52 embodies a presumption of finality to factual findings and purports to prevent appellate judges from “scrutinize[ing] factors irrelevant to the rules’ applicability.”64

But we will see, other decisional tools are available to allow judges to do just that, i.e., scrutinize trial court findings despite Rule 52’s directive. But before discussing de novo and independent appellate judgment standards of review, a brief history of Rule 52 and description of the clear error standard is in order.65

A. RULE 52—A BRIEF HISTORY

As mentioned earlier, Rule 52 directs that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous [.]”66 This standard of review extended equity practice in non-jury cases to actions at law.67 Though adopted in 1938, its roots lie in the Constitution. With Article III conferring federal jurisdiction over questions of both law and fact, debate arose over the power of federal courts to determine the proper form and scope of appellate review.68 At that time,

65 At this point, it is useful to distinguish standard of review from scope of review. A standard of review is the limit of review, or the extent to which and manner by which a court will scrutinize the findings of fact, conclusions of law, or rulings. Often, the levels of scrutiny given matters that touch upon constitutional rights (e.g., rational basis, intermediate, strict) are also referred to as the standard of review, although in a narrower sense. The scope of review refers to the range of issues the court will examine.
66 F.R.C.P. 52(a) states, in full: (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule. (Emphasis added).
68 Article III, Sec. 2, Cl 2 reads: Jurisdiction of Supreme Court. “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” That final sentence was at the core of the debate over Congress’s delegation of authority to the Supreme Court to make and interpret procedural rules.
appellate courts could review actions at law only for legal error; actions in equity, in which evidence was taken in the form of documents and depositions, were reheard *de novo*. 69

Between 1865 and 1875, Congress acted to sharply curtail *de novo* review. Appellants could waive jury trials, and were required to file a bill of exceptions to the trial court’s rulings. Those exceptions could then be reviewed either upon writ of error or appeal. In addition, the Supreme Court lifted the jurisdictional monetary minimum necessary to bring federal actions and restricted review of admiralty cases. These changes dramatically reduced the number of cases appealed under equity. 70

With the Equity Rules in 1912, 71 litigants could transfer equity cases to courts of law. In addition, Rule 46 of the Equity Act effectively restored the practice following the 1789 Act and required that testimony be taken in open court with trial judges passing on evidence admissibility as with actions at law. 72

The merger of law and equity began in earnest in 1915 with the Law and Equity Act that allowed for transfer of actions at law to equity courts. The immediate predecessor to Rule 52, Equity Rule 70 ½, came into effect in 1930, and required a trial court to state facts specifically and separately state its conclusions of law; appellate courts would treat the former as *conclusive*. Up to that point, despite free review, appellate courts reviewing cases in equity had developed the practice of not disturbing a trial court’s factual findings unless they were “clearly wrong.” 73 Thus, Rule 70 ½ further undercut the power of appellate courts to exercise “absolute” plenary review. 74 The Rules Enabling Act of 1934 was the culmination of the law-equity merger and conferred broad powers upon the Supreme Court to establish rules of procedure and court administration. 75

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69 See Adamson, Ideological Weapon?, *supra* note 20 at 1038-1039.
70 The Act of March 3, 1865, c. 86 § 4, recodified in the Revised Statutes, provided that cases could be tried and determined by the circuit court without a jury whenever the parties, or their attorneys filed a stipulation in writing with the clerk of the court waiving the jury. The Act also provided that the finding of the trial court upon the facts shall have the same effect as a jury verdict. If any party made a contemporaneous objection, and presented those objections in the form of a bill of exceptions, then an appellate court could review the judgment upon error or appeal. See *Bond v. Dustin*, 112 U.S. 604, 606 (1884)(“since the passage of this statute, it is equally well settled by a series of decisions that this Court cannot consider the correctness of rulings at the trial of an action by the circuit court without a jury, unless the record shows such a waiver of a jury”). See also Act of February 16, 1875, § 1, 18 Stat. 315.
71 Equity Rules 1912, Nos. 22, 23.
74 Note, *Rule 52(a), supra* note 73 at 511.
75 The Act allowed the Supreme Court to prescribe “general rules of practice and procedure” and “rules of evidence” for federal courts as long as they were not inconsistent with the statutes or the United States Constitution. The responsibility for creating and evaluating procedural rules lies, in part, with the Judicial Conference. Moore’s Federal Practice (Matthew Bender, 3rd Edition), Ch. 1, §§ 1.02 et. seq. By Congressional mandate, a standing committee on “rules of practice, procedure, and evidence” is appointed.
Although the constitutionality of Congress’s delegation of its rulemaking powers has been called into question on the grounds that it violates the separation of powers and non-delegation doctrines, the Supreme Court has consistently upheld the Act as being within Congress’s authority.\(^{76}\) Similarly, as opposed to giving the courts full reign over rulemaking, courts have found that the Enabling Act contains sufficient intelligible principles to provide guidance for the Courts.\(^{77}\) However, the delegation is still the subject of debate.\(^{78}\) Since 1938, Rule 52 and its clear error standard have defined the scope of review for factual findings in cases tried by the bench.\(^{79}\)

to aid the Conference in its work. Accordingly, the Conference has established an advisory committee on the Civil Rules. An Advisory Committee moves a proposal to the Standing Committee, then to the Judicial Conference. The Judicial Conference may then propose to the Supreme Court that a “rule be changed” as “necessary to maintain consistency and otherwise promote the interests of justice.” \textit{Id.} at Ch. 1, § 1.04 1-22.

The Supreme Court, ultimately, passes upon a proposed rule, and maintains the power of interpretation. See Catherine Struve, \textit{supra note} 21 at 1103-1119, for a description of the rule making structure and process.\(^{76}\) Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (F.R.C.P. is valid exercise of Court’s rulemaking authority); Loving v. United States, 517 U.S. 748, 758 (1996) (“This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.”).

Congress has at least seven months to reject any proposed rule that has been accepted by the Supreme Court: “The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.” 28 U.S.C. § 2074(a) (1994). Because Congress retained the authority to review and reject any rule promulgated by the Court before the rule takes effect, the delegation is limited enough to remain constitutional. 28 U.S.C. § 2074. Congress itself has the authority to enact civil procedure rules—a power firmly established within two constitutional provisions. First, Congress has the power to create federal courts inferior to the Supreme Court. U.S. Const. Art. I, § 8, cl. 9. Second, Congress may make all laws necessary and proper to establish those courts. U.S. Const. Art. I, § 8, cl. 18. However, after delegating the power to create rules to the judiciary with the Rules Enabling Act in 1934, Congress did not use its own rulemaking power for nearly forty years, when it blocked the Federal Rules of Evidence from going into effect. Redish & Amuluru, \textit{supra note} 58 at 1308-14.

\(^{77}\) Mistretta v. United States, 488 U.S. 361, 391 (1989) (The guidelines within the Enabling Act are sufficient to meet the constitutional standard).

\(^{78}\) Struve, \textit{supra note} 21 at 1120 (the Enabling Act delegation of rulemaking power actually limits the Court’s interpretive latitude due to the nature of the delegation); Redish & Amuluru, \textit{supra note} 58 at 1334-35 (arguing that the Rules Enabling Act—at least as currently implemented—should be found unconstitutional due to delegations to an unaccountable, coordinate branch of government which give rise to a set of political and constitutional difficulties); Carrington, \textit{supra note} 57 at 286-88 (“Substance” and “procedure,” as we have seen, are divided at two different places by the same brief Act. Therefore, there is little cause for anxiety that rulemaking under the Act may threaten the power and status of Congress or the interests of groups with a claim on its attentions.).

\(^{79}\) The earliest Supreme Court affirmations of Rule 52 can be found in District of Columbia v. Pace, 320 U.S. 698 (1944); Muschany v. United States, 324 U.S. 49 (1944); Knauer v. United States, 328 U.S. 654 (1946); Walling v. General Industries Co., 330 U.S. 545 (1947); United States v. Yellow Cab Co., 338 U.S. 338 (1949). For a history of the evolution of the Civil Rules, see Charles E. Clark & Ferdinand F. Stone, \textit{Review of Findings of Fact}, 4 U. Chi. L. Rev. 190 (1937); Leon Green, \textit{JUDGE AND JURY} 380 (1930). Since its enactment, Rule 52 has been amended several times. In particular, in 1946 the rule was changed to more clearly require that findings of fact be made. \textit{See Advisory Committee Notes on Rules, 1946 Amendments.} In 1983, where the Rule was formally silent, it explicitly allowed district judges to make findings of fact orally. In 1985, Rule 52(a) was amended to clarify that it applied to \textit{all} findings of fact “whether based on oral or documentary evidence.” Advisory Committee Notes on Rules, \textit{1985 Amendments}. Its last revisions, largely stylistic, came in 2007. Advisory Committee Notes on Rules, 2007.
B. CLEAR ERROR REVIEW

The only ostensible justification for overturning a trial court’s factual findings appears in United States v. United States Gypsum: to find “clear error,” the appellate court must have a “definite and firm conviction that a mistake has been committed.”80 That the Gypsum admonition has as much (or as little) intrinsic meaning as the term it attempts to define has not prevented subsequent appellate courts from offering their own spins. A trial court’s factual findings are clearly erroneous if they are “without adequate evidentiary support,”81 are “without sufficient evidence,”82 or if “reasonable men could not possibly make such a finding.”83 Moreover, if the findings are “devoid of minimum support,”84 have “no rational relationship to the supportive evidentiary data,”85 are “contrary to clear weight of the evidence,”86 or go against “the truth and right of the case,”87 trial courts have committed clear error.

