

1985

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Recommended Citation

Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).
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CONSTITUTIONAL FACT REVIEW

Henry P. Monaghan*

INTRODUCTION

*Bose Corp. v. Consumers Union of United States*¹ held that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)² does not prescribe the scope of appellate review of a finding of actual malice in defamation cases governed by *New York Times Co. v. Sullivan*.³ Rather, as a matter of "federal constitutional law,"⁴ appellate courts "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."⁵ Thus, in addition to the familiar judicial duty to "say what the law is,"⁶ the first amendment imposes a special duty with respect to law application: both trial and appellate judges must examine the evidence, marshal the relevant adjudicative facts,⁷ and then apply the controlling first amendment norms to those facts.⁸ Appellate judges may accept the historical facts found

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1. 104 S. Ct. 1949 (1984).

2. Fed. R. Civ. P. 52(a) ("Findings of fact 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.")

3. 376 U.S. 254 (1964) (Constitution forbids recovery of damages by public officials for defamation absent showing that statements were false and made with actual malice).

4. *Bose*, 104 S. Ct. at 1965.

5. *Id.* at 1967 (emphasis added). The *Bose* opinion needs unpacking and qualification. See *infra* notes 58-99 and accompanying text.

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While familiar, the concept of independent judgment on questions of law is complex, permitting considerable judicial deference to the lawmaking capacity of other institutional actors in both administrative and constitutional law. See Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 2-14, 25-26 (1983).

7. See *infra* note 16. The judge "marshals" the adjudicative facts by culling them from the evidence presented and arranging them in a relevant sequence. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 538-44, 548 n.12 (1965); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 591 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]. This "hard look" precludes any general reliance in constitutional cases on the so-called "two court" doctrine. See *infra* notes 255-61 and accompanying text.

8. The judge need not assume the role of a thirteenth juror. As *Bose* indicates, 104 S. Ct. at 1959, there is no reason to believe that the judge is free to disregard the historical facts found by the jury in resolving disputed testimony. In some contexts, however, the judge may function like a thirteenth juror where the crucial issues do not turn on credibility. This occurs where, as in obscenity cases, the elements of the statutory of-

in the court below,⁹ but they may not defer to the first amendment law application conclusions of even inferior article III judges, no matter how "reasonable."

Although widely seen as an important victory for the media,¹⁰ *Bose* did not, as the Supreme Court claimed, present a "procedural question of first impression."¹¹ The independent judgment rule had been clearly stated in *Sullivan* itself,¹² solidly embedded in the Court's precedents,¹³ and applied by the court below.¹⁴ What is significant about *Bose* is not its result, but its reasoning. *Bose* proffers a comprehensive rationale for the independent judgment rule, one grounded entirely upon concerns assertedly peculiar to the first amendment.¹⁵ But independent judgment in the first amendment context is merely one example of a systemic issue: the scope of judicial review of the adjudicative facts decisive of constitutional claims.¹⁶ This issue is tradi-

fense are identical with the factors that determine whether the speech is unprotected. See *Jenkins v. Georgia*, 418 U.S. 153 (1973).

9. 104 S. Ct. at 1959. Of course, as *Bose* makes plain, see *id.* at 1967 n.31, the independent law application requirement applies only to those facts decisive of the constitutional claim. Cf. *Dennis v. United States*, 341 U.S. 494, 497 (1951) (grant of review to decide only whether statute constitutionally applied, not whether statute violated).

10. See High Court Calls for Special Care in Libel Appeals, *N.Y. Times*, May 1, 1984, at A1, col. 3. There is a surprisingly high rate of reversal by appellate courts in cases where plaintiffs have prevailed on actual malice. "When analysis is confined to review after a trial, 71% of defendants' appeals in cases involving rulings on actual malice have led to reversals." Brief of Amici at 17, *Bose Corp. v. Consumers Union of United States*, 104 S. Ct. 1949 (1984); see also Franklin, Good Names and Bad Law: A Critique of Libel Law and a Proposal, 18 *U.S.F.L. Rev.* 1, 4-5 (1983) (plaintiffs ultimately secure favorable judgments in only 5 to 10% of all libel cases against media defendants). Moreover, the press seems increasingly distrustful of the role of the jury in defamation cases. See, e.g., Kaplan, CBS News Chief Hints at Doubt On Libel Case, *N.Y. Times*, Nov. 22, 1984, at B7, col. 1.

11. *Bose*, 104 S. Ct. at 1953.

12. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 *Sup. Ct. Rev.* 191, 220.

13. See *Bose*, 104 S. Ct. at 1962-65. The Court noted that the precedents most frequently involved application of the independent judgment rule "in cases to which Rule 52(a) does not apply because they arose in state courts." *Id.* at 1959. That distinction does not seem significant. In my view, Congress could provide for different scopes of Supreme Court review over the factfinding of state and federal courts, on the premise that state courts could not be "trusted." See U.S. Const. art. III, § 2, cl. 2; *id.* amend. XIV, § 5. But, absent congressional direction, I agree with the substance of the Court's remark that "surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state court judgments than it exercises in reviewing the judgments of intermediate federal courts." *Bose*, 104 S. Ct. at 1959. Moreover, the Court had previously assumed that independent judgment was required in libel cases originating in the federal trial courts. See *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971).

14. See *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 195 (1st Cir. 1982).

15. See *infra* notes 75-82 and accompanying text.

16. Adjudicative facts tend to be litigation specific; they are "[f]acts pertaining to

tionally raised under the rubric of the constitutional fact doctrine.¹⁷ In a great variety of contexts the pressing question is the extent to which the Constitution itself controls the allocation of functions among the various decisionmakers—appellate and trial judges, juries, administrative agencies—that commonly participate at some stage in the resolution of *all* types of constitutional claims. *Bose* provides an appropriate occasion to reconsider the role of appellate courts, particularly the Supreme Court, in constitutional fact review.

In *Bose*, the fundamental disagreement between the Court and the three dissenting justices was how to characterize the question presented—whether the defendant acted with actual malice. The ma-

the parties and their businesses and activities.” 2 K. Davis, *Administrative Law Treatise* § 12:3, at 413 (2d ed. 1979); see also Fed. R. Evid. 201 advisory committee note (“Adjudicative facts are simply the facts of the particular case.”). Legislative facts, on the other hand, “do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.” 2 K. Davis, *supra*, § 12:3, at 413. The adjudicative facts decisive of constitutional claims usually pertain to the concrete application of a statute or regulation being challenged on constitutional grounds. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (zoning law challenged as applied). See generally Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of “Constitutional Fact,”* 80 U. Pa. L. Rev. 1055, 1067–72 (1932) (genesis of as-applied review). Constitutional fact review thus does not implicate the legislative facts that underlie the statute or regulation in its general application. See, e.g., *Schall v. Martin*, 104 S. Ct. 2403 (1984); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843–44 (1978); *The Supreme Court*, 1983 Term, 98 Harv. L. Rev. 87, 214 n.56 (1984). On the deferential judicial review ordinarily given to findings of legislative fact, see Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 Notre Dame L. Rev. 337 (1984); Note, *Anti-Pornography Laws and First Amendment Values*, 98 Harv. L. Rev. 460, 476–80 (1984).

Of course, no wholly satisfactory criteria exist for distinguishing between adjudicative and legislative facts, and for that reason the categories are at best “only an approach.” Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1268 (1975). Like other legal distinctions, the difference between adjudicative and legislative facts is one of degree, and for that reason the existence of borderline cases does not mean that the distinction is empty. Nonetheless, the lack of precision is of some significance given the traditional rule that a litigant’s right to a trial-type hearing before an administrative agency depends on whether adjudicative or legislative facts are at issue. Compare *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244 (1973) (applying “basic distinction between rulemaking and adjudication”), with Friendly, *supra*, at 1307–09 (disputing usefulness of this distinction as a means to determine right to trial-type hearing).

17. The term “constitutional fact” was first used by Professor Dickinson in his insightful analysis of *Crowell v. Benson*, 285 U.S. 22 (1932), and its antecedents. See Dickinson, *supra* note 16. On the general development of the constitutional fact doctrine, see L. Jaffe, *Judicial Control of Administrative Action* 624–53 (1965); Larson, *The Doctrine of “Constitutional Fact,”* 15 Temp. L.Q. 185 (1941); Strong, *The Persistent Doctrine of “Constitutional Fact,”* 46 N.C.L. Rev. 223 (1968). *Bose* carefully avoids using the term “constitutional fact,” mentioning it only once, in a footnote, and even then tying it to the first amendment. See 104 S. Ct. at 1964 n.27 (“The simple fact is that First Amendment questions of “constitutional” fact compel this Court’s *de novo* review.”) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion)).

jority viewed the question as one of first amendment law application, deserving of the Court's independent judgment.¹⁸ The dissenters viewed the question as simply one of historical fact governed by Rule 52(a).¹⁹ For both groups, the initial characterization determined the appropriate scope of appellate review.

It is not surprising that the justices in *Bose* were unable to agree on the proper characterization of the question presented. The difficulty has its origins in the "vexing" distinction between "questions of law" and "questions of fact."²⁰ This distinction has long caused perplexity in such diverse areas as contracts,²¹ torts,²² and administrative law.²³

18. *Id.* at 1949, 1967.

19. *Id.* at 1968 (Rehnquist, J., dissenting); *id.* at 1967 (White, J., dissenting).

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

21. Long ago, Professor Thayer commented on "[t]he reasons for leaving questions as to the meaning and construction of writing to the judges." Thayer, "Law and Fact" in *Jury Trials*, 4 *Harv. L. Rev.* 147, 160 (1890). It is not "that these are questions of law, for, mainly, they are not." *Id.* (footnote omitted). Rather, Thayer understood the allocation to rest on "ground[s] of policy": "[s]uch things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents." *Id.* at 161.

Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate, 733 F.2d 195 (2d Cir. 1984), provides a recent illustration of the confusion as to whether the interpretation of a contract is a question of law or fact. At issue was a shipowner's claim of coverage under a marinery hull and machine insurance policy. The evidence consisted of the policy and the testimony of two witnesses. The court of appeals said that analysis should center on the "parties' mutual understanding," an inquiry that embraced the "language of the policy and the circumstances surrounding its execution, custom and usage, as well as the established law." *Id.* at 199. Branding the "central question" both as "a mixed question of law and fact" and as one of "ultimate 'fact,'" *id.*, the court set aside as clearly erroneous the trial court's finding for the plaintiff. Judge Newman's thoughtful concurring opinion contains a comprehensive examination of the allocation problem. He rejects the view of the leading text writers that the construction of a contract is always a question of fact, see 3 A. Corbin, *Corbin on Contracts*, A Comprehensive Treatise on the Rules of Contract Law § 554 (1960); 4 S. Williston, *A Treatise on the Law of Contracts*, § 616 (3d ed. 1961), in favor of the view that it is such a question only if extrinsic evidence is relied upon. 733 F.2d at 204. Judge Newman thus voted with the majority to reverse, not because the lower court's finding was clearly erroneous, but because he believed that the lower court's conclusion was wrong as a matter of law. *Id.* at 207.

22. In torts, questions relating to negligence cause the most difficulty since the law to be applied is a standard: whether the defendant acted as a reasonable man would have under the circumstances. Traditionally, application of the reasonableness standard to the facts is for the jury. Since "the legal profession has so long accepted it as axiomatic that the jury has no power except to find facts," Bohlen, *Mixed Questions of Law and Fact*, 72 *U. Pa. L. Rev.* 111, 114 (1924), determinations whether a defendant acted negligently have generally been spoken of as "mixed questions of law and fact." *Id.* at 112. According to Professor Bohlen, "it is time to recognize that this supposed axiom is not accurate." *Id.* at 115. He is surely right. In deciding questions of negligence, the jury is called upon to exercise its judgment to formulate a more precise standard by which to evaluate some particular act or omission. Strictly speaking, this task is neither factfinding nor law declaration. Thus, the allocation of negligence questions to the jury

Some would insist that this condition exists because the asserted distinction is fundamentally incoherent.²⁴ The incoherence argument seems greatly overdrawn²⁵ once it is recognized that any distinction posited between "law" and "fact" does not imply the existence of static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience. In our legal system, the categories have functioned as crucially important constructs that permit us to understand, organize, and regulate certain forms of social experience.²⁶ Most important, they find expression in the constitutional text. Article III invests Congress with power

rests on grounds of policy, not on abstract conceptions of the intrinsic nature of the question itself. Cf. *Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate*, 733 F.2d 195, 205-06 (2d Cir. 1984) (Newman, J., concurring) (determination of negligence could be viewed as a question of law, but is left to the jury for practical reasons).

23. See L. Jaffe, *supra* note 17, at 546-55. It must be noted, however, given the broad delegation of power—especially rulemaking power—to administrative agencies, that they necessarily possess considerable lawmaking authority. See Monaghan, *supra* note 6, at 25-26.

24. This attitude has always had prominent adherents.

["Law" and "fact" are] equally expansible and collapsible terms It is readily acknowledged that the term "law" is indefinable. No less difficult to bound is the orbit of that companionate phantom "fact." . . . No two terms of legal science have rendered better service than "law" and "fact." They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them. . . . What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.

L. Green, *Judge and Jury* 270 (1930).

In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of "fact"; and when otherwise disposed, they say that it is a question of "law."

J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 55 (1927) (emphasis in original).

25. Seemingly, this skepticism draws support from important and widely accepted currents in modern thinking. The first is that facts are "theory-soaked," a phrase I believe used by Karl Popper. Necessarily, therefore, perceptions of what counts as a "fact" are influenced by value judgments and theories, legal and otherwise. Second, there is the danger of epistemic mistake—namely, characterizing what are really value judgments as facts. See N. Elias, *What is Sociology* 42-43 (1970) ("[T]he idea that supposedly immutable rules of logic are indeed regular patterns found in all human thought, rests upon the unheeded confusion of facts with values."). The general criticisms have force particularly with respect to legislative facts. But our focus here is on adjudicative facts. See *supra* note 16.

26. Monaghan, *supra* note 6, at 4.

over the Supreme Court's appellate jurisdiction "both as to Law and Fact,"²⁷ and the seventh amendment provides that "no fact tried by a jury, shall be otherwise re-examined . . . than according to the rules of the common law."²⁸ Quite clearly, any analysis that purports to take the constitutional text seriously must try to make some sense out of these categories.

The confusion exhibited in judicial opinions over law and fact stems from two sources. First, courts assume that the properly affixed characterization necessarily determines which legal actor is assigned the decisionmaking task. Second, the two categories have been used to describe at least *three* distinct functions: law declaration, fact identification, and law application.²⁹

To be sure, the categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system.³⁰ But there is no imperative that a properly affixed characterization necessarily controls allocation of functions.³¹ And, quite plainly, the actual distribution of authority between judges and other decisionmakers has often been governed by other factors, such as the nature of the substantive issue and the character of the decisionmakers.³² That is, viewing the statutory or common law scheme as a whole, the judges decide on an "appropriate" division of functions between themselves and others engaged in the law-declaring or law-applying process.³³ The difficulty comes when the judges

27. U.S. Const. art. III, § 2, cl. 2. The apparent power of the Supreme Court to review factual findings by a civil jury was a repeated target of criticism and spurred the seventh amendment. See Hart & Wechsler, *supra* note 7, at 21.

28. U.S. Const. amend. VII. The seventh amendment has not been held applicable either in administrative proceedings, see *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974), or in the context of appellate review of constitutional law application by lower courts. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964).