On the other hand, when examining for clear error, a trial court’s factual findings are to “enjoy a presumption of correctness.”88 An appellate court is not to “substitute [its] own impressions for those of the district court.”89 It should not overturn the trial court decision “because [it] would have decided the case differently,”90 nor should it “retry the facts.”91 Appellate courts are not to make “independent findings upon [the] evidence.”92 It does not matter whether the factual findings were based on oral or documentary evidence:93 even “where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.”94

80 United States Gypsum Co., 333 U.S. 364, 394 (1948). One justice wrote that the trial court decision “must strike us as more than just maybe or probably wrong; it must...strike us as wrong with the force of a five-week-old, unrefrigerated dead fish[.]” Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).
81 Reproystem v. SCM Corp., 727 F.2d 257, 261 (2d Cir. 1984); Power v. Union Pac. R. Co., 655 F.2d 1380, 1382-83 (9th Cir, 1981).
83 Campbell v. Barsky, 265 F.2d 463, 466 (5th Cir. 1959).
86 Fleming v. Palmer, 123 F.2d 749, 751 (1st Cir.), cert den, 316 U.S. 662 (1941); Sears, Roebuck & Co. v. Talge, 140 F.2d 395, 396 (8th Cir. 1944); In re Fielder, 799 F.2d 656, 657 (11th Cir. 1986).
87 Sanders v. Leech, 158 F.2d 486, 487 (5th Cir. 1946); Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 283 (5th Cir.1987).
89 Horner v. Mary Institute, 613 F.2d 706, 713 (8th Cir. 1980); Adzick v. UNUM Life Ins. Co., 351 F.3d 883, 889 (8th Cir.2003).
92 Panaview Door & Window Co. v. Reynolds Metals Co., 255 F.2d 920, 926 (9th Cir. 1958).
93 Since 1985, appellate courts have been bound to give appropriate deference to a trial court’s factual findings “whether based on oral or documentary evidence.” Fed. R. Civ. P. 52(a). Before the amendment, appellate courts would review factual determinations based mostly or entirely upon documentary evidence. See, e.g., Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980). Moreover, circuit courts took
The existence of any procedural rule creates a presumption that it should be followed. Thus, trial court factual findings must first be viewed through Rule 52’s clear error standard. A standard such as “clear error,” however, is not a rule. A standard “tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation [.]” If compelling reasons dictate a deviation from Rule 52, appellate judges, with consideration towards its underlying principles, may take one of three roads: ignore it; resort to another rule; or create a new rule. “Clear error” can be (and has been) disregarded under various circumstances: 1) the trial court got the law wrong (resorting to another rule); 2) the record below is based entirely upon documentary evidence (ignoring the plain language of the rule), or; 3) the trial court factual determinations fall within a category such as a “constitutional,” “ultimate,” “legislative,” or “sociological” fact—thus taking the factual determinations entirely out of the clear error realm and into de novo/independent judgment territory.

C. DE NOVO REVIEW

Juxtaposed against Rule 52’s clear error standard is de novo review. Relative to clear error, de novo compels a more rigorous review of the trial court’s determinations. De novo review is also called “independent,” “plenary,” or “full” review. Applicable to bench trials and to certain dispositive rulings and jury verdicts, de novo review is sweeping, but not the most searching scrutiny appellate courts can perform.

widely varying approaches when doing so (e.g., the standard of review choice was contingent upon whether there were disputed or undisputed facts found in documents). Predictably, this increased the appellate caseload. In addition, the second-guessing impinged upon trial courts’ authority to find the facts, and the air of finality and legitimacy that was felt should follow trial court determinations. The “or documentary evidence” phrase sought to resolve questions regarding the form of evidence that must be reviewed for “clear error.”

Even after the amendment, appellate courts ignored the rule. The Supreme Court ignored the rule in part to justify its “extensive review for clear error” in Easley v. Cromartie, see discussion infra, at Sect. IID. See also First Nat'l Bank v. American States Ins. Co., 1998 U.S. App. LEXIS 335 at *15 (10th Cir.) (“This case was resolved by the district court on stipulated facts and documentary evidence so that we can review de novo whether those facts establish just cause or excuse”); Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912, 916 (11th Cir. 1989) (“The appellate court, in reviewing the documentary evidence presented, is in as good a position as the district court to determine the existence of personal jurisdiction. Our review, therefore, is plenary.” (citation omitted)).

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). An appellate court’s characterization of what clear error means is a good indication of what it will do with the trial court’s ruling. When an appellate court evinces solicitude towards the fact-finder’s role, it is likely the judgment will be upheld. But if the appellate court begins its opinion with a standard greater than clear error, it invariably signals a reversal, vacation, or remand.

Sullivan, Rules and Standards, supra note 63 at 59.


For example, summary judgment motions, motions to dismiss, injunctions, and jurisdictional rulings are reviewed de novo.
Popular interpretation has it that the *de novo* standard requires an appellate court to reverse or modify the trial court findings. In fact, *de novo* review does not *demand* a different conclusion on the record; it merely means that appellate courts have the *power and competence* to reach a different one. In other words *de novo* review is not the same as “no deference” nor does it automatically compel a different outcome.

This is apparent upon a closer look at what it means to conduct *de novo* review. *De novo* review refers to engagement on four levels of scrutiny. Certainly, appellate courts will examine whether the trial court applied settled law to the facts. However, the most searching scrutiny is due if the decision raises the specter that the trial court misinterpreted (and by extension, misapplied) the law, created new law, or failed to fairly explain the legal basis for its conclusions.

Depending upon the character of the law applied (settled law? settled, but misinterpreted law? new law?), or whether the trial court competently articulated its reasoning, an appellate court will vary the intensity level of its *de novo* examination. How the trial judge treated the law is the first consideration, which then impels a re-examination of the facts adduced. Nonetheless, appellate court options remain the same: reverse, modify, vacate, remand, or affirm.

**D. INDEPENDENT APPELLATE JUDGMENT AS A MATTER OF CONSTITUTIONAL OBLIGATION**

Independent appellate judgment entails something more than *de novo* or independent review. The Supreme Court, upon deeming factual findings constitutionally critical, speaks of a corresponding *obligation* to “make an independent examination of the whole record” in order to make sure that “the judgment does not constitute a forbidden intrusion” upon a constitutional right. Independent or *de novo* review suggests that appellate courts enjoy the *power* to closely examine the bases of the lower court’s conclusions. Indeed, under the independent appellate judgment standard, they have no option but to exercise that power, even when presented with “pure” historical facts.

The distinction between “independent judgment” and “independent review” may seem minimal. But the two terms are qualitatively different; to exercise one standard of review over the other triggers different, outcome-determinative, cognitive frameworks. For an appellate court to exercise independent review, or give “closer scrutiny,” the trial

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101 Casey, et. al., *supra note* 2 at 291.
102 See, e.g., McFarlin v. Conseco Services, LLC, 381 F.3d 1251, 1259 (11th Cir.2004).
104 See, e.g., Magan v. Lufthansa German Airlines, 339 F.3d 158, 163 (2nd Cir. 2003).
105 See, e.g., Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (2007)(“the Court of Appeals erred in concluding that the District Court applied a *per se* rule. Given the circumstances of this case and the unclear basis of the District Court's decision, the Court of Appeals should have remanded the case to the District Court for clarification”); United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir.1992) (De novo review of whether a trial court had a legal basis for the imposition of a sanction).
106 Casey et. al., *supra note* 2 at 292.
107 *Bose*, 466 U.S. at 486, 499.
court’s factual findings are treated with heightened skepticism, but its authority to find facts is not necessarily stripped.

On the other hand, to make an independent judgment (or independent determination) connotes a wholesale disregard of the trial court’s factual conclusions. Thus, the reviewing court might not just reverse or remand, but vacate the trial court’s findings and enter its own. Independent judgment represents appellate court decisionmaking power at its highest. Under this standard, when the appellate court is under a duty to elaborate upon constitutional principles, it must fully examine the record to protect those principles. In other words, it exercises independent appellate judgment as a matter of constitutional obligation. 108

Independent review of constitutionally significant facts first appeared forty-five years ago in New York Times v. Sullivan, 109 in which the Supreme Court weighed actual malice liability against First Amendment principles. Yet, as the late professor and federal judge Robert E. Keeton chronicled, the notion of independent review as a concept, and the terminology associated with it, evolved in a variety of settings pre-Sullivan. 110

In Schneiderman v. United States, 111 a denaturalization proceeding raising First Amendment issues, the Supreme Court rejected the Court of Appeals clear error review of the trial court’s ruling. In reversing the decision to revoke Schneiderman’s citizenship, the Court stated that the review standard for the trial court’s decision must be “clear, unequivocal, and convincing.” 113 Early opinions such as Schneiderman also spoke of “closer scrutiny” of facts found rather than “independent review.” 114 It was after Sullivan, however, that independent appellate review emerged as “independent determination,” and then “independent judgment.”

Independent determination on constitutionally significant findings of historical facts proceeded under other constitutional provisions. The Supreme Court has invoked the standard when deciding controversies turning on the Fourth Amendment, 115 the Fifth Amendment, 116 the Seventh Amendment, 117 and the Tenth Amendment. 118 Here are a few examples.

108 Bose, 466 U.S. at 510-11 (Independent appellate review as a matter of constitutional law “emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges -- and particularly Members of this Court -- must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.”) See Matheson, supra note 6 at 226 (“Values embodied in the supreme substantive law—the Constitution—arguably have the strongest claim for special procedural safeguards [.]”).


110 Keeton, Keeton on Judging, supra note 6, §19.7.3, p 550.

111 320 U.S. 118 (1943).