29. See H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 374-76 (tent. ed. 1958).

30. For example, it is often said that "questions of law" are for judges and "questions of fact" for the jury. See, e.g., Thayer, *supra* note 21, at 147.

31. In every area, as Professor Thayer long ago observed, "judges have always answered a multitude of questions of ultimate fact involved in the issue. It is true that this has often been disguised by calling them questions of law." *Id.* at 159; see also *Ram Constr. Co. v. American States Ins. Co.*, 749 F.2d 1049, 1052 (3d Cir. 1984) ("When the question is one of contract interpretation, the difference between factual and legal conclusions is often confused with the assignment of functions between court and jury.").

32. See *Base*, 104 S. Ct. at 1960 n.17.

33. For example, though the question of negligence may involve considerable norm elaboration, a function ordinarily performed by judges, the question has long been viewed as one for the jury. See L. Green, *supra* note 24, at 153-85; Bohlen, *supra* note 22, at 111-12; *supra* note 22. On contracts, see *supra* note 21. The field of administrative law provides another illustration, for it is now quite clear that agencies can be empowered with significant law declaration competence. See Monaghan, *supra* note 6, at 2-7, 25-31. Thus, to characterize an issue as one of "law" is not to decide that it falls within the province of the court rather than the administrative agency.

seek to force such allocation decisions into the conventional categories of law and fact. Distortions in the analytic content of the categories occur. These distortions are wholly unnecessary *if we separate the allocative uses from the analytic content of these categories.*

With this distinction in mind, we can sort out more clearly our ideas about the analytic content of law and fact. Law declaration involves "formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms."³⁴ In a strict sense, then, law declaration yields only what we commonly think of as "law"—conclusions about the existence and content of governing legal rules, standards, and principles. The important point about law is that it yields a proposition that is *general* in character.

Fact identification, by contrast, is a case-specific inquiry into *what happened here.*³⁵ It is designed to yield only assertions that can be made without *significantly* implicating the governing legal principles.³⁶ Such assertions, for example, generally respond to inquiries about who, when, what, and where—inquiries that can be made "by a person who is ignorant of the applicable law."³⁷ It should be noted that this analysis does not depend on the legal equivalent of the epistemological doc-

34. H. Hart & A. Sacks, *supra* note 29, at 374–75; see Michael & Adler, *The Trial of an Issue of Fact* (pt. 1), 34 *Colum. L. Rev.* 1224, 1241–43 (1934). I omit here the distinctive problems raised by so-called "private" bills, such as legislation conferring citizenship.

35. See H. Hart & A. Sacks, *supra* note 29, at 375; Michael & Adler, *supra* note 34, at 1241–43; Morris, *Law and Fact*, 55 *Harv. L. Rev.* 1303, 1304–06, 1326 (1942).

36. See *Wainwright v. Witt*, 105 S. Ct. 844, 855 (1985) ("[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function . . . involves credibility findings"). Of course, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including . . . a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose*, 104 S. Ct. at 1960; cf. *Wiesberg v. United States Dep't of Justice*, 745 F.2d 1476, 1496 (D.C. Cir. 1984) (fact identification influenced by an erroneous legal standard may be overturned as clearly erroneous).

37. L. Jaffe, *supra* note 17, at 548. Inferences drawn from such assertions are also facts, so long as they rest on general experience. *Id.* at 549; see *United States v. Kowalchuck*, 744 F.2d 301, 307 (3d Cir. 1984). I would also include as facts terms that are used to classify for legal purposes, but whose legal content is not at issue in the case at hand. See L. Jaffe, *supra* note 17, at 550–51; see also *Wainwright v. Witt*, 105 S. Ct. 844, 855 (1985) (prospective juror's "bias" with respect to capital punishment is a factual issue). Professor Jaffe notes that special difficulties are involved where facts are themselves constructed from statistical data or are otherwise the result of a complex set of inferences. Regarding the confiscation rate cases, see *infra* notes 112–26 and accompanying text, Jaffe writes:

The "facts" themselves—value of investment, costs of service, value of service, rate of return—are abstract. They are derived from a mass of statistical data which is in turn abstract, the result of a sophisticated classification of the underlying data. If the annual rate of depreciation of assets of a billion dollar corporation is a "fact," it is nevertheless a very different kind of fact from the bigness of Cyrano's nose.

L. Jaffe, *supra* note 17, at 646.

trine of naive realism; the question is "not whether the fact exists in an absolute sense but whether the evidence is adequate to justify the exercise of [the decisionmaker's] power."³⁸ This means that while "what happened" may be viewed as a question of fact, the legal *sufficiency* of the evidence³⁹ may be viewed as the equivalent of a question of law.⁴⁰

Law application, the third function, is residual in character. It involves relating the legal standard of conduct to the facts established by the evidence.⁴¹ If all legal propositions could be formulated in great detail, this function would be rather mechanical and require no distinctive consideration. But such is not the case. Linking the rule to the conduct is a complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment.⁴² Thus, law application frequently entails some attempt to elaborate the governing norm. But in contrast to the generalizing feature of law declaration, law application is situation-specific; any ad hoc norm elaboration is, in theory, like a ticket good for a specific trip only. Moreover, in this kind of situation, specific norm elaboration is generally invisible.⁴³ By definition, when law application occurs, further explicit norm elaboration ceases. And any implicit norm elaboration may be buried in a general verdict and in the decisionmaker's resolution of the controversy over the facts. The typical jury verdict in a negligence case provides a good example.⁴⁴

Quite plainly, anterior to law application a crucial policy decision must be made: should a further effort at norm elaboration be under-

38. *Id.* at 551 (emphasis omitted).

39. The relevant constitutional provision fixes the standard of what is legally sufficient, and that is frequently greater than a simple preponderance of the evidence. See, e.g., *Bose*, 104 S. Ct. at 1965 n.30 (first amendment requires "clear and convincing" evidence of actual malice in public figure defamation cases); *Santosky v. Kramer*, 455 U.S. 745 (1984) (due process clause requires "clear and convincing" evidence of child neglect in proceedings to terminate parental rights); *In re Winship*, 397 U.S. 358 (1970) (due process clause requires proof beyond a reasonable doubt in criminal cases).

40. See *L. Jaffe*, *supra* note 17, at 595-99. The no-evidence rule is illustrative. See *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960); *Fiske v. Kansas*, 274 U.S. 380, 385 (1927); *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912). A similar rule has long obtained in the field of administrative law. See, e.g., *Florida E. Coast Ry. v. United States*, 234 U.S. 167, 185 (1914) ("where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law"); *ICC v. Louisville & Nash. R.R.*, 227 U.S. 88, 91-92 (1913).

41. If an erroneous legal standard is used as the predicate for law application, the reviewing court will set the conclusion aside because it rests on a legal error. See *Bose*, 104 S. Ct. at 1960; *United States v. Kowalchuk*, 744 F.2d 301, 308 (3d Cir. 1984).

42. See *H. Hart & A. Sacks*, *supra* note 29, at 375.

43. There may be some cases where the norm elaboration can be discerned by the court on appeal; that is, the court may be able to say that the law application decision *must* have rested on a certain norm elaboration that was either correct or incorrect.

44. See *H. Hart & A. Sacks*, *supra* note 29, at 379; *supra* note 22.

taken?⁴⁵ For example, should the "recklessness" component of *Sullivan's* actual malice standard be amplified to provide more detailed guidance on the frequently recurring question of whether a reporter must check his sources?⁴⁶ Such policy decisions draw upon complex considerations that must be faced at each level of the proceeding.⁴⁷ Law application decisions in the lower federal courts may lead the Supreme Court to believe that further norm elaboration is needed.⁴⁸ Still, the important point for our purposes is that law declaration occurs only to the extent that further *general* norm elaboration occurs.

In light of the foregoing, it seems misguided to assume, as many courts apparently do, that all law application judgments can be dissolved into either law declaration or fact identification.⁴⁹ Law application is a distinctive operation.⁵⁰ The real issue is not analytic,⁵¹ but allocative: what decisionmaker should decide the issue?⁵² Our system has not proceeded on the premise that judges, to say nothing of appellate judges, must render independent judgment on all law application. Many such decisions are left in the hands of juries, masters, and admin-

45. See H. Hart & A. Sacks, *supra* note 29, at 376.

46. See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). For other references, see *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139-40 (2d Cir. 1984).

47. See *infra* notes 234-54.

48. Of course, a series of law application decisions may impel a court to undertake explicit norm elaboration. See O. Holmes, *The Common Law* 96-103 (M. Howe ed. 1963). This is especially true where appeals are taken and opinions written. The court on appeal will be impelled to give a rule formulation for the various factual instances it has considered, particularly if they present a recurring core situation. See *United States v. Boyle*, 105 S. Ct. 687, 692 n.8 (1985); H. Hart & A. Sacks, *supra* note 29, at 382; see also J. Dickinson, *supra* note 24, at 317 n.21 (warning that legal standards evolved from specific fact patterns, "if laid down by judges, will be taken as of general application and applied to other cases as well").

49. In both *Ram Constr. Co. v. American States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984), and *United States v. Kowalchuk*, 744 F.2d 301, 308 (3d Cir. 1984), the Third Circuit did not recognize that law application is a distinct mental process. Compare Lord Denning's suggestion that the law application decision should be analyzed functionally: "If, and so far as, [inferences from primary facts] can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact . . ." *British Launderers' Research Ass'n v. Hendon Rating Auth.*, [1949] 1 K.B. 462, 471-72. For a discussion of law application in English administrative law, see Emery & Smythe, *Error of Law in Administrative Law*, 100 *Law Q. Rev.* 612 (1984).

50. Long ago, Holmes emphasized the difference between asking whether a person "has done or omitted certain things" and whether "his alleged conduct . . . come[s] up to the legal standard." O. Holmes, *supra* note 48, at 97. And surely there is a distinction between what a speaker said and did, and whether that conduct constitutes "actual malice" within the *Sullivan* rule.

51. H. Hart & A. Sacks, *supra* note 29, at 376 (whether law application raises a question of "'law' or 'fact' cannot be derived from the inherent characteristics of the question").

52. *Id.* But even if the judge decides the issue, how it is characterized can have important implications for the scope of appellate review and for the precedential effect of a decision. *Id.* at 380.

istrative agencies. *Bose* confirms this point. The Court assumed that, but for the Constitution, no independent appellate review would be required. It did not hold that all questions of law application should be assimilated to law declaration so that Rule 52(a) has no applicability.⁵³ A contrary holding would have rendered the independent judgment rule in constitutional cases simply a subset of law application in general, always to be viewed as essentially a "question of law."⁵⁴

Viewed in this way, the key question is whether constitutional law application differs from ordinary law application. *Bose* provides an affirmative answer, but attempts to limit it to the first amendment context. Yet *Bose* presents simply one example of constitutional fact review, and the Court's reasoning is not easily confined to the first amendment context. We commonly assume that there is something distinctive about judicial review of the adjudicative facts decisive of *any* constitutional claim. This Article examines what that assumption implies about the proper scope of constitutional fact review in the appellate courts.

Constitutional fact review presupposes that appellate courts will render independent judgment on any issues of constitutional "law" presented. Its distinctive feature is a requirement of similar independent judicial judgment on issues of constitutional law "application." That is, the courts must sort out the relevant facts and apply to them the controlling constitutional norms. Firmly embedded case law establishes that, absent limiting legislation, federal appellate courts, particularly the Supreme Court, possess that authority. This Article will argue, however, that constitutional fact review at the appellate level is a matter for judicial (and legislative) discretion, not a constitutional imperative. This discretion can be made responsive to important institutional

53. Indeed, in assuming that Rule 52(a) applied to questions of "ultimate fact," 104 S. Ct. at 1959-60, the Supreme Court impliedly rejected that conclusion. Compare the Ninth Circuit's casual treatment of the issue in *Taylor v. Moram Agencies*, 739 F.2d 1384, 1385-86 (9th Cir. 1984) (appellate review of law application not restricted by Fed. R. Civ. P. 52(a)). Still, the Court has not been consistent on this point even outside the field of constitutional law. Compare *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) ("[T]he conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."), with *Pullman-Standard v. Swint*, 456 U.S. 273, 286-87 & n.16 (1982) (criticizing *Baumgartner* on the ground that Rule 52(a) does not make exceptions or purport to exclude certain categories of factual findings). Moreover, one commentator has argued that the text and legislative history of Rule 52(a) demonstrate the drafter's intent that it apply only to "strictly factual matters" and not to matters of law application. See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 113-15 (1944).

54. The proposed amendment to Rule 52(a) gives district judges a greater explicit role in law application. See Proposed Fed. R. Civ. P. 52(a), 98 F.R.D. 337, 359 (1983) ("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 *and to the need for finality.*") (emphasis in original).

needs. The most important of these are the danger of systemic bias of other actors in the judicial system and the need for continuous development of constitutional principles on a case-by-case basis. But appellate courts are under no inexorable compulsion to review every application of settled constitutional norms to the historical facts.⁵⁵ Law declaration, not law application, is the appellate courts' only constitutionally mandated duty.⁵⁶ And, considered afresh, I see no compelling considerations for positing a different principle for the first amendment.

In the process of this argument this Article will contrast the role of appellate courts with that of courts asked to enforce the constitutional law application decisions of administrative agencies.⁵⁷ In the latter context a strong argument can be made that enforcement tribunals *must* undertake constitutional fact review. Indeed, in that context constitutional fact review may entail even more: the court may be required independently to find the relevant historical facts on the basis of its own record. But the reasons for these requirements are rooted in the "legitimacy deficit" inherent in administrative adjudication. The rise of administrative adjudication is at variance with the original constitutional premise that most adjudication would take place in judicial, not administrative, tribunals. Constitutional fact review in the context of judicial review of administrative conduct seeks to ameliorate that legitimacy deficit. So viewed, it does not establish the propriety of a similar scope of review by an appellate court over the decisions of an inferior court.

I. INDEPENDENT JUDGMENT AND THE FIRST AMENDMENT

A. *Bose Corp. v. Consumers Union of United States*

Bose began as a trade libel suit in a district court. Consumers Union had published a magazine article evaluating the qualities of numerous brands of loudspeaker systems, including one marketed by the Bose Corporation. While the plaintiff objected to several statements in the article, the case ultimately turned on only one: the path of the

55. If I am right, the power of the federal courts to render independent judgment on constitutional law application must be treated as a gloss on the present statutes prescribing appellate jurisdiction. It would be too far afield to discuss the source of the powers or duties of the state courts, particularly the source of the power, if any, of state courts to render independent judgment on constitutional law application where the federal Constitution does not require it.