112 Id. at 125.

113 Id. at 153.

114 Keeton, Keeton on Judging, supra note 6, §19.7.3, p 550. See also Baumgartner v. United States, 322 U.S. 18 (1944).


116 United States v. Appalachian, 311 U.S. 377 (1940) (navigability of waterway under the 5th Amendment Commerce Clause).
Miller v. Fenton, 119 decided on the heels of Bose, raised Fifth 120 and Fourteenth Amendment challenges in a habeas proceeding under 28 U.S.C. §2254. There, the Supreme Court held that whether a confession was voluntary or not was an issue of fact entitled to a §2254(d) presumption of correctness, but “the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review.”121

In U.S. Term Limits, Inc. v. Thornton, 122 the majority overturned the Arkansas state constitutional amendment that imposed term limits on persons who previously served in Congress, because it violated the Qualifications Clause 123 through the Tenth Amendment. 124 There, and on summary judgment, the Court refused to cede to a trial on the merits the factual data showing the historical lack of success of write-in candidates for Arkansas Senate and House races. Drawing its own conclusions on the evidence, the Court reiterated that “constitutional rights would be of little value if they could be . . . indirectly denied.”125

Yet a third case bearing on the meaning and applicability of independent review of historical/constitutional facts was Thompson v. Keohane. 126 Like Miller, Thompson was a habeas petition calling for an interpretation of §2254(d)’s presumption of correctness. 127 Thompson had argued that his alleged confession occurred without the proper Miranda warnings. Justice Ginsburg wrote for the Court, holding that Miranda warnings for Fifth Amendment purposes do not “qualify for a presumption of correctness.”128 After reviewing §2254 cases in which the Court categorized certain issues as fact and others as law, she wrote that “[c]lassifying ‘in custody’ as a determination qualifying for independent review” was appropriate so as to “unify precedent, and stabilize the law.”129

120 “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V.
121 474 U.S. at 115.
124 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. Amend. 10.
127 Id. at 99.
128 Id.
129 Id. at 115-117 (“The law declaration aspect of independent review potentially may guide police” and “help develop legal rules and norms regarding permissible parameters of interrogation.”).
Seven years ago, the Supreme Court flirted with applying the constitutional fact exception to intentional race discrimination. In re-evaluating the evidence, it reversed the district court finding that the North Carolina legislature violated the Equal Protection Clause. In *Easley v. Cromartie*, a 5-4 decision led by Justice Breyer, the Court determined that the question of whether the North Carolina legislature was motivated by race in redrawing the 12th Congressional District lines was a "constitutionally critical one." Examination of the district court’s finding thus demanded an "extensive review" for "clear error."

That novel twist on clear error seemed to push the question of race and intent into constitutional fact/independent review territory. Weighing against such a conclusion, however, was that the majority highlighted the "unique" circumstances and posture of the litigation. First, much of the evidence was based on documents and expert testimony. Second, the case was on direct appeal from the district court. Third, the Supreme Court itself had passed on *Easley* three other times in the prior ten years. Finally, and crucially, the majority made virtually no effort to "legitimize" its rationale by, for example, grounding it in precedent or articulating it as a new legal norm.

**SUMMARY**

Understanding the distinctions between clear error, *de novo*, and independent judgment, the range of standards of review on appeal might look something like this.

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131 Id. at 243.
132 Id.
133 This was so despite Rule 52(a)’s mandate. See discussion, *supra note* 93.
134 This reasoning allowed the Court to bypass its own comity rule that where an intermediate court reviews, and affirms, a trial court's factual findings, it would not "lightly overturn" the concurrent findings of the two lower courts. *Neil v. Biggers*, 409 U.S. 188, 193, n. 3 (1972).
136 Each standard determines the degree of deference an appellate court is to give the trial judge findings (or, in the case of substantial evidence, the jury’s), which is contingent upon the issue being reviewed. *Casey et. al.*, *supra note* 2 at 287. See Judge Frank’s opinion in *Orvis v. Higgins*, 180 F.2d 537, 539-40 (2nd Cir. 1950), discussing these and other standards of review.

One other standard of review for administrative agency action is whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 702(2) (A). The Supreme Court defined that provision to mean that an "action will be arbitrary and capricious if it relies on factors which Congress has not intended the agency to consider, failed entirely to consider an important aspect of the problem, offered an explanation which is counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). Agency determinations, to be upheld, must be supported by *substantial* evidence. See, e.g., *Kincade v. Mikles*, 144 F.2d 784 (8th Cir. 1944); *Universal Camera Corp v. N.L.R.B.*, 340 U.S. 474 (1951). Judicial review is not available in two circumstances: when agency action is committed to agency discretion by law, or where statutes preclude judicial review. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).
Standards of review are powerful monitors. By their transparency, they act to keep judicial decisionmaking within a discrete framework.\textsuperscript{137} Like outcomes themselves, the choice of standard of review does not take place in a vacuum. The chosen standard must be a product of some majoritarian level of consensus of the impaneled judges.\textsuperscript{138} Consequently, when determining which standard of review to apply, appellate judges must rely on coalition building. To be sure, coalition-building around Rule 52’s application (or rejection) is often the subject of vigorous debate in opinions.\textsuperscript{139}

In deciding to deviate from the clear error standard, appellate judges must first weigh important institutional considerations. Competence, administrative efficiencies, and doctrinal coherence are the core values Rule 52 embodies. Consequently, appellate judges must balance the core values of the rule to a new legal setting and determine whether clear error should be followed, or some other standard of review should apply.

### III. RULE 52 AND INSTITUTIONAL VALUES

Generally speaking, procedural rules express institutional goals. If properly crafted and applied, they act trans-substantively to further social and institutional values.\textsuperscript{140} In one sense, Rule 52 is an action-guiding norm that channels the subjects (the litigants, witnesses, etc.) and objects (relevant legal and factual elements) through the appellate process.\textsuperscript{141} Most importantly, Rule 52 imposes duties and confers powers upon trial and appellate judges.

\textsuperscript{137} Whether formal or informal, rules not only guide behavior, but can also act as monitors. Gulati &. McAuliffe, supra note 21 at 164 (rule constraints include external scrutiny and ‘reputation sanctions.’)

\textsuperscript{138} See J. Woodford Howard, Jr., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 191 (1981) (judges surveyed “showed a consensus regarding appropriate methods of making decisions.”).


\textsuperscript{140} Matheson, supra note 6 at 229.

\textsuperscript{141} Gavison, supra note 64 at 740-41.
Rule 52 is the procedural mechanism that allocates responsibilities for fact identification, law declaration, and law application. Directing that findings of fact “shall not be set aside unless…” demonstrates that Rule 52 aimed to fix the realm of authority trial courts would possess. That the drafters did not have Rule 52 read factual findings “shall [ ] be set aside if…” reflects that they did not intend Rule 52 to articulate the reach of the appellate courts over the trial courts. By negation however, Rule 52 reinforces the principle that appellate courts retain the power to “say what the law is.”

Several institutional rationales militate in favor of reposing factual determinations with the trial court and legal determinations with the appellate courts, all going to further judicial effectiveness. Judge Richard Posner observed that procedural rules serve two primary functions: to reduce both error costs and direct costs. Error costs, or social costs, are those incurred in the absence of accurate or “fair” outcomes. For example, appellate review serves in part to reduce the likelihood of incorrect results arising from the trial court’s law misinterpretation or misapplication. Direct costs are those economic or temporal losses incurred by the litigants and judicial system. Judge Posner’s economic-model framework incorporates institutional values of tribunal competency, administrative efficiency, and the need for doctrinal coherence.

A. RESPECTIVE TRIBUNAL COMPETENCIES

Rule 52 is a bow to trial courts’ competency at finding facts no matter the type or form. Trial courts are best suited to take evidence, empanel juries, and evaluate witness credibility, demeanor, context and atmosphere. In other words, trial judges have a better familiarity with both common and unique aspects of a case. Moreover, they are likely to be more in tune with “human affairs,” given their experiential background and the degree to which they daily interact with litigants, witnesses, counsel, and court personnel.

Conversely, Rule 52 acknowledges appellate courts’ expertise in norm application and development. The role of appellate judges is to thoughtfully consider and apply the law with a high degree of intellectual rigor. By extension, appellate judges are better able to ensure decisional accuracy. The presumption of finality to factual findings gives appellate judges that deliberative space by limiting the scope and quantity of appeals.

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142 Adamson, Ideological Weapon? supra note 20 at 1044; Monaghan, supra note 29 at 236; Alogna, supra note 28 at 1155 (law application “entails a judgment that this law is relevant to these facts, or stated conversely, that the facts, by meeting the standard instantiated in the law, trigger legal consequences.”).
143 Marbury v. Madison, 5 U.S. 137 (1 Cranch) (1801).
145 Posner, supra note 144 at 400.
146 Louis, Allocating Adjudicative Decisionmaking, supra note 34 at 1013-14, 1041.
B. ADMINISTRATIVE EFFICIENCIES

By directing trial court authority over oral or documentary evidence, and urging “due regard” for witness credibility determinations, Rule 52 reduces direct costs. Put another way, trial courts are better positioned to make such determinations, and appellate costs will not be “sunk” into re-litigating facts capably found below. Direct costs are lowered also because litigants, aware of the presumptive finality of the findings, are compelled to more vigorously prosecute their cases. For appellate judges, the presumption of finality to factual findings reduces their workload and furthers their ability to reduce error costs through decisional accuracy.

C. DOCTRINAL COHERENCE

Rule 52 acknowledges through silence appellate courts’ obligation to maintain control of and clarify legal principles. In making sure that legal norms are properly articulated, developed, and applied, appellate courts are best suited to unify precedent, stabilize norms, and give predictive force to law interpretation. By limiting the scope of review of factual findings, the judicial system avoids the doctrinal dissonance that would otherwise arise should different circuit panels interpret the same legal norms differently. To expand appellate review would generate decisions of marginal weight or precedential value due to the number and fact-specific nature of opinions.

Doctrinal coherence becomes most essential when federal—especially constitutional—rights are at issue. Indeed, a critical aspect of the Supreme Court’s Erie Railroad Co. v. Tompkins decision touches upon appellate court powers under Rule 52. The separation of powers aspect of the Erie doctrine echoes the Rules Enabling Act provision that enjoins federal judges from creating or applying rules that “abridge, enlarge, or modify” a substantive right. Erie announced a parallel proscription, enjoining judge-made common law in the absence of a federal constitutional or statutory

147 Fed. R. Civ. P. 52(a).
149 Cf. Allen & Pardo, supra note 6 at 1776; Alogna, supra note 28 at 1154 (“legal principles have general normative and prescriptive significance.”); Richard D. Friedman, Standards of Persuasion and the Distinction Between Fact and Law, 86 New. U. L. Rev. 916, 918 (1992) (legal norms “prescribe the consequences to be attached to” facts).
150 Consider that, for example, a 9 member court can yield 84 different 3-member panel combinations.
151 Louis, Allocating Adjudicative Decisionmaking, supra note 34 at 1014.
152 304 U.S. 64 (1938).
provision. Thus, appellate judges should not allow, under any circumstance, a federal rule to override a substantive right. That obligation is perhaps what leads appellate courts to surface substantive interests embedded in ostensibly pure factual findings despite Rule 52’s plain language.

SUMMARY

As facts move from the category of the “pure” adjudicative type to the type that would concretize legal norms or rules, appellate obligation to say “what the law is” comes into play. Rule 52 strikes the balance towards underlying principles of respective competencies, administrative efficiencies, and doctrinal coherence. In doing so, Rule 52 seeks to capture important policy reasons that justify reposing fact finding with trial courts.

But due to the malleable, capacious nature of facts, appellate courts are empowered to balance institutional values not captured by Rule 52. Because Rule 52 makes no distinctions between the kinds of facts subject to review for clear error, it “produces errors of over-inclusiveness.” In particular, a determination that a fact is a constitutional one brings other institutional values into the equation and compels departure from Rule 52. That determination is pivotal; it marks the point at which appellate judges decide to engage in an active instead of passive Rule 52 interpretation. Consequently, while Rule 52 might constrain appellate judges, “its power is not conclusive.”

IV. ACTIVE VIRTUES, PASSIVE VIRTUES, AND CONSTITUTIONAL FACTS

Rule 52 qualifies the term “fact” in no way. It does not exclude ultimate legislative, sociological, or constitutional facts from its coverage. In 1982, the Supreme Court emphasized that when it comes to intentional race discrimination factual findings, Rule 52 means what it says: it “does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with ‘ultimate’ and those

154 Id. at 528.
155 Id.
156 Id.
157 Professor Struve sets forth the theoretical sources of the Supreme Court’s power to interpret procedural rules by balancing policy arguments for or against a particular interpretation. Discretion to interpret procedural rules is inherent because the Supreme Court itself promulgates those rules. Struve, supra note 21 at 1124-1132. She even makes the case as to how lower federal courts have “felt free to strain the Rules’ text and ignore relevant Notes, in order to implement their own views of desirable policy.” Id. at 1119 and discussion at 1141-47.
that deal with ‘subsidiary’ facts.” Two years later, the Supreme Court did just that: it carved out a constitutional fact exception and held that independent appellate judgment must be made on actual malice findings. Thus, the Supreme Court has concluded that to fulfill certain institutional obligations, appellate courts must ignore Rule 52’s plain language when it comes to constitutional facts—some of the time.

A. ACTIVELY PRIVILEGING THE FIRST AMENDMENT

The constitutional fact doctrine emerged out of the jurisdictional fact controversies arising in administrative agency decisions on due process and takings issues. The doctrine gained force when it first appeared in a criminal case, Near v. Minnesota. New York Times v. Sullivan was the first case that placed actual malice into the constitutional setting, with the Supreme Court announcing its obligation to make an “independent determination” on the factual record. A series of cases leading up to Bose further refined malice as a constitutional fact.

Constitutional facts are, obviously, those that establish a constitutional right or obligation. As with any fact type, constitutional facts are not always apparent. Often, it is the inference from subsidiary facts established that becomes the constitutional fact. In any event, the constitutional fact doctrine operates as a sub rosa exception to Rule 52. Bose Corporation v. Consumers Union applied this exception, announcing a need to make an independent judgment on the district court’s libel and actual malice findings.

Bose was a product disparagement claim brought by the manufacturer against the publisher of Consumer Reports and the author of a review of the latest Bose loudspeaker.

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160 283 U.S. 697 (1931).
164 Id. at 501, n. 17, 514.
The author wrote that the loudspeaker caused the sounds of individual music instruments to wander “about the room.”\textsuperscript{165} The trial judge ruled that the author made a false and disparaging statement, and did so with actual malice.\textsuperscript{166} The Court of Appeals reversed, ruling that the judge’s findings were clearly erroneous.\textsuperscript{167} While affirming the Court of Appeals decision, the Supreme Court invoked a constitutional responsibility of independent review “to test challenged judgments against the guarantees of the First and Fourteenth Amendments,”\textsuperscript{168}

The Supreme Court went on to discuss why Rule 52 did not apply to actual malice. The crux of the Court’s justification for independent judgment can be found in footnote 17. It is entirely textual, with no citations whatsoever. There, the majority noted how the term actual malice blurs the line between fact and law.

A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is ‘found’ crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must \textit{exercise its own independent judgment}. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.\textsuperscript{169}

In the text surrounding that footnote, Justice Stevens makes the point that even though the Rule 52 prescribes deferential review even for “ultimate” findings of fact, Rule 52 does “not inhibit an appellate court’s power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicted on a misunderstanding of the governing rule of law.”\textsuperscript{170}

The majority even went so far as to ground its expansive review in the language of Rule 52 itself. The majority reasoned that “Rule 52(a) never forbids such an examination [.]”\textsuperscript{171} The majority asserted that the \textit{Gypsum} Court “expressly contemplated a review of the entire record,” and that a “finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”\textsuperscript{172}

The Court next identified three characteristics of the \textit{New York Times v. Sullivan}\textsuperscript{173} actual malice standard relevant to applying independent judgment instead of

\begin{footnotes}
\footnote{165} Id. at 488.
\footnote{166} Id. at 487.
\footnote{167} Id. at 491-92.
\footnote{168} Id. at 522, n. 27 (quoting Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.)).
\footnote{169} Id. at 501, n. 17 (emphasis added).
\footnote{170} Id. at 501.
\footnote{171} But see discussion, \textit{infra} at Sect. II B.
\footnote{172} Bose, 466 U.S. at 516 (citing \textit{United States v. United States Gypsum Co}, 333 U.S. at 395) (emphasis supplied).
\footnote{173} 376 U.S. 254 (1964) (in libel action, plaintiffs must prove actual malice against media defendants).
\end{footnotes}
clear error. First, due to the common law evolution of the standard, trial judges were accorded “an especially broad role…in applying it to specific factual situations.”

Second, the meaning of “actual malice” had evolved only through case-by-case adjudication—making it a purely judge-made rule of law. Third, “the constitutional values protected by the rule” made it “imperative that judges—and in some cases judges of this Court—ensure that it is correctly applied.” For those reasons, the majority felt no need whatsoever to be “bound by the conclusions of the lower courts, and could re-examine the evidentiary basis” for those conclusions.

The majority acknowledged that the core determination of actual malice, viz. actual knowledge of falsity or subjective reckless disregard for falsity, involved nothing more than findings on the mens rea of the author. But the announced constitutional obligation outweighed any policies or principles underlying Rule 52 that might justify any fidelity to the clear error standard. The court re-examined the appellate court’s and district court’s findings, including those going to the subjective state of mind of the review’s author and sound expert. Thus, beginning with a novel Rule 52 interpretation, and ending with its three-pronged New York Times-based rationale, the majority ruled that independent appellate judgment on actual malice determinations is not just appropriate, but imperative.

B. PASSIVELY MARGINALIZING INTENTIONAL RACE DISCRIMINATION

In contrast, neither independent appellate judgment nor independent review is imperative for intentional race discrimination claims under the Equal Protection Clause. That clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Ratified in light of the ineffectiveness of the Thirteenth Amendment, which sought to eliminate all badges and incidents of slavery, the Fourteenth Amendment codified Congress’s 1866 Civil Rights and Freedman Bureau Acts. This primary constitutional mechanism to provide remedy to racial

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174 Bose, 466 U.S. at 502.
175 Bose at 518 (“When the standard governing the decision of a particular case is provided by the Constitution, this Court’s role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance.”).
176 Id. at 501-02.
177 Id. at 509.
178 Id. at 498 (“It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of ‘fact.’”).
179 Id. at 493-98.
180 U.S. Const., Amend. XIV.
181 U.S. Const., Amend. XIII.
182 Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (42 U.S.C.A. § 1982 (2006)) (“[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, …shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.”).
discrimination, of course, makes no distinction between cause or effect, intent, or even negligence.

Many scholars have lamented that the Equal Protection Clause, early on, did little to ensure that African-Americans would receive equal treatment.\(^{183}\) While evolving Equal Protection Clause interpretations eventually improved its efficacy, the discriminatory intent requirement has impeded realization of the true purpose of the clause.\(^{184}\)

If a law, policy, or regulation explicitly classifies citizens on the basis of race, the Supreme Court has required a strict scrutiny analysis.\(^{185}\) Upon establishing the existence of a suspect classification, discriminatory intent is presumed.\(^{186}\) For a time, the presumption was true for facially neutral initiatives evincing a racially disproportionate impact. That presumption disappeared with *Washington v. Davis*.\(^{187}\)

*Davis* was an equal protection challenge brought by two African-American applicants for the Washington D.C. police department. They charged that the department used racially discriminatory hiring procedures; specifically that the department’s personnel test demonstrated a racially disproportionate impact. The petitioners put forth evidence that African-Americans failed Test 21, a verbal skills examination, at a rate four times higher than white applicants.\(^{188}\)

The Court rejected its *Griggs v. Duke Power Company*\(^{189}\) ruling that a demonstration of disparate impact was sufficient under Title VII discrimination standards.\(^{190}\) Marking a seismic shift in the burdens of proof, the Supreme Court concluded that when challenging facially neutral laws, policies, or regulations, plaintiffs must prove discriminatory intent.\(^{191}\) In accord with public employment cases like *Davis*,

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\(^{183}\) This is so even though its drafter, John Bingham, made clear that the purpose of the Fourteenth Amendment was to ensure that every person, “no matter whether Asiatic or African, a European or an American sun first burned upon them” would be equal in the eyes of the law. Justice Miller, in the Slaughterhouse cases conceded that African-Americans would be the “primary beneficiaries” of the equal protection clause. Yet between 1873 (the year of the Slaughterhouse cases) to Plessy, of the 150 Fourteenth Amendment cases coming to the courts, only 15 involved African-Americans. Dean Richard Aynes discusses the lowlights of that era in Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation, 39 Akron L. Rev. 289, 304-07 (2006) (“whites and corporations appeared to be [the equal protection clause’s] primary beneficiaries. This produced an unintentional result of the Fourteenth Amendment: the orphaning of African Americans.” *Id.* at 307).