56. I do not consider here the judicial duty under statutes or rules that *enlarge* the scope of appellate review. For example, the ancient practice in equity appeals opened all questions of law and fact (not resting on credibility) to the independent judgment of the appellate court. Nor do I consider whether distinctive issues are implicated in appellate review of federal statutory claims. See, e.g., *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

57. An appellate court may also be charged with immediate review of an administrative determination of constitutional fact when, for example, it is asked to enforce an agency order. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (first amendment objection to labor board order).

sound heard through the speakers. The article stated that the sound tended to wander "about the room"; but, sitting without a jury, the judge found that the sound tended to wander "along the wall" between the speakers.⁵⁸ After concluding that the article contained a false and disparaging⁵⁹ statement of "fact,"⁶⁰ and that for purposes of this litigation the Bose Corporation was a public figure,⁶¹ the judge found clear and convincing proof of actual malice. The crucial conclusion that the article writer, who had testified extensively, knew at the time of publication that the offending statement was false rested on a single premise: the article writer "is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible . . . to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning."⁶² The First Circuit reversed.⁶³ Accepting dubitante that the offending comment was one of fact rather than opinion,⁶⁴ the court concluded that Rule 52(a) does not govern the scope of appellate review of a finding of actual malice.⁶⁵ And making its own independent determination, the court found nothing more than the use of "imprecise language."⁶⁶

The Supreme Court affirmed, three justices dissenting. The Court acknowledged both that "[i]t surely does not stretch the language of [Rule 52(a)] to characterize an inquiry into what a person knew at a

58. See *Bose*, 104 S. Ct. at 1954.

59. *Bose Corp. v. Consumers Union of United States*, 508 F. Supp. 1249, 1268 (D. Mass. 1981), rev'd, 692 F.2d 189 (1st Cir. 1982), aff'd, 104 S. Ct. 1949 (1984).

60. 84 F.R.D. 682, 684 (D. Mass. 1980) (denying motion for summary judgment).

61. 508 F. Supp. at 1271-74. This finding was not challenged on either appeal. See 104 S. Ct. at 1955 n.8; 692 F.2d 189, 197 (1st Cir. 1982) (Campbell, J., concurring).

62. 508 F. Supp. at 1276-77.

63. 692 F.2d 189.

64. *Id.* at 194 ("that the statement [in defendant's article] is an opinion is plausible"). The court noted that "[t]he determination of whether a statement is one of opinion or fact . . . is difficult to make and perhaps unreliable as a basis for decision." *Id.*; see *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc). See generally Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 *Geo. L.J.* 1817 (1984) (advocating bright-line rule to reduce uncertainty).

65. 692 F.2d at 195.

66. *Id.* at 197. The court emphasized the careful preparation and overall accuracy of defendant's articles, including the one at issue. In so doing, the court focused less on the actions and knowledge of the article's individual author and more on whether defendant as an organization had adhered to the standards of a "reasonable publisher." *Id.* at 196-97 (citing *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977)). Arguably, the court did not make an independent determination of the evidence, but instead applied a slightly different standard—that of the "reasonable publisher"—to the facts found below. This reading is consistent with the court's failure to dispute the trial court's central finding with respect to actual malice: that the author knew at the time of publication that certain statements in the article were false. Cf. *Bose*, 104 S. Ct. at 1958 (rejecting finding of actual malice on ground that trial court "did not identify any independent evidence that [the author] realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication") (footnote omitted).

given point in time as a question of 'fact,'⁶⁷ and that Rule 52(a) applies even to findings of "ultimate facts."⁶⁸ But, said the Court, the Constitution requires judges to exercise independent judgment as to whether there exists clear and convincing proof of actual malice.⁶⁹ The Court made clear that this requirement is not a special rule for public figure defamation cases. The Court extensively reviewed precedents emphasizing the independent judgment rule in a wide variety of speech contexts,⁷⁰ and it repeated *Sullivan's* insistence that "[t]his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."⁷¹ The three dissenting justices insisted that the article writer's actual knowledge was simply a question of "historical fact" governed by Rule 52(a).⁷²

Bose could be understood not as implicating the constitutional fact doctrine at all, but as resting instead on the ground that the quantum of evidence before the district judge was insufficient to permit an inference about the article writer's intent.⁷³ But the Supreme Court pro-

67. *Id.* at 1958 (footnote omitted).

68. *Id.* at 1959-60.

69.

The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. . . . 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. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at 1965 (emphasis added).

70. *Id.* at 1960-65.

71. *Id.* at 1963-64 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

72. *Id.* at 1967 (White, J., dissenting); *id.* at 1968-70 (Rehnquist, J., dissenting) (joined by O'Connor, J.). The differences between the Court and the three dissenters should not be exaggerated. Justice Rehnquist acknowledged that in many cases independent appellate review is constitutionally appropriate. *Id.* at 1969 n.2. But, quite plainly, he believed that though this case presented "close questions," *id.* at 1970, what the article writer actually knew about his use of language presented a routine issue of historical fact, resting, as it did, on the article writer's "credibility." *Id.* at 1969. On its part, the Court did not deny that appellate judges are bound by findings of historical fact. Its ultimate conclusion was that

[w]e may accept all of the purely factual findings of the District Court and nevertheless hold *as a matter of law* that the record does not contain clear and convincing evidence that [the article writer] or his employer prepared the loudspeaker article with knowledge that it contained a false statement, or with reckless disregard of the truth.

Id. at 1967 (emphasis added).

73. *Id.* at 1956-58. As the Court understood the record, the district judge had

ceeded on a quite different conception of what is involved, speaking repeatedly of the duty of appellate judges to decide independently whether the facts are sufficient to show that the speech is unprotected. First amendment law application, as well as first amendment law declaration, is part of the judicial duty. An appellate court cannot content itself with accepting the results of a "reasonable" application of admittedly correct legal norms to the historical facts. The court's responsibility is to scrutinize the record and marshal the evidence to see if it yields the characterization put on it by the court below.⁷⁴

The Court's justification for its demand of independent appellate judgment warrants close attention. The Court begins with some backing and filling. First, the distance between independent judgment and clearly erroneous review is minimized, then acknowledged to be "much more than a mere matter of degree."⁷⁵ Next, we are told that the "vexing nature" of the distinction between law and fact does not "diminish its [constitutional] importance."⁷⁶

These preliminaries put aside, the Court turns to the basis of the independent judgment rule with respect to actual malice. That review is required for three reasons:

First, the common law heritage of the [actual malice] rule itself assigns an especially broad role to the judge in applying it to specific factual situations. Second, the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law. Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.⁷⁷

The first two justifications do not drive the opinion. Other difficul-

found only that the statement was mistaken, and then proceeded on the basis of what "an intelligent person" must have known. The judge made no additional relevant finding as to the specific mindset of the writer, and he relied on no other relevant evidence. *Id.* at 1958. The Court held that this kind of evidence is insufficient to justify an inference of malice unless, in the Court's words, "the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves." *Id.* at 1966 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971)) (emphasis added). So viewed, the Court decided what we normally consider the equivalent of a question of law, not fact: the quantum of evidence sufficient to justify, but not require, the drawing of an inference. See Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 *Ohio St. L.J.* 384, 407 & n.143 (1956); *supra* notes 39-40 and accompanying text.

74. Cases like *Feiner v. New York*, 340 U.S. 315 (1951), that place deferential reliance upon the law application conclusion of the court below, must be taken to be overruled.

75. 104 S. Ct. at 1959. The Court explains that "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Id.*

76. *Id.* at 1960.

77. *Id.*

ties aside, they would suggest that independent judgment is appropriate only in those first amendment cases where the substantive constitutional rule has a common law foundation or where the contours of the rule must be hammered out on a case-by-case basis. But the importance of having a common law ancestry for a constitutional rule is never defended and is surely not self-demonstrating.⁷⁸ And if emphasis is to be placed instead on the necessity for case-by-case adjudication, independent review would be required for the great bulk of Bill of Rights claims since the contours of those provisions have been developed in that manner.⁷⁹

That the Court is not serious about the first two justifications becomes apparent once we examine its elaboration of the third justification. In reviewing the wide range of first amendment cases in which the independent judgment rule has been applied—fighting words, incitement to riot, contempt, obscenity, and child pornography⁸⁰—the Court makes plain the driving impulse of its decision: independent review is required to protect first amendment values. To my eye, the core of the opinion is contained in two sentences:

[T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.⁸¹

The Court's approach has considerable intuitive appeal. It has long been clear that the substantive constitutional guarantees, particularly the first amendment, have important remedial dimensions.⁸² And, by fastening the demand for independent judgment to special first amendment considerations, the Court seemingly bypasses the need to

78. Without explaining its significance for constitutional law, the Court said this common law rule permitted a large role for the judge. *Id.* at 1960 & n.20. But see Henderson, *The Background of the Seventh Amendment*, 80 *Harv. L. Rev.* 289 (1966) (emphasizing large role of the English jury in common law criminal libel suits); Presser & Hurley, *Saving God's Republic: The Jurisprudence of Samuel Chase*, 1984 *U. Ill. L. Rev.* 771, 802–88 (commenting on Justice Chase's effort to control juries in public figure defamation cases).

79. See Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. Rev.* 353, 391–95 (1981). In fact, this feature seems to me important for developing a general theory of constitutional fact review. See *infra* notes 249–59 and accompanying text.

80. 104 *S. Ct.* at 1962–63.

81. *Id.* at 1962 (footnote omitted).

82. Monaghan, *First Amendment "Due Process,"* 83 *Harv. L. Rev.* 518 (1970).

face more systemic considerations. As we shall see, however, the Court's rationale is ultimately unpersuasive.

B. *Implications of Bose*

Sooner or later, the Supreme Court must confront a range of issues for which its *Bose* opinion provides little guidance. Quite obviously, the Court must determine whether *Bose's* independent judgment requirement applies to all first amendment claims,⁸³ and it must also assess the significance of its reasoning for administrative agencies.⁸⁴ More important than *Bose's* horizontal sweep, however, is its vertical reach. *Bose* demands independent judicial judgment on whether speech is constitutionally protected. But, particularly in defamation cases, large damage awards pose greater threats to first amendment values than do findings of liability.⁸⁵ There is, accordingly, considerable interest in imposing controls on the amount of recoverable damages, most generally by eliminating certain items, such as punitive damages, from any recovery.⁸⁶ Any such development would be affected by assump-

83. An obscure footnote suggests that commercial speech cases might be treated differently. 104 S. Ct. at 1961 n.22. Perhaps the "hardy" character of commercial speech might be thought to obviate the need for the special protection accorded to speech more easily chilled. See *infra* notes 217-23 and accompanying text.

Even with respect to defamation actions, *Bose* needs further elaboration. For example, the Court makes no mention of its decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), in which it applied a clearly erroneous standard in reviewing a state court jury determination that a publication was not "factually correct." *Id.* at 457-59. *Firestone* did not involve a public figure, but the first amendment imposes limits on private libel suits also. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974). See generally *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 135-38 (2d Cir. 1984) (applying public figure analysis to author of pornographic novels). Moreover, doubt exists whether the independent judgment requirement extends to the question whether the statements are in fact defamatory. E.g., *Church of Scientology v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984), or at the summary judgment stage. See *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1571 (D.C. Cir. 1984).

84. What counts as an historical fact is an important problem in this context. *Bose* indicates that inferences drawn from and characterizations put upon primary facts, unless based upon witness credibility, are a nondelegable judicial responsibility. Applied rigorously, this would have a significant impact upon administrative law, for it would mean that courts should refuse the normally accorded deference to the inference-drawing capacities of "expert" agencies. On the meaning of deference generally, see *Monaghan*, *supra* note 6, at 4-5. Under this view, for example, a court could not defer to the labor board's conclusion that certain employer speech is constitutionally unprotected because "coercive." Statements that "a reviewing court must recognize the Board's competence in the first instance to judge the impact [of the speech] in the context of the employer-employee relationship," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619-20 (1969), could not be understood to compel real deference to the board's view that the speech is unprotected. At most, the board's conclusion would act simply as a caution to the reviewing court.

85. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 996-97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

86. See, e.g., *Van Alstyne*, *First Amendment Limitations on Recovery from the*

tions about whether *Bose's* independent judgment requirement applies to the award of damages, as well as to the determination of liability in first amendment cases.⁸⁷

In addition, the Supreme Court must determine the contours of the "duty" of independent review. Initially, the Court must decide whether both parties, or only the free speech claimant, can demand independent appellate review; that is, can the party opposing the free speech claim demand independent appellate judgment on the first amendment law application point?⁸⁸ Suppose, for example, that in *Bose* the judge had found that there was no clear and convincing proof of actual knowledge or recklessness. Could *Bose Corporation*, the party opposing the first amendment defense, insist upon independent appellate review? That possibility is left open by the Court's ultimate holding in *Bose*, where it frames its conclusion "as a matter of law" on the historical facts found by the district judge,⁸⁹ and by *Connick v. Myers*,⁹⁰ in which, in reversing a finding in favor of the free speech claimant, the Court stated that the question whether the speech was protected or not presented a question of law.⁹¹ The rationale used to explain whether the party opposing the free speech claim is also entitled to independent judgment will have considerable importance in understanding the independent judgment rule, both in the first amendment context and elsewhere. The cases reflect a special judicial concern that the claim of federal right not be incorrectly *denied*. But if labeling something a question of constitutional fact guarantees that it will be treated like a question of law, then either party is entitled to independent appellate review. In *Bose* itself, the Supreme Court reviewed de novo the conclu-

Press—An Extended Comment on "The Anderson Solution," 25 Wm. & Mary L. Rev. 793 (1984).

87. It can readily be argued, to paraphrase *Bose*, that "[p]roviding triers of fact with a general description of the type of [damages] has not, in and of itself, served sufficiently . . . to eliminate the danger that decisions by triers of fact [on damages] may inhibit the expression of protected ideas." 104 S. Ct. at 1962. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), impliedly assumes that *Bose* is not applicable to "megaverdicts," *id.* at 141, and that the standard of review is whether the award "shocks [the] conscience" of the court. *Id.* at 141-42. Whether *Bose* can be sensibly applied to the damage issue, which seems to me doubtful, is not within the scope of this Article.

88. I do not intend here to open up the large question of whether the speaker or the public, or both, possess the substantive right. This would require examination of the foundation of such decisions as *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978), of the distinction between rights held personally and rights held as a representative of the public, see *L. Jaffe*, *supra* note 17, at 525-28, and of third party standing. See *Monaghan*, *Third Party Standing*, 84 Colum. L. Rev. 277 (1984).

89. 104 S. Ct. at 1967.

90. 461 U.S. 138 (1983).

91. *Id.* at 148 n.7, 150 n.10; see also *Dennis v. United States*, 341 U.S. 494, 513 (1951) (plurality opinion) ("When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law.").

sion of a court of appeals that had sustained, not denied, the federal claim.

How the duty concept is to be understood is also unclear. *Bose* stresses the rhetoric of obligation; indeed, the duty of independent judgment is said to lie "particularly [upon] members of this Court."⁹² Quite plainly, judicial authority to make an independent judgment on constitutional law application is one thing—a judicial duty to do so, quite another. The effort to locate the duty in the first amendment is troublesome given the general rule that there is no constitutional right to appellate review in any civil case.⁹³ Is there a special requirement of some appellate review in first amendment cases?⁹⁴ If so, does that requirement extend to the Supreme Court itself? Given the "deeply held conviction that judges—and particularly members of this Court—must exercise [independent] review,"⁹⁵ can the Court properly deny petitions for review in first amendment cases where the sole issue is whether, on the evidence, the free speech claim has been correctly rejected? May the Court properly limit its grant of review to whether correct first amendment standards have been employed, leaving the "routine" law application point for final disposition in the court below?⁹⁶ Or is the only point of *Bose* that if an appellate court turns to the law application issue, then must it render its own independent judgment?

In considering the nature of the appellate "duty" stressed by *Bose*, one should bear in mind not only its potentially burdensome character, particularly for a tribunal with the wide-ranging responsibilities of the Supreme Court, but also the evident strain that constitutional fact review often places on the Court's institutional capacity. *Cox v. Louisiana*⁹⁷ illustrates both problems. In *Cox*, the Court sustained a first

92. 104 S. Ct. at 1965.