\(^{184}\) The law played a powerful role in imposing identities on racialized minorities as a way of excluding them from full participation in American life.

\(^{185}\) This standard first appeared in *Korematsu v. United States*, 323 U.S. 214 (1944). Such an analysis also obtains if a fundamental right is deprived.

\(^{186}\) “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 272.


\(^{188}\) *Id.* at 232.

\(^{189}\) 401 U.S. 424 (1971).

\(^{190}\) *Davis*, 426 U.S. at 230.

\(^{191}\) Before *Washington v. Davis*, lower courts had used the disproportionate racial impact theory to overturn legislation that did not have a racial criterion of selection, but did have a disproportionate racial impact.
plaintiffs bear that heightened burden in public housing, school desegregation, redistricting, and voting rights Equal Protection settings.

Like actual malice, intentional race discrimination calls for an inquiry into an actor’s motivation or mental state to determine animus or illicit motive. Evidence of intentional discrimination takes form through direct, circumstantial, oral or documentary evidence. Regardless of it’s form (subtle or overt, intentional or unintentional, conscious or unconscious, examined or unexamined), the fact finder is charged with ferreting out the discriminatory purpose.

Unlike actual malice, the Supreme Court has ruled that intentional race discrimination findings are reviewable only for clear error. Furthermore, that standard is applied not only to the so-called subsidiary facts and inferences from the facts, but to the ultimate finding on discrimination as well. Since Pullman Standard v. Swint, the
Supreme Court has been steadfast in applying Rule 52’s clear error standard to intentional discrimination factual findings.\(^{200}\)

**SUMMARY**

The Supreme Court’s most frequently stated rationale for reviewing intent and mens rea determinations for clear error centers on comparative tribunal competency. Rule 52 itself directs appellate courts to give “due regard” to the trial judge’s assessment of “the credibility of witnesses.”\(^{201}\) Since intentional discrimination is a state of mind determination, often turning upon witness credibility and demeanor, the trial judge is best situated to make the most credible conclusions on intent.\(^{202}\) And despite the significance of the violation that follows a finding of intentional discrimination, the Supreme Court has insisted that intentional discrimination “does not lose its factual character because its resolution is dispositive of the ultimate constitutional question.”\(^{203}\)

But somehow, actual malice does. This apparent double standard bears exploring.

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\(^{200}\) See, e.g., *Easley*, 532 U.S. at 243 (affirming that the issue of race rather than politics was a motivating factor in the state redistricting plan was reviewable under the clear error standard, but applied different standard. See discussion *infra* at Sect. III); *St. Mary’s Honor Ctr.*, 509 U.S. at 505-06 (1993)(Trier of fact’s rejection of employer’s asserted non-discriminatory purpose is subject to review under a clear error standard); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 531 (1991)(issue of purposeful employment discrimination reviewable under for clear error); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (Court of Appeals in an employment discrimination case errored in reviewing de novo rather than using a clearly erroneous standard); *Anderson*, 470 U.S. at 573 (intentional gender discrimination is a finding of fact; the governing appellate review standard is clear error (following *Davis*); *Dayton Bd. of Ed.*, 443 U.S. at 534 ( Court of Appeals must find the district court’s determination that “defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment,” to be “clearly erroneous.”); *Clients’ Council v. Pierce*, 711 F.2d 1406, 1410 (8th Cir. 1983)(any intentional discrimination arising out of the facts that the public housing was “virtually one hundred percent segregated” and the housing for black families was “less well constructed and less well maintained” must be reviewed for clear error); *Clark v. Universal Builders, Inc.*, 706 F.2d 204, 206 (7th Cir. 1983)(fact that home builders and sellers charged blacks buyers higher prices than charged white buyers “cannot be set aside on appeal unless [it was] ‘clearly erroneous.’”); *Sandford v. R. L. Coleman Realty Co., Inc.*, 573 F.2d 173 (4th Cir. 1978)(clear error applied to defendant’s “policy of discrimination against black people seeking to rent and purchase housing accommodations.””). *Cf. Louisiana v. Snyder*, 128 S. Ct. 1203 (2008)(prosecutor’s justifications for striking African-American jurors failed even under the clear error standard); *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (prosecutors may not dismiss jurors solely on the basis of their race; trial court’s decision will not be overturned unless it is clearly erroneous ); *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (no clear error in prosecutor’s dismissal of two Latino jurors despite the potential disproportionate impact on members of this group).

\(^{201}\) *Rule 52(a).*

\(^{202}\) As Justice Breyer noted in his concurring opinion in *Rice v. Collins*, 546 U.S. 333 (2006), a case of race discrimination and jury selection, an appellate court, on a cold record, cannot detect “a prosecutor's hesitation or contradiction reflecting (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision.*** These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson.*” *Id.* at 343.

\(^{203}\) *Miller*, 474 U.S. at 113.
V. EXPLORING THE DOUBLE STANDARD

Consider, now, whether this double standard is doctrinally sound, jurisprudentially defensible, or substantively justified. First, we must test the soundness of the Bose reasoning, looking at whether any fundamental differences between actual malice and intentional race discrimination concepts account for the differential treatment. Second, we must ask whether Rule 52 permits the differential treatment, and which underlying institutional values argue for treating the two concepts differently. Finally, we can demonstrate how Rule 52 and the Supreme Court’s selective application of the constitutional fact exception work a substantive injustice on intentional race discrimination fact findings.

A. WHAT’S THE DIFFERENCE? ACTUAL MALICE AND INTENTIONAL RACE DISCRIMINATION—A DOCTRINAL CRITIQUE

The Bose majority’s parsing of Gypsum’s definition of Rule 52 is wholly disingenuous. As one scholar observed, Gypsum’s “definite and firm conviction” language did not signal an intent to extend the scope of factual review, but merely did “no more than suggest a means of approach to the nebulous problem of when a finding of fact is subject to reversal under Rule 52(a).” In other words, the Gypsum Court correctly assumed that appellate judges are doing their jobs when it speaks of the “reviewing court” looking at the “entire evidence” in reaching a “definite and firm conviction” of a trial court mistake. The Bose majority tortures the Gypsum language, substituting “reviewing…the entire evidence” with “re-weighting.” If such an interpretation of Gypsum is warranted, then the clear error standard is utterly meaningless.

Notably, while all nine justices approved the need for independent review, several did not subscribe to the independent judgment language. In its final footnote, the majority opinion seems to sense its own overreaching. In closing, Justice Stevens offers what comes across as a post-hoc rationalization. The Court did not make an independent judgment in the sense of conducting “an original appraisal of all of the evidence,” but took “an independent assessment only of the evidence germane to the actual-malice determination.” In writing as he did, he introduced confusion as to which elements of libel itself, as a constitutional imperative, demand independent “assessment.”

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204 See also Comment, Scope of Appellate Review Widened, 2 Stan. L. Rev. 784, 787 (1949-50).
205 Keeton, Keeton on Judging, supra note 6 at 19.7.4.
206 Bose, 466 U.S. at 514.
207 Id., Bose has been interpreted as requiring independent review to the ‘of and concerning’ prima facie libel element. Matheson, supra note 6 at 272; David Elder, Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock’s Attempts to Circumvent New York Times v. Sullivan, 9 Van. J. of Ent. And Tech. L. 551,584 (2007); Susan M. Gilles, Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation, 58 Ohio St. L.J. 1753, 1772 (1998). Independent review may also apply to findings of falsity, negligence, the opinion/fact distinction; may mandate review only of actual malice; may mandate de novo review; it may apply to appeals by both parties or only to defense appeals; may apply only to appeals from trial verdicts. Gilles at 1772-73 (and cases cited therein). See, also Note, Amplifying Bose
And what of other constitutionally significant factual findings? The majority’s rationale for independent judgment in *Bose*, viz., the common law evolution of the actual malice standard, the protection of constitutional values, and ensuring that constitutionally-based legal norms are correctly applied, could pertain to most any legal concept implicating constitutional rights or obligations.208 One could most certainly apply identical reasoning to justify independent determinations on intentional race discrimination findings.

The antecedents of race discrimination prohibitions lay in common law, and go back beyond the passage of the Thirteenth Amendment and the Civil Rights Statutes.209 Before this, at least 32 states had codified anti-discrimination provisions in their innkeeper statutes.210 Both actual malice and intentional discrimination have similar roots in the line of English cases involving scienter and the law of deceit.211 The Supreme Court itself has recognized that racial discrimination proscriptions have shared histories...
with the common law torts of insult and indignity\textsuperscript{212} and has characterized intentional
discrimination as “tantamount to malice.”\textsuperscript{213}

One must ponder whether something about the respective structures of the First
Amendment and Fourteenth Amendment would account for the double standard. The
First Amendment is widely interpreted as creating positive rights.\textsuperscript{214} On the other hand,
the Equal Protection Clause is seen as creating a negative right, i.e., to be free from
discrimination.\textsuperscript{215} Actual malice establishes a protective boundary around those
venerable First Amendment guarantees. Intentional discrimination, on the other hand,
prosecutes a right in the face of a presumption of non-discriminatory animus. However,
what the Equal Protection Clause \textit{obliges} (not to discriminate) is no less venerable than
First Amendment guarantees.

Thus, the Court’s “protecting constitutional values” justification simply begs the
question. The value being protected is rooted in general federalism principles and the
power of the Court to unify legal norms. It is apparent that an intentional race
discrimination finding triggers a constitutional right, i.e., to be free from such
discrimination. It is difficult to see why actual malice needs more vigilant doctrinal
norming than intentional discrimination.

Constitutional malice is defined as a knowing or reckless disregard of the falsity
of statements made of or concerning a person\textsuperscript{216} Constitutional malice can also be found
where the defendant engaged in “highly unreasonable conduct” in his investigation and
reporting.\textsuperscript{217} In judging whether the defendant evinced knowing falsity, reckless
disregard, or even unreasonable behavior, the trial court is charged to determine whether

Statutes: History Adrift in a Maelstrom, 68 Nw. U. L. Rev. 503, 524-527 (1973); Carolyn F. Kolks, United
States v. Burke - Does It Definitively Resolve the Analytical Confusion Created by the Section 104(a)(2)
Personal Injury Exclusion? 46 Ark. L. Rev. 657(1993) (Citing \textit{Loether}, asserting that “this statement is a
clear indication that the Court would have concluded that discrimination is a personal injury had the Court
found that a violation of Title VII is a tort”); Marc A. Franklin & Robert L. Rabin, Tort Law and
Alternatives 914-15 (8th ed. 2006) (discussing common law and statutory racial and sexual harassment
claims). See also Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and
\textsuperscript{213} Courts have referred to the term “intent” as “invidious” discrimination, on a par with “animus, malice,
or a conscious awareness.” Selmi, supra note 7 at 288; Siegel, supra note 196 at 1134-35 (discussing
\textit{Feehey} which parses motive, intent, and volition).
\textsuperscript{214} Orville Lee, Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society, 26
Law & Soc. Inquiry 847 (2001) (access and enhanced participation are positive rights which maximize the
First Amendment’s right to free speech). But see Kathleen Sullivan, Constitutionalizing Women’s Equality,
90 Cal. L. Rev. 735 (2002) (judges often feel that positive rights are outside of their ability to enforce).
\textsuperscript{215} Roberto Gonzalez, Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine, 55
Stan. L. Rev. 2195, 2226 (2003) (it makes sense to structure Equal Protection as a negative right as it is
sometimes difficult to measure the baseline discrimination against a person or group); Robert F. Williams,
Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance
Cases and Beyond, 24 Conn. L. Rev. 675, 696-97 (1992) (the Equal Protection Clause has been most often
applied as a negative right).
\textsuperscript{216} Sullivan, 376 U.S. at 270. See Elder, supra note 207 at 600.
\textsuperscript{217} Curtis Publishing, 388 U.S. at 155.
the “defendant in fact entertained serious doubts as to the truth of his publication.”²¹⁸ In doing so, the trial judge can make factual findings on any subjective animus the defendant may have had towards the plaintiff.²¹⁹

Alternatively, the trial judge, in reaching a constitutional malice determination, can find that a defendant engaged in a course of conduct in spite of its ultimate impact, viz., publishing a false statement. By holding that independent appellate judgment must be had on those determinations, the Supreme Court treats actual malice like obscenity, fighting words, or prurient interest “facts.” The suggestion is that the guises in which constitutional malice manifests itself are limitless.

Hence, the converse argument would be that an act of intentional discrimination cannot be calibrated or nuanced; “it is a factor that has influenced [a decision] or it is not.”²²⁰ There are two fundamental problems with this argument.

First, the inconsistency is evident when we look within the intentionalist framework. A constitutional violation under actual malice can be shown if a defendant did not care about the impact of his conduct, yet under intentional discrimination, such “reckless disregard,” or the entertainment of serious doubts about the impact of one’s behavior that resulted in discrimination can never carry the day. When we consider the Equal Protection Clause and its antidiscrimination principles, the same goals are in mind.

As Professor David Lawrence so succinctly put it, the task of the trial judge is to ferret out the perpetrator of discrimination. The core tenet of antidiscrimination adjudication is to “select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects.”²²¹ In looking for race-dependent decisions made by the perpetrator, the court must look to fault. To do so, the trial court must do more than examine whether the perpetrator proceeded on a course of conduct with a purposeful desire to create discriminatory results. The court must also explore whether and which any aspect of that person’s conduct contributed to the violation.

Though the Supreme Court has rejected any disparate impact or negligence basis to prove an equal protection violation, it is apparent that race discrimination is just as textured as actual malice. If the Court is to be doctrinally consistent, it must allow consideration of those negligent and reckless discriminatory acts; in particular, independent appellate judgment should apply to examine whether the perpetrator engaged in a course of conduct in disregard for its discriminatory effect, or could not justify the rationality of his course of conduct.²²²

²¹⁸ St. Amant, 380 U.S. at 732.
²¹⁹ Elder, supra note 207 at 600 (summarizing libel cases since Near v. Minnesota, pps. 555-600).
²²⁰ Feeney, 442 U.S. at 277.
²²² Id. at 1098.
Second, the notion that discrimination exists or it does not exist is a gross oversimplification. To be sure, most discrimination is not the result of conscious, direct malice or bigotry, but arises out of more subtle, complex motivations. Stereotyping, unexamined or unconscious bias, aversive racism, or mixed-motive cognitions are each forms of discrimination marked by some degree of illicit volition. And even those forms of discrimination are manifested in variant ways. The argument that intentional discrimination exists or does not fails to consider “intent” in all but its narrowest sense.

224 Unlike traditional racial discrimination, where an actor actively and consciously discriminates against someone based on their race, unconscious bias takes place without the actor even knowing. “treat[ing] others differently even when they are unaware that they are doing so.” Christine Jolls, The Law of Implicit Bias, 94 Cal. L. Rev. 969, 969 (2006); Charles Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 319 (1987)(“Improper motives are easy to hide. And because behavior can result from the interaction of a multitude of motives” governmental officials will always be able to argue that racially neutral considerations prompted their actions.) Instead of an individual act, unconscious bias is a cultural or social practice, Imani Perry, Post-Intent Racism: A New Framework for an Old Problem, 19 Nat'l Black L.J. 113, 115 (2006), where people disadvantage racial minorities, “even while vociferously stating that they are not ‘racist’ and without evidence of any form of deliberate racial animus.” Id. at 125.

Psychologists often measure unconscious bias with the aid of the Implicit Association Test (IAT). The test pairs an attitude object, like a racial group, with an evaluative dimension, like good or evil, and tests the speed and accuracy of responses to indicate implicit and unconscious biases. Examination of hundreds of thousands of IATs show that white test subjects often relate racial minorities with negative connotations, confirming the systematic display of unconscious bias. Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345, 356 (2007). See also See, e.g., Lawrence, 39 Stan. L. Rev. 317(noting that individuals acquire and use racial attitudes and stereotypes without knowing it); Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489 (2005) (analyzing psychology studies indicating that subjects performed tasks with unconscious racial bias); Linda Hamilton Kreiger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1203 (1995) (noting that once individuals rely upon stereotypes to explain societal differences, the stereotypes become an unacknowledged but engrained part of their cognitive processes).

225 Aversive racism has much in common with unconscious bias. Aversive racism is the idea that there is an inner conflict between denying personal prejudice and unconscious negative feels and beliefs. According to Samuel L. Gaertner and John F. Dovidio, unlike traditional racism, which is “characterized by overt hatred for and discrimination against racial/ethnic minorities, aversive racism is characterized by more complex, ambivalent racial expressions and attitudes.” Samuel L. Gaertner and John F. Dovidio, “The Aversive Form of Racism,” in PREJUDICE, DISCRIMINATION AND RACISM: THEORY AND RESEARCH 61-89 (1986). Far from wearing hoods or burning crosses, aversive racists “support policies that promote racial equality and regard themselves as not prejudiced,” but at the same time experience feelings of uneasiness in the presence of minorities, and tend to engage in racial discrimination when there are “race-neutral justifications for their behavior.” Leland Ware, A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain. 36 Ga. J. Int'l & Comp. L. 89, 113 (2007) Aversive racists have this ambivalent attitude in part because their negative view of minorities conflicts with their “egalitarian value systems,” which results in discrimination that can be justified to others and to themselves as nonracial. Id. Jerry Kang, discussing aversive racism, stated: “even those who espouse equality norms on self-reported surveys may have substantial implicit biases against racial minorities.” Jerry Kang, *supra note* 10 at 956.
B. WHAT’S THE DIFFERENCE?: ACTUAL MALICE AND INTENTIONAL RACE DISCRIMINATION FINDINGS: AN INSTITUTIONAL VALUES CRITIQUE

The actual malice and intentional race discrimination concepts themselves cannot fairly explain the difference in standard of review choice. Consequently, we must re-visit Rule 52 and the institutional values it seeks to promote. The discretionary nature of Rule 52, like a decision to depart from it, is contingent upon a host of institutional goals. By considering those goals, we can see whether it makes sense to apply independent appellate judgment to actual malice but not intentional race discrimination.