93. In re *Burley*, 738 F.2d 981, 987 (9th Cir. 1984). Indeed, the same rule formally applies in criminal cases. See *Evitts v. Lucey*, 105 S. Ct. 830, 839 (1985); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974). This difficulty is not plausibly escaped by arguing that clearly erroneous review in first amendment cases is an unconstitutional condition on the statutorily conferred right to appeal. See generally Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984) (reviewing materials on unconstitutional conditions).

94. *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977), seems animated by that assumption.

95. 104 S. Ct. at 1965.

96. Similar questions exist at the state court level. Like the Supreme Court, many state supreme courts have discretionary review over intermediate appeals courts. After *Bose*, may such a court refuse review, or grant review on a limited basis? The issue is not raised squarely if the decision below is in favor of the free speech claimant, or if it rests upon some ground independent of the first amendment claim.

On the question whether either Congress or the states can so structure their judicial systems that constitutional issues must be raised in only certain courts, see Monaghan, *supra* note 6, at 19-20.

97. 379 U.S. 536 (1965).

amendment defense to a breach of the peace conviction, but reversal of the state supreme court on this point was possible only because the Court undertook an extensive independent inquiry into a very detailed record.⁹⁸ In the process, the Court rejected not only the state supreme court's plausible characterization of the evidentiary facts, but also the trial court's "feel" for what the evidence amounted to.⁹⁹

II. THE ORIGINS AND VAGARIES OF CONSTITUTIONAL FACT REVIEW

Thus far, this Article has treated independent appellate review in first amendment cases as a particular application of the constitutional fact doctrine. But in origin and line of development, constitutional fact review is far removed from appellate review in first amendment cases. Although the evolution of the constitutional fact doctrine has been anything but straightforward, a brief examination makes apparent the general utility of distinguishing between two quite different contexts of constitutional fact review: judicial control of the administrative state and appellate review of the decisions of inferior tribunals.

A. *Judicial Control of the Administrative State*

Article III could have been read to require that Congress assign all the federal adjudicatory business specified therein to some court, whether an article III court or a state court.¹⁰⁰ The Supreme Court has never embraced such a position, however.¹⁰¹ Most important for our purposes, nineteenth century decisions established that "public rights"—largely claims by private individuals against the government for such matters as pensions and land patents, claims to which the government could entirely refuse consent to suit¹⁰²—might, if Congress so

98. See, e.g., *id.* at 541-43 nn.2-6, 546-49 nn.9-11. The Court emphasized the duty language, saying that "[b]ecause a claim of constitutionally protected right is involved, it 'remains our duty in a case such as this to make an independent examination of the whole record.'" *Id.* at 545 n.8 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

99. *Id.* at 544-51. For another example, see *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (record does not support Mississippi Supreme Court's finding that boycott was illegal or that petitioners were liable for all resulting damages). Similarly, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court made its own independent determination that the movie *Carnal Knowledge* was not "patently offensive," *id.* at 161, despite the contrary finding of the state court jury and the state courts. *Id.* at 160.

100. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92-93 (1982) (White, J., dissenting).

101. The adjudicatory authority of territorial and military courts, as well as other tribunals, was quickly upheld. See *Currie, Bankruptcy Judges and the Independent Judiciary*, 16 *Creighton L. Rev.* 441, 447-49 (1983).

102. The category of public rights has never been entirely stable. It has included some claims by the government against private parties for such matters as custom duties. See, e.g., *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). But whether jurisdiction over government claims against private parties for taxes can be conferred exclusively on a non-article III tribunal has not yet been resolved. See *Hart, The Power of Congress to*

chose, be left entirely to final administrative determination.¹⁰³ But these exceptions were not understood to have wide significance, and the deeply held assumption was that the regular courts must remain freely available to adjudicate all other disputes, both in suits by the government and between private parties.¹⁰⁴

In time, however, the imperatives of the administrative state utterly destroyed this assumption as a working principle of government, for effective regulation presupposed a much larger role for administrative adjudication than that allowed by the nineteenth century conceptions of public rights. The story is too well known to justify retelling here. Suffice it to say that by the time of *Crowell v. Benson*,¹⁰⁵ a fundamental transformation in American law had occurred. The Constitution's "preference" for adjudication of disputes by the regular courts had in large part collapsed. In *Crowell*, the Supreme Court recognized that it was too late to cut back significantly on the adjudicatory apparatus of the modern administrative state. *Crowell* not only reconfirmed the public rights cases, it expressly sanctioned, subject to limited judicial review, administrative adjudication of the duty of one private person to another arising from government regulatory programs. In recognizing a wide area for the operation of public administration, *Crowell* removed both article III and the due process clause as meaningful barriers to the use of administrative agencies to establish and enforce, at least initially, all of the rights and duties created by the emerging administrative state.¹⁰⁶

But focusing on the "normal" pattern of administrative adjudication that characterizes the present era does not tell the whole story. Traditionally, judges have assumed that they were ordained by the Constitution to demarc legitimate claims of public administration from illegitimate interferences with private rights. This judicial task was thought to include not only enforcing the substantive constitutional guarantees, but also setting some limits to the kinds of controversies

Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1369-70 & n.32 (1953). See generally Monaghan, *supra* note 6, at 14-20 (discussing public rights).

103. The public rights distinction took hold in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

104. Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 912-24 (1930), reflects this premise. For a modern restatement of this view, see Currie, *supra* note 101, at 452-53.

105. 285 U.S. 22 (1932).

106. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), does not impair this important legacy of *Crowell*. See Monaghan, *supra* note 6, at 18-20. Professor Currie apparently agrees. He laments that the Court's redefinition of public rights to embrace all federal statutory rights confirms a wide area of adjudication free from the article III requirements that he believes the framers envisioned. See Currie, *supra* note 101, at 463-64; see also Redish, *Legislative Courts, Administrative Agencies, and The Northern Pipeline Decision*, 1983 Duke L.J. 197 (criticizing the logic of the distinction between public and private rights in any form).

that could be resolved by the rapidly growing number of administrative agencies. While slowly yielding "ordinary" factfinding and law application to administrative agencies, judges increasingly resorted to constitutional fact review as a means of structuring the "appropriate" allocation of functions between agency and court.¹⁰⁷

Constitutional fact review had its antecedents in the doctrine of jurisdictional fact, which the English superior courts, particularly King's Bench, developed to confine administrative agencies and inferior courts within their delegated authority.¹⁰⁸ The jurisdictional fact concept emerged as a construct for partitioning functions between agencies and the superintending courts:¹⁰⁹ "ordinary facts" could be left for final administrative determination, but the superior courts would render independent judgment upon those "facts" governing the agency's "jurisdiction."¹¹⁰ And though the distinction between ordinary and jurisdictional fact was not, and could not be, expressed with logical precision, it was not on that account empty. Its basis seems to have been intuitive and functional, a device employed to permit judicial control of administrative action to prevent what, in terms of the statutory scheme under review, would be viewed as an important error.¹¹¹

107. See Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. Va. L. Rev. 249, 261, 271 (1967).

108. This discussion draws upon the lucid analysis of Professor Jaffe, and I see no need to repeat that here. See L. Jaffe, *supra* note 17, at 624-33.

109. See, e.g., *Groenwelt v. Burwell*, 1 Salk. 144, 91 Eng. Rep. 134 (K.B. 1700); *Rex v. Inhabitants of Glamorganshire*, 1 Ld. Ray. 580, 88 Eng. Rep. 1409 (K.B. 1691) (certiorari would issue from King's Bench to all inferior jurisdictions "to see that they keep themselves within their jurisdiction; and if they exceed it, to restrain them").

110. "The practical result of the doctrine of 'jurisdictional fact' is to throw open for re-examination in court facts which, if they were not held to be 'jurisdictional,' would be concluded either by the decision of the administrative body or at least by the evidence at its disposal." Dickinson, *supra* note 16, at 1060 (citation omitted). Indeed, where necessary the English courts showed a tendency to take evidence and make their own findings on jurisdictional facts, L. Jaffe, *supra* note 17, at 628-29, and this was the scope of jurisdictional fact review adopted in the American courts. See *id.* at 633. Emphasizing cases that reviewed administrative determinations by certiorari, however, Professor Dickinson argues that the jurisdictional fact doctrine only rarely resulted in independent judicial factfinding. Moreover, he asserts that most courts applying the doctrine declined even to exercise independent judgment on the administrative record, accepting instead the existence of the jurisdictional fact if it could have been found by "reasonable men on the evidence presented in the administrative proceeding." Dickinson, *supra* note 16, at 1067.

Arguably, Professor Dickinson takes too narrow an historical view of the jurisdictional fact doctrine by focusing on only the certiorari cases, in which the scope of appellate review was limited by the special requirements of the writ. And in any case, the distance between Professor Dickinson and Professor Jaffe should not be overstated. Both agreed that the jurisdictional fact doctrine assumed that courts were *competent* in all cases to exercise whatever scope of review was necessary to ensure that agency action was not *ultra vires*, yet neither believed that the doctrine imposed a *duty* on courts to exercise a given level of review in any particular case.

111. See L. Jaffe, *supra* note 17, at 631-33. Professor Dickinson rightly emphasizes

American courts early on embraced the jurisdictional fact doctrine. But not until the emergence of the administrative state did an important difference from the English practice develop: courts insisted that the Constitution itself required some form of the doctrine.¹¹² This development began with *Chicago, Milwaukee & St. Paul Railway v. Minnesota*,¹¹³ the first Supreme Court decision applying the due process clause to restrict the states. Invoking the "wisdom of successive ages,"¹¹⁴ the Court held that the due process clause requires judicial review of a claim that administratively prescribed rates are confiscatory.¹¹⁵ The Court said that the "question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation."¹¹⁶

The Supreme Court did not squarely address the scope of the

that, in principle, the issue presented by the jurisdictional fact doctrine was at one level simply a question of statutory construction.

If the legislature desires and intends to make the validity of an administrative determination turn on whether or not the existence of a particular fact shall be later proved to the satisfaction of a court, the court must give effect to the legislative intent and determine for itself in the review proceeding the existence of the fact.

Dickinson, *supra* note 16, at 1063. But, as Professor Dickinson acknowledges, the jurisdictional fact doctrine also reflected a general approach by courts to the control of administrative conduct, both in England and in the United States. *Id.* at 1064-67; see also L. Jaffe, *supra* note 17, at 634 ("The concept of jurisdictional fact was devised originally by English and American courts to justify a fairly limited judicial review of orders otherwise immune.").

112.

The doctrine of constitutional fact . . . applies to constitutional limitations on administrative jurisdiction the same reasoning which the doctrine of jurisdictional fact applies to statutory limitations. Just as a statute may confine jurisdiction to cases where a certain fact exists, so the constitution may be construed to limit jurisdiction to the presence or absence of a fact-situation.

Dickinson, *supra* note 16, at 1067; see also *id.* at 1072 ("The doctrine of constitutional fact is the doctrine of jurisdictional fact in special form.").

113. 134 U.S. 418 (1890).

114. *Id.* at 457.

115. *Id.* at 458. This result was reached despite the general principle that the federal Constitution does not mandate separation of powers at the state level. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1907). This principle has, of course, suffered considerable erosion. See Monaghan, *supra* note 82, at 524 n.23.

116. 134 U.S. at 458. The Court was unclear whether this "judicial investigation" would require *de novo* proceedings. The state supreme court had construed the statute at issue to provide that rates promulgated by the agency were "final and conclusive as to what are equal and reasonable charges." *Id.* at 456. Given this construction, the Court simply may have viewed the issue as whether a "question of law"—what are "equal and reasonable" charges—had been impermissibly removed from judicial determination. On the other hand, the Court did indicate a separate concern over the fairness of the administrative proceedings, both in terms of the statute on its face and as applied. *Id.* at 457-58.

“question for judicial investigation” identified in *Chicago, Milwaukee & St. Paul Railway* until *Ohio Valley Water Co. v. Ben Avon Borough*,¹¹⁷ another confiscation challenge to a state public utility rate order. In a cursory opinion by Justice McReynolds, the Court said:

[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause¹¹⁸

More important, the Court assumed that the judicial task did not simply embrace judicial application of the constitutional norm of a “fair return” to the administratively found facts. The crucial issue dividing the litigants was the value of the utility’s property, and on that issue the Court required independent judicial judgment.¹¹⁹ Nonetheless, the case should not be overstated. *Ben Avon* does not address the scope of Supreme Court review over state courts. Indeed, at the time the limitations of review by writ of error greatly restricted that power.¹²⁰ Nor does *Ben Avon* address the issue of scope of review by higher state courts over inferior courts.¹²¹ The only point decided in the case was

117. 253 U.S. 287 (1920). It should be noted, however, that a strong dictum by Justice Holmes prefigured the *Ben Avon* result. In *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908), a challenge to a state rate order, Justice Holmes declared:

Whether [the railroads’] property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. . . . They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent.

Id. at 228; see also *Ex parte Young*, 209 U.S. 123, 147 (1908) (“If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional.”). See generally Buchanan, *The Ohio Valley Water Company Case and the Valuation of Railroads*, 40 *Harv. L. Rev.* 1033, 1040 (1927) (“[I]t would be an error to suppose that [*Ben Avon*] was inconsistent with any of the earlier authorities.”).

118. 253 U.S. at 289.

119. The Court reversed the ruling of the Pennsylvania Supreme Court, which had denied the lower state court’s power to arrive at an independent determination of the value of the utility’s property. See *Borough of Ben Avon v. Ohio Valley Water Co.* (No. 2), 260 Pa. 310, 103 A. 750 (1918).

120. This point was stressed in the dissenting opinion of Justice Brandeis. Because of the limitations on the writ of error, he denied that the undervaluation issue was properly a basis for complaint before the Supreme Court. See 253 U.S. at 298; cf. Hill, *The Inadequate State Ground*, 65 *Colum. L. Rev.* 943, 946 n.18 (1965) (“[T]he Court has been thought to be unduly influenced by the earlier limitation on the scope of review of state judgments.”).

121. Indeed, on remand the Pennsylvania Supreme Court held that *Ben Avon* did not require that it exercise independent judgment on the lower state court’s determination of the value of the utility’s property, and it affirmed on a “clearly erroneous” standard. See *Borough of Ben Avon v. Ohio Valley Water Co.*, 271 Pa. 346, 350, 114 A. 369, 370–71 (1921).

that the independent judgment of *some* state judicial tribunal must be provided on the "value" component of a confiscation claim.

Ben Avon need not have spawned constitutional fact review outside of the rate setting context. The case was decided against two closely related background premises: first, that a legislature could set rates so long as some court was available to hear claims that the rates were confiscatory;¹²² and second, that no legislature could insulate its actions from judicial review by determining initially the facts upon which the constitutionality of those actions depended and thereafter making such factual findings binding upon the courts.¹²³ Once the *Ben Avon* Court had concluded that the state agency had performed a "legislative" act in setting the challenged rates,¹²⁴ it seemed axiomatic that the agency's findings of constitutional fact must be subject to the same level of review that would apply to similar findings made by a legislature.¹²⁵ We need not stop to examine all the difficulties in the Court's reasoning.¹²⁶

122. See *supra* notes 113-16 and accompanying text.

123. See Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 *Harv. L. Rev.* 6, 19 (1924); *supra* note 117. With the rise of as-applied review, which occurred at roughly the same time as the emergence of the administrative state, the "facts" on which constitutionality depended began to include the specific facts relating to the application of the statute in question. See Dickinson, *supra* note 16, at 1067-72.

124. The Court was unanimous on this point, see 253 U.S. at 289; *id.* at 293 (Brandeis, J., dissenting), relying largely on its earlier decision in *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908) (state agency regulating corporations, though a court for some purposes, performs "legislative" function when setting rates). Tracing the rise of agency involvement in rate setting, Dean Landis observes that

by the turn of the century, [rate setting] appeared to be more of a legislative power than a judicial power. The administrative was seen as taking the place of the legislature so that its functioning was easier to analogize to the exercise of power by the legislative branch of government than by the judicial branch.

J. Landis, *The Administrative Process* 126 (1938).

It was apparent from the outset, however, that rate setting was not always comfortably analogized to legislation. At some stages of the process, the agency functioned like a court. See, e.g., *ICC v. Louisville & Nash. R.R.*, 227 U.S. 88 (1913) (where agency hears complaint that rates for a *single* carrier are unreasonable, proceeding is "quasi-judicial" and must afford trial-type protections). Confusion over the proper characterization of rate setting persists even today. Compare *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 243-46 (1973) (where agency rate order applied prospectively to *all* railroads within agency's jurisdiction, agency engaged in "rulemaking"), with *id.* at 253-54 (Douglas, J., dissenting) (where agency bases rates on evidentiary facts, agency engaged in "adjudication"). See generally Friendly, *supra* note 16, at 1305-10 (criticizing *Florida East Coast* majority).

125. See *Ben Avon*, 253 U.S. at 289; Larson, *supra* note 17, at 211. Counsel for the Ohio Water Company were careful to present the Court with this syllogism in order to fit their case within the accepted precedents. See Buchanan, *supra* note 117, at 1037.

126. The Court's analogy to legislative action is troublesome. It seems likely that agency action of the type present in *Ben Avon*—setting rates for a single utility after an evidentiary hearing—would today be assimilated to adjudication, not legislation. See *supra* note 124. But even granting the Court its characterization of the issue, a further problem remains. Legislative action has traditionally enjoyed a presumption of constitu-

It is enough to note that *Ben Avon's* independent judgment rule could have been limited to cases in which the agency was performing what were then understood as "legislative" functions.

That the Supreme Court would not view constitutional fact review so narrowly became quickly apparent. *Ng Fung Ho v. White*,¹²⁷ decided only two years after *Ben Avon*, sanctioned constitutional fact review in the context of what was clearly "adjudicative" action by an administrative agency. At issue were habeas challenges to administrative deportation warrants. Petitioners insisted that their deportation was improper because they were United States citizens. Administrative rejection of petitioners' claims was not conclusive on the courts, said Justice Brandeis, because citizenship is "an essential jurisdictional fact."¹²⁸ Deportation works an obvious and grievous loss of liberty, and "[a]gainst the danger of such deprivation without the sanction afforded by judicial proceedings," the due process clause "affords protection."¹²⁹ This, the Court insisted, was not novel doctrine. "The difference in security of judicial over administrative action has been adverted to by this court."¹³⁰ Once again, however, the thrust of the opinion was a requirement of independent judgment by some—but not all—courts.

In *Crowell v. Benson*,¹³¹ a divided Court both confirmed and generalized the constitutional fact doctrine in strong terms. While conceding that ordinary facts could be established in the administrative process, the Court held that constitutional facts must be found by the courts. Thus, an employer challenging a federal administrative compensation order was entitled to an independent judicial determination of whether the injury occurred on navigable waters, as well as of the existence of the employer-employee relationship. These conditions were considered indispensable to the application of the statute "not only because

tionality; legislative findings are upheld if "reasonable." See *Radice v. New York*, 264 U.S. 292, 294 (1924); *Biklé*, supra note 123, at 21. Yet the *Ben Avon* Court made no effort to explain why this same presumption should not also attach to agency actions that were assertedly "legislative." Cf. *J. Dickinson*, supra note 24, at 199 ("Surely the formal conclusions of fact reached by an administrative tribunal after a hearing and the taking of testimony should be entitled to as much respect as findings of fact supposed to have been made by a legislative body as the implied basis for its enactments."). That the Court felt no need to defend this point may have reflected its internalization of the ongoing assault—in the name of "substantive" due process—on the supremacy of legislative findings in areas of economic regulation.

127. 259 U.S. 276 (1922).

128. *Id.* at 284. *Contra United States v. Ju Toy*, 198 U.S. 253 (1905) (Department of Labor determination on question of citizenship is final). Professor Larson has observed the crucial influence that the development of as-applied review had in generating the contrary holdings in these two cases. See *Larson*, supra note 17, at 198 n.54.

129. 259 U.S. at 284–85.

130. *Id.* at 285; see, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (administrative agency may not impose criminal punishment on a deportable alien); *Brown*, *Administrative Commissions and the Judicial Power*, 19 *Minn. L. Rev.* 261, 293–95 (1935).

131. 285 U.S. 22 (1932).

the Congress has so provided explicitly . . . but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."¹³² The ground was article III, not due process:

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. . . . *It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions.* It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend.¹³³

In an elaborate dissenting opinion, Justice Brandeis argued that article III provided no support for a constitutional fact doctrine,¹³⁴ although he acknowledged that on occasion the due process clause would require judicial process.¹³⁵

B. *Independent Record*

While this Article focuses on constitutional fact review in the Supreme Court, it would be radically incomplete if it did not notice another aspect of constitutional fact review: the independent record requirement. In *Crowell*, Justice Brandeis' dissenting opinion states:

The primary question for consideration is not whether Congress provided, or validly could provide, that determinations of fact by the deputy commissioner should be conclusive upon the district court. The question is: Upon what record shall the district court's review of the order of the deputy commissioner be based? The courts below held that the respondent was entitled to a trial *de novo*; that all the evidence introduced before the deputy commissioner should go for naught; and that respondent should have the privilege of presenting new, and even entirely different, evidence in the district court. Unless that holding was correct the judgment below obviously cannot

132. *Id.* at 55.

133. *Id.* at 56 (emphasis added) (footnote omitted). The Court added: The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Id. at 56-57.

134. *Id.* at 84-88 (Brandeis, J., dissenting).

135. *Id.* at 87 (Brandeis, J., dissenting); see Monaghan, *supra* note 6, at 19.

be affirmed.¹³⁶

It seemed evident that if the employer had a right to an independent judicial record, independent judicial judgment followed as a matter of course. With the single exception of *Ng Fung Ho*, however, no decision had yet held that the Constitution required more than an independent judicial judgment on the administrative record.¹³⁷ Nonetheless, in *Crowell* the Court endorsed the broader version of the constitutional fact doctrine:

Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.¹³⁸

This statement comes late in the opinion, and the Court's way of putting the point is unsatisfying. The Court said that an independent record requirement is necessary in order to maintain "the essential independence of the exercise of the judicial power,"¹³⁹ a formulation that suggests that article III is not concerned with the personal rights of litigants, but with the institutional independence of the federal adjudicatory process.¹⁴⁰ On this reasoning, it seems that an independent record is only an adjunct to the more basic requirement of independent judicial judgment, and thus that this procedural safeguard is unnecessary where there is a trial-type administrative proceeding resulting in a formal record.¹⁴¹

In any event, it soon became apparent that effective regulation presupposed that the agency be permitted to construct the record, even with respect to constitutional facts.¹⁴² This development was made

136. 285 U.S. at 66.

137. Dickinson, *supra* note 16, at 1072-73. Indeed, *Ben Avon* had assumed that a reviewing court could proceed on the basis of an administrative record. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 287 (1920); see also *United States v. Ju Toy*, 198 U.S. 253 (1905) (no right to judicial trial *de novo* to challenge an administrative exclusion order even on the claim of citizenship).

138. 285 U.S. at 63-64.

139. *Id.* at 64.

140. Commentators are divided on whether article III should be understood to confer personal rights. See Note, *Federal Magistrates and the Principles of Article III*, 97 *Harv. L. Rev.* 1947, 1952-53 (1984).

141. See Strong, *supra* note 107, at 275. Of course, many lawyers would insist that who finds the facts is far more important than who applies the law, and at least a plurality of the present Court endorses that view. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-86 (1982) (plurality opinion).

142. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 20, 47 (1937) (rejecting respondent's *Crowell*-based independent record challenge); Strong, *supra* note 17, at 230-40. See generally Dickinson, *supra* note 16, at 1061-63, 1077-82 (predicting

possible a few years after *Crowell*. In *St. Joseph Stock Yards Co. v. United States*,¹⁴³ the Court, while reaffirming the independent judgment rule in ratesetting cases, broadly retreated from an independent judicial record requirement. Chief Justice Hughes, *Crowell's* author, wrote:

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency.¹⁴⁴

The Chief Justice added that "in ordinary cases, and where the opportunity is open, all the pertinent evidence should be submitted in the first instance to the Commission."¹⁴⁵ Indeed, it would take a "clear case" for the Court to consider evidence not presented to the agency.¹⁴⁶ After *St. Joseph Stock Yards* the independent record requirement receded into the constitutional shadows.¹⁴⁷

However, in light of the Court's recent decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁴⁸ it is certain that we shall see renewed interest in the independent record requirement. In *Northern Pipeline*, a divided Court held that article III courts, not legislative courts or administrative agencies, must *find the underlying facts* in common law disputes governed by state law. According to Justice Brennan's plurality opinion, only those "public rights" created by statute may be committed to non-article III tribunals.¹⁴⁹

The potential for the resurrection of some form of the independent record requirement is easily illustrated. Suppose, for example, that a student is expelled from a state university following a fairly held disci-

that requirement of trial de novo would become altogether disruptive of administrative processes).

143. 298 U.S. 38 (1936).

144. *Id.* at 53.

145. *Id.* at 54 (quoting *Manufacturers Ry. v. United States*, 246 U.S. 457, 489 (1918)).

146. *Id.*

147. See, e.g., *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 321 (1953); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937).

148. 458 U.S. 50 (1982) (plurality opinion).

149. See *id.* at 81 (limiting non-article III adjudication to "congressionally created statutory rights"). This may expand, as well as curtail, the reach of the public rights category. See *supra* note 106. Whether Justice Brennan also attempted to distinguish between adjudication by agencies and by legislative courts is unclear. On whether such a distinction is tenable, compare Currie, *supra* note 101, at 456 & n.85 (recognizing distinction where separate administrative agency employs distinctive nonjudicial procedures and lacks power to enforce its own decisions), with Note, *supra* note 140, at 1957 n.50 (distinction between adjudication by agencies and courts "may be more theoretical than real").

plinary proceeding that found he had engaged in unprotected misconduct. In his reinstatement action in a district court, *Bose*—wholly apart from *Crowell*—would require independent judicial judgment on law application. But suppose the student contends that the administrative finding of misconduct is false and that he was expelled because of protected speech activities. What is the court obligated to do? For some, like Professor Hart, article III is not at all implicated: the district court is not being asked to enforce an administrative order, but simply to intervene to correct administrative wrongdoing.¹⁵⁰ Even if we make that assumption, does the student have a constitutional right to review under either the due process clause¹⁵¹ or the first amendment?¹⁵² It is unlikely that the Court will directly address this question because section 1983¹⁵³ appears to authorize such actions.¹⁵⁴ But does that statute also determine the scope of judicial review? Does section 1983, the first amendment, or article III require an independent judicial record, so that the administrative proceeding is effectively treated as a nullity?¹⁵⁵

In its modern form, *Crowell v. Benson* suggests that, at most, independent judgment is all that is constitutionally required in the above situation.¹⁵⁶ Indeed, in *United States v. Raddatz*,¹⁵⁷ citing *Crowell*, the Court held that an article III judge could accept a magistrate's factual findings on a motion to exclude evidence allegedly obtained in violation of the fourth amendment.¹⁵⁸ But *Raddatz* might be distinguished on the ground that the exclusionary rule is not part of the fourth amendment right, but simply a judicially fashioned remedy that a liti-

150. It is possible to posit a distinction between courts asked to enforce legal duties and those asked merely to set aside administrative decisions that, standing alone, would not serve as the predicate for further judicial action. See Hart, *supra* note 102, at 1375-78. I have elaborated upon and criticized that distinction, see Monaghan, *supra* note 6, at 20-24, but my criticism need not be accepted for the purposes of this Article. It is, in fact, by no means clear that Hart would apply the enforcement/nonenforcement court distinction to constitutional cases if the litigant could demonstrate a right to review. *Id.* at 11 n.62.

151. Professor Jaffe argues that due process requires judicial review of any coercive administrative action. L. Jaffe, *supra* note 17, at 384-89. But there remains a large question as to what counts as "coercion."

152. *Freedman v. Maryland*, 380 U.S. 51 (1965), would not be dispositive in this case because the university's substantive rule—permitting expulsion of disruptive students—is not a content-based restriction.

153. 42 U.S.C. § 1983 (1982).

154. See *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972).

155. Cf. *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1091 (8th Cir. 1969) (Lay, J., dissenting) ("A civil rights action under § 1983 is a separate proceeding which requires a trial de novo . . . [A] district judge is not bound by . . . prior findings of fact of any state official.").

156. Unless, of course, one reads article III as does Professor Hart. See *supra* note 150.

157. 447 U.S. 667 (1980).

158. *Id.* at 676.

gant is permitted to assert.¹⁵⁹ Moreover, *Northern Pipeline* suggests that a broad reconsideration is in order. The plurality not only opined that rights *not* created by Congress may require more intensive judicial factfinding,¹⁶⁰ it also emphasized the importance of judicial factfinding on any view of the purposes of article III.¹⁶¹ And surely it is difficult to believe that article III requires independent judicial factfinding in diversity cases, but only independent judgment on an administrative record when constitutional rights are at stake. Yet an affirmative requirement of judicial factfinding grounded on either article III or the first amendment has startling implications. Any such general requirement seems inconsistent with the practical exigencies of the administrative state. For example, no one yet supposes that the first amendment guarantees independent factfinding by a court when the NLRB has found that an employer has engaged in unprotected "coercive" speech.¹⁶²

At this point in our history I would be startled to see the Court decide that a litigant pressing a bona fide constitutional claim could be denied access to the independent judgment of a judicial forum.¹⁶³ Nevertheless, I confess considerable uncertainty over whether the Constitution generally mandates any specific level of independent judicial factfinding. My inclination is to start with Justice Brandeis' attempt in both *Crowell* and *St. Joseph Stock Yards* to reformulate the substance of the constitutional fact doctrine. Justice Brandeis asserted that due process sometimes requires judicial process. In this respect, he urged a sharp distinction between claims of "liberty" and of "property."¹⁶⁴ In these terms the analysis is troublesome. The general distinction posited between liberty and property has not weathered well in other areas of law, partly in recognition that the Constitution does not appear to

159. *United States v. Leon*, 104 S. Ct. 3405, 3412 (1984), strongly emphasizes this rationale.

160.

[W]hile *Crowell* . . . endorsed the proposition that Congress possesses broad discretion to assign factfinding functions . . . to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition . . . that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress.

458 U.S. at 81-82. *Raddatz* and *Northern Pipeline* are hard to reconcile in terms of their general approach. See Currie, *supra* note 101, at 458-59; Note, *supra* note 140, at 1957 n.49.

161. See 458 U.S. at 84-86.

162. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619-20 (1969). But *Bose* seems to foreclose deferential review of constitutional facts in the first amendment context. See *supra* note 84.

163. The Court has been assiduous in reading statutes that preclude judicial review as not cutting off review of constitutional claims. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974).