Given the power of procedural rules to monitor judicial behavior, Rule 52 secures a kind of fidelity to the law itself. It demands that appellate judges resist categorizing facts in order to “get at” trial court findings. While not apparent on its face, the bottom line is that Rule 52 confines upon appellate courts the power to do just that. However, the power is purely discretionary. Consequently, appellate courts may engage actively or passively with the trial court’s factual findings.\(^\text{226}\)

In deciding to resort to Rule 52’s constitutional fact exception, appellate judges weigh institutional interests. Foremost, a decision to resort to the exception means that the imperative to articulate a legal norm and decisional accuracy outweigh trial court legitimacy, any presumption of finality, and even direct costs.\(^\text{227}\)

It is clear that for actual malice and intentional race discrimination, the Supreme Court has weighed the institutional interests in a way that results in different applicable standards of review. If courts apply independent appellate judgment to factual findings on intentional race discrimination, we should ask what is gained or lost from a direct cost/error cost perspective.

On one hand, Rule 52 acknowledges the trial courts are best situated to explore and assess intent. Appellate judges can not directly observe the trial actors, the expressions or reactions, or hear the vocal tone or nuances. Thus, independent appellate judgment would neither ensure decisional accuracy, nor ensure confidence in outcomes. Importantly, appellate re-evaluations of context-specific determinations made by the trial judge could be wrong.

\(^{226}\) Judges and scholars alike have even praised the “clear error” discretion as important, allowing appellate judges the “room” to animate the elusive nature of “facts” through the case context. See, e.g., Maloy, supra note 19 at 620-22; Michel, supra note 19 at 20; Cooper, supra note 19 at 648.

\(^{227}\) This is not to say at all that appellate judges do not insert their personal policy views and ideologies into their decisionmaking. Attitudinal and personal interests can and do play a role, even when deciding on matters of procedure. See Daniel R. Pinello, Linking Party to Judicial Ideology in American Courts: A Meta-Analysis, 20 Just. Sys. J. 219, 243 (1999); See also, David Klein, Making Law in the United States Courts of Appeals (2002); Jeffrey A. Segal, Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993); Tracy E. George, Positive Theory of Appellate Decisionmaking, 58 Ohio S L J 1635 (1998)(analyzing attitudinal and strategic theories of en banc cases at Federal Court, 4th circuit, testing how judges decide cases). This article, however, leaves a more probing exploration of that topic for another day.
Treating intentional race discrimination findings as constitutional facts for independent judgment thus raises direct costs, with no guarantee of a reduction of error costs. Conversely, clear error review lowers direct costs. Litigants and courts save time and money due to the limited ability to engage in a subsequent, independent review of factual findings. As a corollary, appellate courts run more efficiently if appeals are fewer.

The scope of appeal broadens if factual findings no longer carry presumptive finality. But the quantity of appeals would undoubtedly rise. Sunk costs would tax the trial court if litigants fail to prosecute cases with the vigor they otherwise might exert. Conflicts in outcomes on intentional race discrimination claims within circuits would add to the direct costs as those conflicts would require reconciling. Perceptions of being “second-guessed,” coupled with any lessening of due regard litigants may exhibit, would threaten comity between tribunals and trial court legitimacy.

In defense of independent appellate judgment on intentional race discrimination findings, clear error review exacts extraordinary error costs. First, its application to intentional race discrimination minimizes the appellate role to ensure decisional accuracy. Independent appellate review proceeds in part on the grounds that trial judges, sitting alone and without voting colleagues to provide checks and balances “will sometimes make aberrational decisions.”228 The cost of a wrong decision by the trial court burdens litigants and society as a whole.229

Second, clear error review prevents legal norming of a constitutional-based issue of fact. Under the clear error standard, intentional race discrimination in its various forms can not develop as a robust legal norm, much less a constitutional one.230 Were such questions fully re-examined on appeal race discrimination doctrine would develop in a way that more broadly encompasses the forms of discrimination.231 By extension, giving

228 Louis, Allocating Adjudicative Decisionmaking, supra note 34 at 1014.
230 See Kreiger, The Content of Our Categories, in Race and Races, supra note 224 at 33, who compares Title VII race discrimination claims with those of age discrimination and the type of proof needed. While rejecting that unconscious racial bias could operate to discriminate, she notes that the Seventh Circuit embraced such a possibility in age discrimination claims. But see Justice Wellford’s dissent in Davis v. Combustion Engineering, Inc., 742 F.2d 916 (6th Cir. 1984), where he makes a wholly unconvincing distinction between age discrimination and race discrimination (“Unlike race discrimination, age discrimination may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce: Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in non-employment because of feelings about a person entirely unrelated to his ability to do a job.” Id. at 925).
231 Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 183(2004) “We want outcomes that are substantively just, judgments that are legally correct, and findings that are factually true.” Id. at 184.
doctrinal coherence to intentional race discrimination would lower direct and social costs by offering stability and predictability to the constitutionally proscribed contours of race discrimination. At the same time, the Supreme Court furthers federalism interests and solidifies its power as the final arbiter of matters directly affecting constitutional rights.

One persistent argument in favor of clear error review regards the trial court’s greater competency at assessing witness credibility and demeanor. Yet the Bose Court was undaunted by the task to make those assessments in order to surface the critic’s motives. Trial judges are undoubtedly better positioned to assess motivation from testimonial responses, rebuttals, vocal tone, nuances, and visual reactions. Moreover, “any inquiry into a person’s motivation or mental state (such as intent or knowledge) is necessarily complex, context-specific, and depends upon its application for shape.” But those complexities obtain regardless of whether the trial judge is considering a stereo critic’s explanation of what he meant when he wrote how the sound emanating from a Bose loudspeaker wandered about the room or an employer’s testimony on his reasons for firing an African-American.

Some direct costs would be higher as a result of independent appellate review. Litigants would incur higher direct economic and temporal costs through appeals. Direct costs incurred by litigants are no small issue—particularly with poor plaintiffs prosecuting discrimination claims. Thus, concerns about increased direct costs to the appellate system can receive little weight: the Supreme Court struck that balance in its Bose decision.

C. PASSIVE VIRTUES, ACTIVE VIRTUES, AND THE SELECTIVE APPLICATION OF THE CONSTITUTIONAL FACT EXCEPTION

Appellate courts have weighed Rule 52’s institutional values in a manner favoring certain constitutional rights and obligations over others. With a double standard existing between actual malice and intentional race discrimination, we can examine whether the rule itself perpetuates a substantive injustice. From there, we can ask whether the refusal to apply the constitutional fact doctrine (and the independent appellate judgment standard) in the intentional race discrimination setting reinforces any substantive injustices. The answer is “yes” on both counts.

Moreover, procedures must “at least strike a fair or reasonable balance between the benefits of accurate outcomes and the costs imposed by the system of procedures.” Id. at 185.

232 The benefit of appellate review of race discrimination and its myriad forms is substantial. For litigants, then appellate judges in conference, the conversations would be doubtlessly rich. It is through both formal and informal conversations between institutional and social peer groups that attitudes, beliefs, and values will most likely be shared, mediated, and influenced. Through those conversations, appellate judges are better able to view race and racism through alternate lenses.

233 Allen & Pardo, supra note 6 at 1776.


Rule 52 operates in a way so that its operative terms—“facts,” “findings,” “oral or documentary evidence,” and “clear error”—ensure that intentional race discrimination findings will never receive the benefit of thorough appellate consideration. This is so not only under circumstances in which intentional race discrimination is explored from the aspects of the perpetrator’s motives and decisional impacts, but especially so when claims are based upon its more subtle forms.

Scholars have noted that the adjudicative processing of “facts” fails to adequately capture the discrimination experience. Every litigant comes to the courthouse armed with a construct of the experience bringing him or her there in the first place. That construct is “any artificial, causal, or interdependent arrangement of facts, factors, elements, or ideas that flow from their own inner awareness.”

It is the individual’s construct of the racial grievance that must receive primary consideration in the adjudicative setting. Overt racial discrimination might be readily seen by others. Yet not all forms of racial discrimination are viewed as “fact” in a manner that the law is equipped to redress. Stories of or by discrimination victims are not always reductive, yet can be intangible and hard to pin down. Even the term “intentional” discrimination fails to fairly capture the experience of victims of unconscious or unexamined bias or aversive racism. As a result, intentional discrimination, broadly understood, can never be authentically captured in the adjudicative setting.

Finding a fact adds an additional layer to the quandary. First, to construct a finding of fact requires a judge to do more than simply identify and describe a “reality;” it requires the judge to interpret, choose between, make inferences from, deduce toward,

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236 D. Marvin Jones, The Death of the Employer: Image, Text, and Title VII, 45 Vand. L. Rev. 349, 363 (1992) (“The individual employer's state of mind, his malice or irrationality, is not the source of the injured victim's discrimination experience.”).


239 One author has posited that if racism is often unconscious, employment discrimination should be seen more often as negligent rather than intentional. Oppenheimer, supra note 223.
and/or synthesize data, evaluate, then articulate one or more “relevant realities.” If human beings are limited by what they believe and those beliefs are articulated as understandings, or “facts” in the adjudicative context, those beliefs constitute one of the competing realities a trial judge must come to terms with if he has to articulate findings. From the perpetrator perspective, race-dependent actions or omissions—whether intentional, negligent, or reckless constitute the other competing reality.

Finding a fact also requires an act of reductionism that, if successful, captures the subordinating experience, and does so in a manner that is intellectually and morally accessible. That experience should be captured whether in its intentional, negligent, reckless, or more subtle forms. If the trial judge cannot or refuses to legitimize the discrimination experience, then that experience will not emerge in a manner that truly does justice to the wound. For those reasons, competent appellate review of the myriad forms of “intentional” race discrimination is contingent upon, and ultimately defeated by the a priori “fact” requirement of Rule 52.

Decisions interpreting Rule 52 also reinforce its deterministic nature. In Bessemer, the Supreme Court reminds appellate judges that their utmost fidelity is to the rule: “applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.” Going further, Justice White in Zenith Radio v. Hazeltine Research, Inc. reminds appellate judges that a tie goes to the trial judge: Even “where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.” Add to these admonitions the fact that they apply regardless of whether the evidence is in oral or documentary form. These directives act as checks on appellate court judges even under circumstances for which intuition, common sense, equal appellate competence (to review documents) and even a resort to another rule (such as the constitutional fact exception) would provide the better answer.