164. See *Crowell v. Benson*, 285 U.S. 50, 87-88 (1932) (Brandeis, J., dissenting); L. Jaffe, *supra* note 17, at 385-89.

grade in such a general way the rights that it confers.¹⁶⁵

But Justice Brandeis' analysis rests on a deeper ground. By radically separating due process from article III, he acknowledged that the very existence of the process of administrative adjudication could no longer be considered irreconcilably at variance with the purposes of having article III courts.¹⁶⁶ In thus breaking due process concerns free from article III's gravitational pull, Justice Brandeis offered the possibility of a unified framework—one that is equally applicable to federal and state courts—governing the extent to which the Constitution allocates functions between courts and agencies. And, at least in its modern form, due process theory permits a discriminating judicial response to the problems of administrative adjudication,¹⁶⁷ a response that reflects the specific substantive constitutional values at stake rather than generalized notions about the nature of federal judicial power.¹⁶⁸

C. *Independent Appellate Judgment*

Crowell's constitutional fact doctrine elicited considerable academic commentary, mostly hostile. Some commentators insisted that the independent judgment rule had been quickly and quietly discarded, even in the rate cases.¹⁶⁹ The more common academic response was to criti-

165. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972).

166. Justice Brandeis' analysis failed to acknowledge the historically close connection between article III and due process—a connection apparent not only in *Crowell* itself, see L. Jaffe, *supra* note 17, at 639, but even more so in the cases that preceded it. See Monaghan, *supra* note 6, at 17.

167. Justice Brandeis emphasized the due process clause. My own preference has been to stress the remedial and procedural dimensions of constitutional provisions with a specific subject matter, such as the first amendment. See Monaghan, *supra* note 82. On occasion the Supreme Court seems inclined to the latter mode of exposition. See, e.g., *California v. Ramos*, 103 S. Ct. 3446, 3451 (1983) (“[T]he Court’s principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury. . . .”). In general, however, the Court follows Brandeis, insisting that the general prohibition against government intrusions contained in the fourth amendment and in the due process clause takes on a special meaning where important substantive constitutional values—such as freedom of speech—are at stake. See, e.g., *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

168. In the first amendment area, for example, the Court might accept administrative factfinding by administrative agencies with ongoing, carefully structured adjudicatory apparatus, see *Bush v. Lucas*, 462 U.S. 367 (1983), while insisting on independent judicial factfinding where the agency might be thought to be infected with systemic bias against the free speech claim, see, e.g., Monaghan, *supra* note 82, at 523 (movie censors), or where the agency meets so occasionally that it might be thought to lack sufficient institutional safeguards—for example, school disciplinary panels.

169. These commentators placed major reliance on the Supreme Court’s failure to mention the rule in a subsequent rate case, *Railroad Comm’n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 581–82 (1940). See, e.g., K. Davis, *Handbook on Administrative Law* § 255 (1951). But the decline of *Crowell's* importance in the rate-setting area seems more properly attributable to an abandonment of the requirement of a judicial record, see *supra* notes 142–47 and accompanying text, and to an important change in the con-

cize the distinction between constitutional and ordinary facts, both practically and theoretically. It was insisted that no workable line between the two categories existed,¹⁷⁰ and that the practical imperatives of public administration were at variance with attempting any such distinction.¹⁷¹ Moreover, not only would the text of article III not support such a distinction, reliance upon article III could not explain *Ben Avon*, a case originating in the state courts.¹⁷² The resulting uncertainty over both the theory and reach of *Crowell* led to a marked decline in overt judicial reliance upon its authority. Indeed, at one time the fashion was to pronounce the constitutional fact doctrine dead.¹⁷³

While commentators focused on *Crowell's* decline in the field of administrative law, they began to notice that constitutional fact review had become the operative measure of the Supreme Court's general appellate jurisdiction.¹⁷⁴ *Norris v. Alabama*,¹⁷⁵ decided just two years after *Crowell* and in the same year as *St. Joseph Stock Yards*, is the watershed case. There the Court reversed a holding of the Supreme Court of Alabama that no impermissible racial exclusion from state juries had been proved. The Court framed its task in terms identical to those stated by the *Bose* Court:

The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and

trolling substantive constitutional law. In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), the Court introduced flexibility in the rate setting process by minimizing the concept of a "fair return." Until then, as Professor Dickinson had earlier noted, the "fact-issue of the fair value of the property [was] decisive on the constitutionality of every rate order." Dickinson, *supra* note 16, at 1072. After *Hope*, confiscation challenges to rate orders became practically irrelevant. See L. Jaffe, *supra* note 17, at 649-50; Strong, *supra* note 17, at 227.

170. See, e.g., J. Landis, *supra* note 124, at 131; Dickinson, *supra* note 16, at 1069-72; Schwartz, *Does the Ghost of Crowell v. Benson Still Walk*, 98 U. Pa. L. Rev. 163, 171 (1949).

171. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); Dickinson, *supra* note 16, at 1077-82.

172. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); see also *Booth Fisheries Co. v. Industrial Comm'n*, 271 U.S. 208, 211 (1926) (reaffirming that *Ben Avon* is grounded in due process clause of fourteenth amendment). The difficulty in relying on article III is that it requires independent judgment on *all* questions of law when an article III court is asked to enforce an administrative order against private parties. See Hart & Wechsler, *supra* note 7, at 336-46. It is not clear whether Hart's reference to independent judgment on "questions of law" extends to law application. See Monaghan, *supra* note 6, at 20-21.

173. For citations to obituary notices, see M. Redish, *Federal Courts: Cases, Comments, and Questions* 193 (1983).

174. See L. Jaffe, *supra* note 17, at 645 n.86; Strong, *supra* note 17, at 240-83.

175. 294 U.S. 587 (1935).

effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.¹⁷⁶

The Court reviewed the evidence, including books containing the jury rolls,¹⁷⁷ in a thorough manner and concluded that "the evidence required a different result from that reached in the state court."¹⁷⁸

After *Norris*, occasional doubts were expressed about the Supreme Court's power to review "factual" matters when the case came from the state courts.¹⁷⁹ However, any special limitations on Supreme Court review of state court factfinding and law application in constitutional cases rested not on federalism principles, but on no longer extant statutory restrictions on the Court's appellate jurisdiction.¹⁸⁰ In any event, all traces of doubt soon vanished. The Court's *authority* to make an independent judgment on constitutional law application became firmly established, particularly in the areas of coerced confessions, jury discrimination, and free speech.¹⁸¹ The formulas varied, to be sure. Sometimes the Court insisted on its power to review "mixed" questions

176. *Id.* at 589-90.

177. *Id.* at 593 n.1.

178. *Id.* at 596. The Court added:

We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination the Constitution forbids. The motion to quash the indictment upon that ground should have been granted.

Id. The Court concluded that the state court's reliance upon the "mere general asseverations" of the jury commissioners to the contrary was not enough. *Id.* at 595. For other illustrations of independent review in jury discrimination cases, see *Cassell v. Texas*, 339 U.S. 282, 283 (1950); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939).

179. See, e.g., *Watts v. Indiana*, 338 U.S. 49, 50-51 (1949) ("[A]ll those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple."). Commentators have tended to focus on Supreme Court review of state factfinding, see Hart & Wechsler, *supra* note 7, at 574-620, without giving corresponding attention to Supreme Court review of the findings of the lower federal courts.

180. *Hill*, *supra* note 120, at 946 n.18.

181. See Hart & Wechsler, *supra* note 7, at 601-20; *id.* at 135-51 (Supp. 1981); Strong, *supra* note 17, at 240-83. Of course, the Supreme Court cannot upset trial court resolution of disputed "historical" facts, *Lisenba v. California*, 314 U.S. 219, 237-38 (1941), but even this limitation may not be significant, given the Court's ability to reshape factual issues into legal ones. See, e.g., *Oliver v. United States*, 104 S. Ct. 1735, 1739 n.5 (1984) ("Contrary to respondent's assertion, we do not review here the

of law and fact; sometimes on the need for review because the conclusions of law and the findings of fact were "intermingled"; sometimes on the need to review the evidence to ensure that the federal right was not denied in substance; and sometimes on the need to determine whether sufficient evidence existed.¹⁸² These various formulas obscure the issue. Laid bare, the point is more easily stated: the entire substance of constitutional fact review had become the operative measure of the Supreme Court's general appellate jurisdiction.

Some regard this development as an outgrowth of the premises of *Ben Avon*, *Ng Fung Ho*, and *Crowell*.¹⁸³ I think that is an error. Constitutional fact review in those cases was concerned with the legitimacy of the administrative state, with its substitution of administrative for judicial adjudication. The dominant concern was the extent to which such a process could displace the pattern of adjudication by regular courts apparently contemplated by the 1787 Constitution. In terms of the constitutional design, the whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious "legitimacy deficit."¹⁸⁴ The constitutional fact doctrine is an effort to overcome this problem, to reconcile the imperatives of the twentieth century administrative state with the constitutional preference for adjudication by the regular courts. It does so by requiring, at a minimum, that a court asked to enforce an administrative order must engage in constitutional fact review. Perhaps the doctrine has a broader bite.¹⁸⁵ But the important point is that it is concerned only with judicial control of administrative conduct.

Quite plainly, no legitimacy deficit can be thought to exist in the adjudications of the inferior courts. The constitutional plan contemplates that state courts can adjudicate federal claims, and that Congress can establish lower federal courts. Accordingly, even on the doubtful premise that judicial control of administrative conduct requires constitutional fact review at the appellate level,¹⁸⁶ different justifications must

state courts' finding as a matter of 'fact' [T]he question before us is the appropriate legal standard").

182. The various formulas are catalogued in Note, Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 Stan. L. Rev. 328, 328-36 (1962).

183. See, e.g., Strong, *supra* note 17, at 240-83.

184. See Currie, *supra* note 101, at 443-45. I recognize that on principle this argument applies most clearly only at the federal level. A strong form of the argument applied at the state level would run into the doctrine that the Constitution does not impose separation of powers on the states. See *supra* note 115. But history has its claim here: it is no accident that the early due process cases evidenced a constitutional concern for adequate state judicial control of state administrative conduct where private rights were at stake. See *supra* notes 113-21 and accompanying text.

185. See Monaghan, *supra* note 6, at 20-24.

186. In *Crowell*, neither the Court nor Justice Brandeis adverted to possible differences between the role of the trial and appellate courts in the context of immediate judicial review of administrative action. Their focus was on the independent judgment requirement at large, so to speak.

be adduced to support such intense review of the findings of inferior judicial tribunals.

Despite the evident distinctions between judicial review of administrative action and judicial review of the conduct of inferior courts, some cases seemingly assumed that constitutional law application was always a task calling for the independent judgment of appellate courts. These authorities need not be examined here. The most that can be said is that they assumed the necessity or propriety of independent appellate review—they did not purport to demonstrate it.¹⁸⁷ Moreover, in recent times when the Supreme Court has spoken of the obligations of the state courts, its most salient reliance has been on specific constitutional guarantees, not on the constitutional fact doctrine of either *Crowell* or *Norris*.¹⁸⁸ Thus, in *Freedman v. Maryland*¹⁸⁹ the Court held that states must provide judicial review of administrative determinations that certain speech is unprotected.¹⁹⁰ Though it does not cite *Freedman*, *Bose* follows this pattern, extending it to the appellate level.¹⁹¹

III. APPELLATE DUTY VERSUS APPELLATE DISCRETION

Thus far the Article has traced the development of the constitutional fact doctrine. In the context of judicial review of administrative action, constitutional fact review may be required because administrative action suffers from a legitimacy deficit. But recognizing that some court should review administrative action provides no basis for a further demand that all subsequent reviewing courts exercise independent judgment. Nor does it compel independent appellate review of the findings of lower federal or state courts in ordinary civil and criminal cases since there is no legitimacy deficit when these courts adjudicate

187. In *St. Joseph Stock Yards*, for example, the Supreme Court itself extensively reviewed claims relating to the fair value of the property as well as to the income to be earned under the prescribed rates. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 54-72 (1936). Justice Brandeis regarded the sufficiency of the evidence as a question of law. See *id.* at 74-75 (Brandeis, J., concurring). In *Ben Avon*, Brandeis viewed the question of whether there was "substantial evidence" in favor of the administrative findings as a question of law reviewable in the state supreme court as well as in the trial court. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 296-97 (1920) (Brandeis, J., dissenting). And, in a little noticed line of cases involving the Federal Employers Liability Act, the Court regularly insisted that it had the duty to decide de novo whether the injury had occurred in interstate commerce, a question then deemed to be of constitutional significance. See *Dickinson*, *supra* note 16, at 1069-71.

188. See *Monaghan*, *supra* note 82, at 524 n.23 (specific constitutional guarantees mandate judicial as opposed to administrative adjudication).

189. 380 U.S. 51 (1965).

190. *Id.* at 58. The Court said that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." *Id.*

191. Cf. *Jenkins v. Georgia*, 418 U.S. 153, 163 (1974) (Brennan, J., concurring in result) ("After the Court's decision today, there can be no doubt that [Miller v. California, 413 U.S. 15 (1973)] requires appellate courts—including this Court—to review independently the constitutional fact of obscenity.").

constitutional claims. To be sure, appellate courts often exercise independent judgment with respect to constitutional law application. But I see no persuasive case for converting this competence into a duty.

I do not doubt that, by statute, appellate courts can be charged with the responsibility for constitutional law application, to ensure that, on the evidence, any constitutional right has not been erroneously denied by a lower federal or state court. No litigant's personal rights are infringed by such review,¹⁹² nor do special federalism considerations forbid it.¹⁹³ But, to my mind, independent judgment on the evidence is constitutionally mandated only when the application issue involves an appreciable measure of additional norm elaboration—that is, where it seems correct to state that the judicial duty to “say what the law is” is implicated. I accept, however, that firmly embedded precedent establishes more: appellate courts, including the Supreme Court, have the authority to engage in constitutional fact review in any case, at least absent restrictive legislation. As will be seen, this competence can be supported by justifications going beyond history. However, our immediate concern is with the claim that appellate courts are under a *duty* to undertake such review.

A. *Appellate Duty*

Bose insists that appellate courts must exercise independent judgment with respect to constitutional facts relevant to first amendment law application. But to what extent are appellate judges obligated outside the first amendment context to undertake constitutional fact review in all constitutional cases? This question, it should be noted, arises in an extraordinary variety of contexts. For example, must each tier in the state appellate court system make an independent judgment on whether enough evidence exists to support a conviction beyond a reasonable doubt,¹⁹⁴ or on whether a specific juror was rightly disqualified because of his views on the death penalty?¹⁹⁵ Is the Supreme Court itself required to make a similar determination, at least in the cases in which it grants review? The day cannot be far off when the Court will be faced with the need for a systematic analysis of the entire problem. At that point the Court will see that there are a wide range of

192. My argument assumes the inapplicability of the jury trial guarantees. See *Bose*, 104 S. Ct. at 1964 n.27; *supra* note 28.

193. Hill, *supra* note 120, at 946 n.18.

194. Cf. *Jackson v. Virginia*, 443 U.S. 307, 316–20 (1977) (federal appellate courts reviewing criminal conviction must determine whether evidence supports the finding of guilt beyond a reasonable doubt). As Professor Wechsler notes, this is a substantial question “that can[not] easily be turned aside.” Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1058–59 (1977).

195. Cf. *Wainwright v. Witt*, 105 S. Ct. 844, 853, 857 (1985) (reviewing court in federal habeas proceeding must defer to state trial judge's findings about specific juror's bias against death penalty if findings “fairly supported by the record”).

constitutional challenges in which the Court does not see itself under an inexorable duty to engage in constitutional fact review.