These hortative instructions reinforce the substantive injustice of Rule 52. That the rule must guide appellate judges, that there can be no clear error even if there is another view to be had, even if the appellate court is as in as good a position to evaluate

241 Robinson, supra note 237 at 1370.
243 Trial courts consistently reject unexamined or unconscious racial bias as a fact, as a phenomenon recognized as operative and existing.
244 Bessemer, 470 U.S. at 573 (emphasis added).
245 Zenith Radio Corp., 395 U.S. at 123 (“The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.”).
the evidence as the trial court was, means this: appellate judges might see race
discrimination (overt or subtle, conscious or unconscious) after reviewing the evidence
(for clear error), yet cannot come to a conclusion contrary to one trial judge.

2. Critical Error: Engaging Active Virtues Through The
Constitutional Fact Exception—Some Of The Time

With intentional race discrimination findings, appellate courts enforce a narrow
construction of the constitutional fact exception under the guise of a strict construction of
Rule 52. However, by hewing to the clear error standard, those courts simultaneously
marginalize and depreciate minority grievances.\textsuperscript{246}

Scholars have criticized the intent requirement to Equal Protection violations.\textsuperscript{247} Many have noted the toughened burdens of proof imposed, particularly in the
employment discrimination context.\textsuperscript{248} Added is the burden of having to demonstrate the
workings of more subtle forms of discrimination. Although the phenomena of
unconscious or unexamined racial bias and aversive racism have been increasingly
documented and verified, discrimination claims on those grounds remain difficult to
sustain.\textsuperscript{249} It is enough that \textit{intentional} race discrimination now must be proved to show an
Equal Protection violation.\textsuperscript{250} That barrier is rises even higher because intent findings
are invariably filtered through the Rule 52’s clear error standard, with no recognition as
constitutional fact.

Professor Laurence Tribe has long advocated that appellate courts remain flexible
in their use and application of procedural rules.\textsuperscript{251} “Structural due process” is already

\begin{itemize}
  \item Passive virtues “forsake[] the constitutional rights of those on the outside to promote the constitutional
    rights of those situated more toward the inside.” Kang, \textit{supra note} 10 at 972.
  \item Michael Selmi, Subtle Discrimination: A Matter of Perspective Rather Than Intent, 34 Colum. Hum.
    Rts. L. Rev. 657 (2003). \textit{See also} Melissa Hart, Subjective Decisionmaking and Unconscious
    Discrimination, 56 Ala. L. Rev. 741 (2005); Christopher P. Banks, The Constitutional Politics of
    Interpreting Section 5 of the Fourteenth Amendment, 36 Akron L. Rev. 425 (2003); Oppenheimer, \textit{supra
    note} 223 at 916; Michael J. Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U.
  \item Selmi, \textit{supra note} 247 at 657-660. The issue is exacerbated further when one considers that certain
    evidentiary findings are reviewed only for abuse of discretion. It is also lamentable that discriminatory
    legislative motive is not a proper ground, in and of itself, to prove an Equal Protection violation. Palmer v.
    Thompson, 403 U.S. 217 (1971); \textit{Feeney}, 442 U.S. at – (discriminatory purpose requires “a particular
    course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable
    group.”). \textit{See also} Ugo Colella, Trust The Tale, Not The Author: Judicial Review Of Legislative
    Motivation And The Problem Of Proving A Racially Discriminatory Purpose Under The California
  \item The Supreme Court’s position regarding intentional race discrimination is even more worrisome when
    one considers its affirmative action jurisprudence. Intent determinations are virtually absent in claims of
    reverse discrimination. So while anti-affirmative action grievances warrant not only independent, but strict
    scrutiny, intentional race discrimination findings fall victim to the “non-presumption of animus”
    underpinnings of \textit{Davis}.
  \item Siegel, \textit{supra note} 196 at 1135 (“discriminatory purpose now insulates many, if not most, forms of
    facially neutral state action.”).
  \item Tribe, \textit{supra note} 22 at 269.
\end{itemize}
implicit in some of the constitutional doctrines that we ordinarily treat either as aspects of substantive due process or as parts of procedural due process. An unyielding application of the clear error standard, improperly concretizes (and thus legitimates) majoritarian principles. Case-by-case decisionmaking requires a court to resolve a dispute on its own terms, while articulating some coherent explanation for the decision reached. Where issues are in flux, such as the constitutional fact doctrine, or the meaning of intentional discrimination, those decisionmakers should adopt decisional approaches that are as open as possible. Once consensus has congealed, the judicial system can then incorporate broader, bright-line norms and per se rules.

As we have seen, appellate courts have the authority to exercise independent judgment over findings of intentional race discrimination. The Supreme Court could determine, once and for all, that intentional discrimination findings are constitutional facts that demand independent appellate judgment, as it has done with actual malice and other doctrines. In the alternative, trial court evidence of racial discrimination through unconscious/unexamined bias or aversion could also be considered ultimate, legislative, or sociological facts. Moreover, like appellate opinions that discuss stereotyping and its pernicious manifestations, judicial notice can be taken by appellate courts. In this manner then—whether labeled as a “mixed question of law and fact,” “an ultimate fact,” even a “legislative,” “sociological fact,” or judicially noted fact—the trial court’s factual findings would warrant, at a minimum, independent review.

Time and again, with regards to racial justice, we have seen appellate courts cede to the countermajoritarian difficulty. The belief that somehow independent appellate judgment on intentional race discrimination findings is inappropriate if not unnecessary is grounded in the fallacy that only trial judges have the capacity, and can be trusted, to hold actors to their constitutional obligations. To allow for appellate review of race discrimination findings only under the narrowest grounds ignores the critical role courts have played in the advancement of minorities’ rights.252

Over the past several decades, the Supreme Court’s Equal Protection jurisprudence has developed in manner distressing to those concerned about racial justice. The presumption of non-discriminatory animus on the part of those creating or implementing facially neutral laws, regulations, or policies places those denied their constitutional rights at a proof disadvantage from the start.253 Furthermore, the intentional discrimination requirement had the effect of aborting proof of and remedy for

252 Chemerinsky, In Defense, supra note 11 at 676. As most would concede, “Laws enforcing segregation existed throughout the South and likely would have lasted long beyond their invalidation by the Supreme Court if it had been left to the political process.” Id. at 683.
253 Matheson, supra note 6 at 226. See also, Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003, 1062 (1994) (minority rights are one reason to reach constitutional issues even if no constitutional grounds for decision exist). Here, I would add to Dean Erwin Chemerinsky’s discussion of opinion rhetoric that trial judges often fail to articulate findings of fact in a manner that will shield them from appellate review. Moreover, appellate judges often fail to explain the choice of standard of review, and the decisional tools used to arrive at that choice. When an appellate court exerts its power to depart from Rule 52, and then fails to express its reasoning with clarity, it makes the decisional outcome look an awful lot like whimsy, or worse. Cf. Chemerinsky, The Rhetoric, supra note 139 at 2026. See also Adamson, Ideological Weapon?, supra note 20 at 1082.
the countless examples of the racially discriminatory impact of ostensibly neutral laws, regulations, or policies. The refusal to confer constitutional fact status to intentional race discrimination findings reinforces the difficulties placed in the way of historically subordinated groups, retracts majoritarian principles surrounding race and discrimination, and adds to the now legion indicia of Supreme Court retreat from hearing grievances of historically subordinated groups.

CONCLUSION

So here lie the subtle vices of Rule 52: “Intentional race discrimination” and “actual malice” are both constitutional facts. The invariable application of Rule 52 to intentional race discrimination findings signifies an ill-considered balancing of institutional values that privilege administrative efficiencies and costs over decisional accuracy, doctrinal coherence, and substantive justice. The Supreme Court’s faulty balancing illustrates again that ostensibly neutral, nonsubstantive issues such as institutional competence and decisional accuracy are never neutral.

Yet another vice: The Supreme Court has failed to clarify its independent appellate judgment standard and why it does not apply to all constitutional facts. By refusing to acknowledge the constitutional significance of intentional race discrimination findings, the Supreme Court deprives discrimination jurisprudence of robust doctrinal norming. While cases must be decided on their own terms, appellate courts must be able to adopt rules of decision that ensure both substantive and procedural due process. Only through a determination that intentional race discrimination findings are constitutional facts will proper legal norms be articulated to guide future cases and behaviors.

The final subtle vice: Rule 52 is a vital procedural tool that serves to legitimize the trial and appellate process. All litigants deserve outcomes that are legally correct. As important is the fact that litigants deserve assurance that the procedural rules have been fairly and equitably applied. When the Court purports to apply the same procedural rule, yet uses it passively towards intentional race discrimination and actively towards other constitutionally-critical issues, it de-legitimizes the adjudicative process. The double standard, critically, de-legitimizes the substantive outcomes as well.

Appellate courts are obliged to ensure decisional accuracy and confidence in those outcomes. Where constitutional rights are at stake, no obligation rises higher. It is a simple truth that trial courts do not always arrive at the right decisions. Allowing independent appellate judgment or independent review of intentional race discrimination factual findings would not necessarily ensure correct or even fair results. However, the application of Rule 52’s constitutional fact exception to such findings can ensure results that are at least consistent within the Supreme Court’s constitutional jurisprudence.

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Supporters of the intent requirement in discrimination cases cite the costs of impact alone, and the burdens on appellate courts. Issacharoff, supra note 191 at 336 (In the face of “the sheer magnitude of cases and the limits of the appellate docket,” one response is to “reduce the scope of relief is to redefine what constitutes the violation.”); Siegel, supra note 196 at 1133 (noting how “the Court moved sharply to curb” the number of federal cases on the bias of racial impact alone).