*Container Corp. of America v. Franchise Tax Board*¹⁹⁶ is an excellent recent example of limited review of constitutional law application. Over commerce and due process clause objections, the Court upheld application of a state tax to the income of a domestic corporation's foreign subsidiaries. In apparently enlarging the concept of a "unitary business," the decision has been widely interpreted as significantly expanding state taxing power.¹⁹⁷ Curiously, however, no attention has been paid to an aspect of the case that virtually ensured that result. The taxpayer contended that whatever the appropriate legal standard for a unitary business, an important issue remained whether it was one, and on that question it was entitled to the Court's independent judgment. The Court's response is puzzling:

The legal principles defining the constitutional limits on the unitary business principle are now well established. The factual records in such cases, even when the parties enter into a stipulation, tend to be long and complex, and the line between "historical fact" and "constitutional fact" is often fuzzy at best. . . . It will do the cause of legal certainty little good if this Court turns every colorable claim that a state court erred in a particular application of those principles into a *de novo* adjudication, whose unintended nuances would then spawn further litigation and an avalanche of critical comment. Rather, our task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment "was within the realm of permissible judgment."¹⁹⁸

In a footnote, the Court added that "[t]his approach is, of course, quite different from the one we follow in certain other constitutional contexts,"¹⁹⁹ citing *New York Times Co. v. Sullivan* and a case involving Supreme Court review of a coerced confession claim.²⁰⁰ The Court made no effort to justify an approach "quite different" from that taken with respect to other constitutional claims, and some justification seems required. After all, the records in first amendment and coerced confession cases can be "long and complex," and the "line between 'historical fact' and 'constitutional fact'" is often "fuzzy at best." More important, the *Container Corp.* Court never explained why either consideration is of constitutional moment.

Container Corp. might rest on an unarticulated and undefended neo-

196. 103 S. Ct. 2933 (1983).

197. E.g., The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 112 (1983). There has been an intense lobbying effort at both the national and state level to curtail unitary tax schemes. See Pressure Grows on States to Reject World-Wide Unitary Tax System, Wall St. J., Dec. 28, 1984, at 15, col. 4.

198. 103 S. Ct. at 2946 (citation & footnote omitted).

199. *Id.* at 2946 n.13.

200. *Brooks v. Florida*, 389 U.S. 413 (1967).

Brandeisian premise: only "personal" constitutional rights, or some kinds of personal rights, warrant close appellate scrutiny.²⁰¹ If so, the source and limits of any such distinction are not apparent. Nor does the current Supreme Court seem to think that the scope of appellate review should be a function of behavioral assumptions that distortions will occur because the litigants are asserting unpopular personal rights. The Court's recent race discrimination and testimonial compulsion cases are especially noteworthy here. Despite *Norris v. Alabama*, the Court has declined to exercise independent judgment in the context of schools²⁰² and voting.²⁰³ In both contexts, the Court has said that impermissible "intent" is properly viewed as a question of fact.²⁰⁴ But surely intent in such contexts is far removed from the garden variety of factual inquiry. Intent to discriminate is itself simply a construct reflecting numerous complex inferences.²⁰⁵ Similarly, in *United States v. Doe*,²⁰⁶ decided in the same term as *Bose*, the Court again sounded the deference trumpet. At issue was whether compulsion to produce documents required the taxpayer "to perform an act that may have testimonial aspects and an incriminating effect," in violation of the fifth amendment.²⁰⁷ The Court said that it would accept the district court's "determination of factual issues . . . unless it has no support in the record."²⁰⁸

No less than the question of actual malice, questions of intentional segregation and testimonial compulsion could have been held entitled to constitutional fact review.²⁰⁹ These inconsistencies should not be dismissed as involving nothing more than esoteric and unimportant

201. See *supra* notes 163-68 and accompanying text.

202. Characterizing the holding in *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979), the Supreme Court recently reaffirmed the principle that "whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past [is] essentially factual, subject to the clearly-erroneous rule." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). *Swint* itself involved a federal statutory claim.

203. *Rogers v. Lodge*, 458 U.S. 613 (1982). The Court found that the district court had applied "the proper legal standard," *id.* at 622, and that its factual findings were not clearly erroneous.

204. E.g., *Rogers*, 458 U.S. at 623; *Swint*, 456 U.S. at 288.

205. The Court seemed to recognize this point in *Rogers*. See 458 U.S. at 622. For a careful examination of the problem, see Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 Yale L.J. 317 (1976).

206. 104 S. Ct. 1237 (1984).

207. *Id.* at 1242.

208. *Id.* at 1243. Presumably the Court's deferential approach applies equally to review of lower court rejections of constitutional claims.

209. Why is it, for example, that courts should defer to a magistrate's conclusion regarding the existence of probable cause to justify issuance of a warrant? See *Massachusetts v. Upton*, 104 S. Ct. 2085 (1984); see also *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 191-92 (3d Cir. 1984) (probable cause is an "ultimate fact" for the jury) (citing cases). Is the only explanation that the exclusionary rule is not constitutionally grounded? See *infra* text accompanying notes 211-13. Or is it that a magistrate counts as a "court" for purposes of the constitutional prohibition?

points of federal jurisdiction, of concern only to the litigants. That the Court sees itself under a duty to exercise independent judgment with respect to some, but not all, constitutional facts suggests that the Court is proceeding on an ad hoc basis, failing to consider the systemic ramifications of its decisions.

More important, the erratic and uncertain state of Supreme Court doctrine has serious consequences in a system of constitutional government. Even if the Court has a penetrating power of review, is talk of its "duty" to engage in such review wholly illusory? If so, should we view the Court's power of review as discretionary? Entirely unconstrained? The confusion about these matters is unsettling. And this uncertainty has an as yet little noticed byproduct: it leaves unclear the nature of the responsibilities of the state and federal judges, both trial and appellate. The current accretion of Supreme Court appellate jurisdiction says nothing, at least overtly, to other actors in the judicial system, particularly the state courts.²¹⁰

Thus, the question presses: does the Constitution require appellate courts to exercise independent judgment on adjudicative facts decisive of constitutional law application? An attempt to justify such a duty can take one of several forms, although upon examination I find them unconvincing whether taken singly or in combination.

1. — All questions of constitutional law application could be viewed as demanding independent appellate review because of the "importance" of constitutional rights and immunities coupled with the central role of courts in preserving the constitutional order.²¹¹ This argument stresses the "importance" of constitutional values,²¹² rather than the danger of distorted factfinding or law application by a specific decisionmaker. While the argument has appeal, its ultimate conclusion seems to be simply asserted, rather than persuasively justified. It is, after all, not obvious that all constitutional rights are more valuable than other rights simply because they are mentioned in the Constitution. If the argument simply reflects a naked bias in favor of constitutional claims, one that seeks only to increase the likelihood that such claims will be vindicated, the bias does not appear to be constitutionally grounded. It is not a premise of our system that the courts are able to detect every violation of the constitutional order.²¹³

210. In the federal system, of course, there is no absence of guidance where, as in *Swint* and *Rogers*, the Court characterizes specific issues as "factual" and therefore subject to clearly erroneous review. This characterization sends a signal to the lower appellate courts that, in the future, they need not engage in independent judicial review on these issues.

211. This theory does not rest upon a general theory of vindicating federal supremacy. See Note, *supra* note 182, at 330. Even if it did, it would be open to the objections set out in the text.

212. See *id.*

213. For example, the intent standard of the equal protection clause cases quite plainly will permit some unconstitutional legislative actions to survive judicial challenge

To my mind, the real center of this argument is a premise that additional intensive judicial review at the appellate level is needed to prevent an "intolerable" level of incorrectly decided cases—incorrect in the special sense that some court has improperly rejected a constitutional claim. The notion is that the greater the number of courts that look at an issue, the greater the possibility of a "correct" decision. But we have no clear idea of what it means to say that we face the danger of an "intolerable" level of incorrectly denied constitutional claims. *Neither the empirical nor the normative reference points for this argument are obvious.*

Absent a coherent and convincing theory about the dangers posed by incorrectly denied constitutional claims, I believe that the important judicial role in preserving the constitutional order is adequately insured by the universal judicial duty to expound and refine the applicable constitutional law.²¹⁴ When necessary, that duty includes further elaboration of the relevant constitutional norms. For I quite agree with Justice Holmes that frequently recurring fact patterns—for example, whether a reporter must check his sources—warrant specific judicial norm elaboration rather than being left to the trier of fact under a more general standard.²¹⁵ But it remains to be demonstrated that more is necessary; that is, that the system of civil liberties is in material danger unless both the trial and all appellate courts are required to render independent judgment on every application of constitutional norms to the facts.²¹⁶

2. — The general argument that all constitutional rights need the security of independent appellate review can be abandoned in favor of an argument that the first amendment is special. Two different forms of this argument can be distinguished. The first places stress on the importance of the right rather than upon the dangers of systemically distorted factfinding and law application. The familiar "chilling effect" rhetoric asserts that first amendment values are very fragile and especially vulnerable to an "intolerable" level of deterrence; and the danger of impermissible deterrence is real, as is evidenced by the high rate of

because the Court cannot penetrate the legislative motive. See J. Ely, *Democracy and Distrust* 138 (1980).

214. This duty includes an examination of the adequacy of the evidence to support the conclusion of the court below. See *supra* note 39 and accompanying text.

215. "But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever?" O. Holmes, *supra* note 48, at 98; see *United States v. Boyle*, 105 S. Ct. 687, 692 n.8 (1985) ("When faced with a recurring situation . . . the Courts of Appeals should not be reluctant to formulate a clear rule of law to deal with that situation."). Thus, at some point, the Court must elaborate whether under the actual malice rule a reporter must investigate his sources. E.g., *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967).

216. It should be noted, however, that *Ben Avon* and *Crowell* may require that *some* court make an independent judgment on the law application point, at least before it can enforce the determination of an administrative agency. See *supra* notes 117–35 and accompanying text.

appellate reversal in first amendment cases²¹⁷ and by the specter of large damage awards in these suits.²¹⁸ Even accepting the validity of these arguments,²¹⁹ the necessity for a "several bites at the apple" approach again remains undemonstrated. *Freedman v. Maryland*²²⁰ may be taken to establish that administrative action focusing on the content of speech cannot be final, and that the Constitution requires independent judicial judgment on whether the speech is protected.²²¹ Perhaps, too, the first amendment guarantees a right to some appellate review.²²² But it is a long way from accepting this set of propositions to a conclusion that we will end up with an "intolerable" degree of chilling effect unless all appellate courts are *required* to redetermine every instance of first amendment law application.²²³

Bose attempts to recast the special nature of the first amendment in a way that places more emphasis on the dangers of distorted factfinding and law application: first amendment interests are especially vulnerable due to the general character of the first amendment rules themselves.²²⁴ The rules—such as the actual malice standard—are simply too indeterminate to be left for application by a trier of fact, even an article III district judge.²²⁵ Of course, this argument depends entirely upon the premises previously discussed: without independent appellate review on constitutional law application, there will be an intolerable level of mistakes in denial of first amendment defenses.²²⁶ Moreover, the argument indiscriminately lumps together all first amendment rules. Perhaps in defamation cases there is such an intrac-

217. See *supra* note 10.

218. See *Ollman v. Evans*, 750 F.2d 970, 996–97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

219. But see Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 36–38.

220. 380 U.S. 51 (1965); see *supra* text accompanying notes 188–91. I recognize that *Freedman* rests at least as much on the danger of distortions in factfinding and law application as on the importance of first amendment rights.

221. See Monaghan, *supra* note 82, at 522–23.

222. See *supra* text accompanying notes 93–96.

223. The appellate reversal cases, *supra* note 10, do not sustain the burden of demonstrating the necessity of independent appellate review without a breakdown showing a high rate of reversal on "straight" law application grounds. The first amendment seems secure by the standard appellate duty to deal with norm elaboration and the power to exercise independent appellate judgement. To convert the latter power into a duty seems to me to be unjustified.

224. See 104 S. Ct. at 1961–62.

225. But see Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 883–90 (1970) (defamation rules sufficiently precise).

226. Cf. Blasi, *The First Amendment and the Pathological Perspective*, 85 Colum. L. Rev. 449 (1985) (carefully crafted judicial doctrine can protect speech in repressive times). But see Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 Cornell L. Rev. 302 (1984) (arguing that level of free speech in society does not depend materially on the Court's pronouncements on the scope of the first amendment). See generally H. McClosky & A. Brill, *Dimensions of Tolerance* (1983) (suggesting a wide variety of factors that affect the development of civil libertarian ideals).

table problem of confusing falsity with malice that layers of de novo appellate review are warranted.²²⁷ But it is hard to believe that all first amendment rules suffer from indeterminacy defects that create comparable risks of misadministration.²²⁸ What is more, it is not apparent that first amendment rules are less precise than other rules of constitutional privilege.²²⁹ To my eye, therefore, the allegedly indeterminate nature of first amendment rules does not supply an adequate basis for a special constitutional duty of independent appellate review for first amendment claims.²³⁰

3. — A final argument can be framed in terms of *stare decisis*. Rightly or wrongly, the Court has repeatedly insisted that appellate courts have a duty to make an independent judgment in the first amendment context and elsewhere. I would be among the last to discount the importance of adherence to precedent.²³¹ In the first amendment context, the argument from precedent is conclusive, at least for me. But one must not overstate the scope of the precedent. The duty posited by *Bose* does not establish a right to appellate review in first amendment cases.²³² Thus, *Bose* notwithstanding, I would think it entirely constitutional for appellate courts to continue to decline discretionary review over cases involving no more than application of settled first amendment norms to the facts.

Outside the first amendment area the precedent argument seems even more problematic. To be sure, there are cases like *Norris* that em-

227. The so-called "distinction" between precise and indeterminate first amendment rules has long been at the bottom of overbreadth analysis. Several commentators on the overbreadth doctrine drew upon considerations analogous to those relied upon in *Bose*. They argued that courts could limit first amendment statutes to constitutional boundaries only where the applicable limiting rule was sufficiently "precise." One commentator, for example, thought that the Supreme Court's defamation and obscenity rules were sufficient, but that its sedition rule was not. See Note, *supra* note 225, at 883-90, 897-907. This argument is criticized in Monaghan, *supra* note 219, at 18-23.

228. The first amendment rules, it should be noted, are a long way from the general standards, such as reasonableness, that Holmes thought were an insufficient basis upon which to charge a jury. See O. Holmes, *supra* note 48, at 97-98.

229. See Hart & Wechsler, *supra* note 7, at 609 ("Is the New York Times standard as to 'malice' less precise than most rules of constitutional law? Of law generally? Is it incapable of being applied by lower courts and juries with a reasonable degree of reliability?") (footnote omitted).

230. There is, to be sure, a first amendment due process, a special concern for procedural protection adequately sensitive to first amendment interests. See Monaghan, *supra* note 82. But one must be on guard against the danger of "double-counting" the first amendment interest. See *Calder v. Jones*, 104 S. Ct. 1482, 1488 (1984).

231. Monaghan, *supra* note 79, at 387-91; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979).

232. To demonstrate such a right would require a different form of argument. It may be that the Court is now prepared to hold that the first amendment presupposes *some* appellate review. See *supra* notes 93-96 and accompanying text. But, whether the first amendment also presupposes review in the Supreme Court is a different issue.

phasize judicial duty. The coerced confession cases are a salient example. But it is apparent that the precedent is much weaker here.²³³ I see no reason to extend the existing support for an appellate duty to engage in constitutional fact review. As the next section shows, appellate discretion adequately permits courts to protect the constitutional order.

B. Appellate Discretion

Constitutional fact review at the appellate level is a potent doctrine even if viewed in discretionary rather than mandatory terms.²³⁴ When courts should exercise that discretion depends on a careful assessment of relevant policy considerations. Thus, even if, as I have argued, the "importance" of constitutional values does not yield a solid basis for constitutional fact review in the Supreme Court, *other* institutional concerns may do so. Two such concerns stand out: first, the danger of systemic bias of other actors in the judicial system; second, the perceived need for a case-by-case development of the law in a given area.²³⁵

233. See, e.g., *Estelle v. Jurek*, 450 U.S. 1014, 1014 (1981) (Rehnquist, J., dissenting from denial of certiorari) (suggesting in broad terms that application of the independent judgment rule is not required in challenges to voluntary confession).

234. Treating constitutional fact review as a discretionary power in the Supreme Court poses no novel theoretical difficulties, at least where review is denied. For instance, the statutes governing appellate review may be taken to authorize discretionary review. See *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (Court dismisses on discretionary grounds an appeal from state supreme court that satisfies article III and seemingly fits language of 28 U.S.C. § 1257); Hart & Wechsler, *supra* note 7, at 656–62.

Difficulties may arise, however, in the context of Supreme Court review of the state supreme courts, because an essentially discretionary concept of constitutional fact review must be integrated with the adequate and independent state ground doctrine. The issue is whether the doctrine acts to bar review of constitutional law application. It seems plain enough that if the state supreme court has passed on the application point, its disposition is open in the Supreme Court. *Wainwright v. Witt*, 105 S. Ct. 844, 856 n.11 (1985). Moreover, though this is less clear on principle or authority, review would also appear to be available if the state supreme court, invoking its discretionary power of review, has refused to pass on the application point. See *Williams v. Georgia*, 349 U.S. 375, 383 (1955).

If, as a matter of state law, the state supreme court cannot pass on an application point, the issue becomes more difficult. If the premises of *Bose* are disregarded, it is hard for me to see any other source for a federal compulsion that the state supreme court entertain the application challenge, if the law governing its jurisdiction precludes it. Even so, the consequences of the state supreme court's refusal to entertain an application challenge are unclear, and one might imagine the awkward situation of Supreme Court review to two state courts in the same case: the state supreme court on the law declaration issue and the lower state court on the law application issue.

235. A third institutional concern that may provide a basis for independent judgment by the Supreme Court is the necessity of an authoritative decision to settle an issue of enormous practical importance. See, e.g., *United States v. Maine*, 53 U.S.L.W. 4151, 4152 (U.S. Feb. 19, 1985); *Colorado v. New Mexico*, 104 S. Ct. 2433, 2439 (1984). I do not pause here to consider the relevance of this concern for constitutional fact review.

1. — The need to guard against systemic bias brought about or threatened by other actors in the judicial system appears to be an important force behind the Supreme Court's exercise of constitutional fact review. It is no accident that the most salient modern examples of constitutional fact review are found in Supreme Court review of the state courts. *Norris* and its progeny proceed on a premise of institutional distrust: constitutional fact review in the Supreme Court is necessary not because of the danger of occasional mistakes but because of the fear of systematic distortion of factfinding and law application. The coerced confession cases are illustrative.²³⁶ Even if it is assumed that racial discrimination is no longer a serious problem in such cases, the danger remains that the question whether a crucial confession was voluntary will be overshadowed by considerations affecting its reliability.²³⁷

The premise that state courts are to be suspected of distorted factfinding and law application is disquieting. After all, the Constitution presupposes that the state courts will enforce declared federal law fairly. To be sure, the constitutional plan leaves to Congress the power to vary the normal presupposition, but absent clear legislative direction, it is not easy to see how any general distrust of the state courts can be a premise for judicial reasoning about the scope of the Supreme Court's appellate review.²³⁸ Still, reality has intruded here, and for nearly five decades the Court has, in substance, asserted a power to respond to perceived dangers of distorted factfinding and law application in the state courts.²³⁹ It is true that the rules announced governing the scope of review are now stated to be equally applicable to both state

236. See Note, *supra* note 182, at 342-46.

237. See *Jackson v. Denno*, 378 U.S. 369, 382-87 (1964). The death penalty cases might also be thought of in these terms. It has long been a matter of grave concern that blacks are far more frequently found to qualify for the death penalty than are whites under the applicable state statutes. See, e.g., Meltzer, *Capital Punishment: On Death Row, The Wait is Over*, 239 *The Nation* 274, 275 (1984). Constitutional fact review may lessen the chances of racially based miscarriages of justice. The question is not what the appellate court is constitutionally obligated to do, but what it may do. It is arguable, however, that eighth amendment due process requires that at least some state appellate court engage in constitutional fact review.

238. See *Pulliam v. Allen*, 104 S. Ct. 1970, 1980-81 (1984); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."). Statutes enforcing civil rights and conferring enforcement jurisdiction on the district courts do reflect a distrust premise, of course. See Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale L.J.* 71, 72 & nn.8-9, 111-12 (1984). But a civil rights plaintiff suing on such a statute in the state rather than the federal courts, see Gordon & Gross, *Justiciability of Federal Claims in State Court*, 59 *Notre Dame L. Rev.* 1145 (1984), does not seem to me entitled to a presumption that the state courts will engage in distorted factfinding or law application.

239. The burdensome character of the task has impelled the Court toward stating more rigid constitutional rules, H. Wechsler, *The Nationalization of Civil Liberties and*

and federal courts.²⁴⁰ But the real bite of intensive review has been on the decisions of state courts. A discretionary, rather than a mandatory, conception of constitutional fact review seems more responsive to the felt need for such control.²⁴¹ It permits the Court to recognize that not all constitutional adjudication in the state courts presents the same dangers of distortion, but that there may be appropriate occasions for intensive review. For example, there is an obvious potential for distorted findings present in state court application of the unitary business standard in taxation cases. Thus, in *Container Corp. of America v. Franchise Tax Board*²⁴² the Court should have eschewed its deferential approach in favor of discretionary constitutional fact review.²⁴³

2. — To my mind, the perceived need for case-by-case development of constitutional norms is likely to be the single most important trigger for constitutional fact review.²⁴⁴ Where such norms are in a process of development, the Court must examine enough factually similar situations to formulate an acceptable norm.²⁴⁵ The point is not that the line between law declaration and law application is so thin that the practical exigencies of the appellate process, both in screening cases and producing opinions, should be taken to permit constitutional fact review. Rather, the argument is an affirmative one: norm elaboration occurs best when the Court has power to consider fully a series of closely related situations involving a claim of constitutional privilege.

The fourth amendment cases come readily to mind. To the despair of some commentators, these cases show that the contours of what constitutes a reasonable search or seizure are hammered out in a case-by-case manner. Consequently, the Supreme Court has engaged in intensive review of specific applications of the governing constitu-

Civil Rights 18-19 (1968), and using the factfinding capacities of federal habeas corpus courts.

240. See *Bose*, 104 S. Ct. at 1959; Hill, *supra* note 120, at 946 n.18.

241. Treating constitutional fact review as discretionary permits the Supreme Court to distinguish between state and federal courts and to distinguish further between cases tried in federal court with and without a jury.

242. 103 S. Ct. 2933 (1983), discussed *supra* at text accompanying notes 196-200.

243. Given the central concern of the dormant commerce clause with self-prefering state conduct, it is singular that the dangers of misadministration are not mentioned by the Court. See *N.Y. Times*, June 28, 1983, at A1, col. 5 (\$600,000,000 in annual tax revenues at stake). The Court can be thought to have ceded far too much in announcing a deferential approach; it can be argued that, on appropriate occasions, the Court should engage in constitutional fact review to protect constitutional values against distorted factfinding.

244. Whether further norm elaboration is desirable depends on an assessment of complex policy considerations. Professor Greenawalt, for example, has recently undertaken such an assessment in considering the advisability of further elaboration of the norms governing justification and excuse, concluding that further elaboration is unwarranted. See Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984).

245. Upon a careful reading, *Colorado v. New Mexico* might fit into this pattern. See 104 S. Ct. at 2439-42.

tional norms.²⁴⁶ In *New Jersey v. T.L.O.*,²⁴⁷ to take a very recent example, the Court held that the fourth amendment applied to searches by school officials, and that such a search must be supported by "reasonable suspicion" that it would yield evidence of a violation of school rules or the law. The Court recognized that the state supreme court had applied a substantially similar standard to the evidence to bar the specific search. But the Court made its own independent review of the evidence to show that the state court's decision "reflect[ed] a somewhat crabbed notion of reasonableness."²⁴⁸

A careful examination of the Supreme Court's recent habeas corpus cases also shows a marked tendency toward a discretionary concept of constitutional fact review, one that emphasizes the need for such review only where the norms are perceived to be in need of additional elaboration on a case-by-case basis.²⁴⁹ *Wainright v. Witt*²⁵⁰ is the most recent example. There the Court reformulated the standard governing exclusion of jurors opposed to the death penalty, and in the process engaged in an extensive review of the conduct of the trial judge. But the Court made plain that in the future the standard is sufficiently clear to be left to the "factual" determination of the trial judge.²⁵¹ By contrast, in *Strickland v. Washington*,²⁵² decided only two weeks after

246. *Florida v. Rodriguez*, 105 S. Ct. 308 (1984), involving airport searches, is a graphic example. Justice Stevens, in dissent, objected to the ad hoc review exhibited by the case. *Id.* at 311; cf. *James v. Arizona*, 105 S. Ct. 398, 405 (1984) (Brennan, J., dissenting from denial of certiorari) (charging Court with assuming that petition raised only a law application decision).

247. 105 S. Ct. 733 (1985).

248. *Id.* at 745. The "regulatory taking" cases afford another illustration. The Court's efforts to define the point at which a regulation becomes a taking have resulted not in rules, but in standards of rather indeterminate character. The result has been a process of ad hoc decisions that seem in need of continuous clarification. See *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2874 (1984).

249. The currently controlling statute requires that deference be given to state court findings of fact so long as they find substantial support in a fairly constructed record. 28 U.S.C. § 2254(d)(8) (1982). The Court has insisted that the statute does not require deference on "mixed" questions of law and fact, see *Sumner v. Mata*, 455 U.S. 591, 597 (1982), a term that is, of course, readily susceptible of including all issues relating to the application of law to facts. Other decisions have pointed in this direction. See *Maggio v. Fulford*, 103 S. Ct. 2261, 2264-65 (1983) (White, J., concurring); *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981). Nonetheless, a majority of the Court now seems inclined to treat routine questions of law application as entitled to the statutorily mandated deference. For example, in *Patton v. Yount*, 104 S. Ct. 2885 (1984), the Supreme Court held that the question whether an individual juror was sufficiently impartial is "plainly one of historical fact," *id.* at 2891, resting largely on the demeanor of the witness. The Court relied on its earlier decision holding that whether a plea was voluntary was also a question of "fact." *Id.* Indeed, in *Patton* the Court went further and held that whether the trial was surrounded by excessive publicity was to be treated as essentially "factual." *Id.* at 2889-91.

250. 105 S. Ct. 844 (1985).

251. *Id.* at 854-55.

252. 104 S. Ct. 2052 (1984).

Bose, the Court held that a state court conclusion that counsel rendered effective assistance—that is, that counsel's performance was objectively reasonable and did not prejudice the defendant²⁵³—is a mixed question of law and fact, not subject to the presumption of correctness that is accorded to state court findings of fact.²⁵⁴ To be sure, the standards formulated in *Strickland* involve some case-specific, concrete determinations of "historical fact." But at least for the foreseeable future, their application—particularly that of reasonably effective counsel—will require considerable elaboration of the underlying constitutional norms. This elaboration can best occur only when the Court has had experience on a case-by-case basis with the difficulties experienced by the lower courts in applying the Court's general norms.

Finally, viewing constitutional fact review as most appropriate where norms are being formulated and reformulated on a continuous basis may reconcile the Supreme Court's use of the so-called "two court" rule with the independent judgement rule.²⁵⁵ The two court rule is a doctrine of judicial self-restraint fashioned by the Court for its own governance; its operative content is that "ordinarily" the Court will not review factual findings in which two lower federal courts have concurred.²⁵⁶ The main bite of this rule seems to be in the nonconstitutional area,²⁵⁷ but it has had an erratic and uncertain play in the field of constitutional law. For example, it has been invoked by the Court to limit its review of a finding of intentional discrimination in the voting context²⁵⁸ and a finding of no testimonial self-incrimination in the fifth amendment context.²⁵⁹ As has been noted, both contexts present issues of law application where independent judgment could have been undertaken.²⁶⁰ The two court rule seems to surface only when the Court senses that the controlling constitutional norm is sufficiently de-

253. *Id.* at 2065–68.

254. *Id.* at 2070. Significantly, the dissenters in *Bose* were with the majority in *Strickland*; in fact, Justice O'Connor wrote the opinion. There is no inconsistency. The *Bose* Court did not undertake further elaboration of the constitutional norm. Rather, as noted, the Court felt that the actual malice standard's indeterminate character necessitates independent appellate review of its application to the historical facts. Justice White seems to have reached this conclusion at least implicitly. In *Bose* he argued that actual knowledge should be treated as a question of historical fact. 104 S. Ct. at 1967. But he thought that independent judgment would be required on the claim of recklessness, *id.*, presumably because such a claim inevitably presents questions of an evaluative character.

255. Professor Vivian Berger called this problem to my attention.

256. See R. Stern & E. Gressman, *Supreme Court Practice* 290–91 (1978).

257. See, e.g., *Tiffany Fine Arts, Inc. v. United States*, 105 S. Ct. 725, 730 n.5 (1985) (federal income tax); *NCAA v. Board of Regents of Univ. of Okla.*, 104 S. Ct. 2948, 2959 n.15 (1984) (antitrust); *Blau v. Lehman*, 368 U.S. 403, 408–09 (1962) (securities); *Graver Tank & Mfg. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (patent).

258. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

259. *United States v. Doe*, 104 S. Ct. 1237, 1243 (1984).

260. See *supra* notes 202–05 and accompanying text.

terminate and stable in character, and perhaps on those occasions where the Court is unwilling or unable to amplify further the controlling norm.²⁶¹

CONCLUSION

Bose raises an important question: the extent to which appellate courts are required to engage in constitutional fact review. When the initial decisionmaker is an administrative agency, such review may be compelled because administrative action suffers from a so-called legitimacy deficit. But that premise is inapposite to evaluate a similar demand for independent appellate review of lower federal and state court findings. The judicial duty of appellate courts is, I submit, limited to saying what the law is. Thus, where law application necessitates an appreciable measure of further constitutional norm elaboration, the appellate court's function is more accurately seen as law declaration, not law application. Beyond that, it may be assumed that at least the federal appellate courts have authority to exercise independent judgment with respect to adjudicative facts decisive of constitutional law application. But it goes too far to convert this competence into a duty. And I do not see *Bose* as presenting a persuasive case for treating the first amendment differently.

261. Cf. *Bose*, 104 S. Ct. at 1959 n.16 (a finding of fact, "even if made by two courts" below, may be reconsidered in the Supreme Court where it "clearly implies the application of standards of law" or where the decision being reviewed "cannot escape broadly social judgments") (quoting *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944)).