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Critical Error: Courts' Refusal To Recognize Intentional Race Discrimination Findings as Constitutional Facts

*Bryan Adamson**

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INTRODUCTION

Rules of civil procedure have been examined extensively for their intended and unintended effects on case outcomes.[1] Little attention, however, has been given to Federal Rule of Civil Procedure 52(a) (Rule 52(a))—its clear error standard of review—and how appellate courts apply or avoid it when examining substantive legal doctrine. Specifically, when confronted with cases involving actual malice and intentional race discrimination determinations, courts take markedly different approaches. While demanding a full reevaluation of facts in the actual malice context, appellate courts invariably apply the far more deferential clear error standard to a trial court's factual findings regarding intentional race discrimination. This inconsistent approach between intentional race discrimination and actual malice findings is neither doctrinally sound nor institutionally defensible.

Rule 52(a) allows an appellate court to set aside trial court factual determinations only if it finds that a trial judge's findings are "clearly erroneous."[2] The clear error standard is applicable to all cases tried without a jury. Noted constitutional law and federal procedure scholar Charles Alan Wright has asserted that Rule 52(a) is perhaps the most frequently referenced federal rule of civil procedure.[3] It is "ISSUE I" of any appellate brief worth its salt. It is the respondent's opening salvo to the appellate bench, and it is the bane of a petitioner's colloquy. The rule ties the hands of the appellate court, which is bound not to reweigh, and certainly not relitigate, the trial court's findings of fact.

To some, the clear error standard of review is a rote, obligatory pronouncement made at an opinion's opening. Others minimize it as irrelevant to the case merits.[4] As with other procedural or jurisdictional issues, Rule 52(a)

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* Associate Professor of Law, Seattle University School of Law. B.S., Ph.B., Miami University (1985); M.A., Purdue (1987); J.D. Case Western (1990). The author thanks Professors Richard Delgado and Devon Carbado for their remarkable insights and is grateful to Professors Maggie Chon, Robert Chang, Tayyab Mahmud, and Gilbert Carrasco for vetting earlier drafts. Many thanks to the editors for their extraordinarily helpful comments and to research assistants Tyler Hubley and Neal Kingsley, who provided excellent support. Finally, a special thanks to Ben Page.

1. *See infra* notes 17-22.

2. FED. R. CIV. P. 52(a)(6).

3. 9C CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2571, at 225-27 (3d ed. 2008) ("Rule 52(a) is the most frequently cited of all the rules and usually is cited to justify a refusal to interfere with the findings of the trial court.").

4. Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 279-80 (2001).

can be "fiendishly recondite and doctrinaire."[5] Yet, Rule 52(a) is anything but irrelevant or without far-reaching consequence. Appellate courts may interpret this seemingly straightforward procedural rule in a manner that has critical implications for constitutional rights and obligations.[6]

Rule 52(a) interpretation has significant impact on substantive rights and obligations in two ways. First, much of this impact is in the form of the rarely considered sub rosa exception: If an appellate court decides that a trial court's finding is a "constitutional fact," clear error review does not apply.[7] Constitutional facts are those which incorporate or directly compel the application of constitutional principles.[8] With constitutional facts, at minimum, de novo review follows. Second, the Supreme Court has insisted that Rule 52(a) must be applied when reviewing intentional race discrimination, but not actual malice factual findings.[9] Thus, appellate courts are free to engage in broad reexamination of trial court determinations where First Amendment rights are implicated but not where equal protection rights and obligations are at issue.[10]

This is doctrinally illogical. Both intentional race discrimination and actual malice entail mens rea determinations of past or present conduct. Both directly trigger constitutional rights or proscriptions; thus, factual findings articulating the presence or absence of either intentional race discrimination or actual malice should be considered constitutional facts. Yet, only actual malice determinations have been deemed constitutional facts for purposes of more searching appellate review. As constitutional facts, intentional race discrimination determinations should be reassessed under, at minimum, a de novo standard of review.

It has been nearly twenty-five years since the Supreme Court established the rule that in the First Amendment actual malice setting, appellate courts must make "independent judgment[s]" on the factual findings.[11] The Court has

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5. FRANK M. COFFIN, THE WAYS OF A JUDGE 101 (1980).

6. To be sure, standards of review "often impact the appeal more than the facts and the substantive law issues upon which advocates spend so much time and effort." Casey et al., *supra* note 4, at 280. The appellate rules require advocates to articulate the standard of review in briefing. "The appellant's brief must contain, under appropriate headings and in the order indicated: . . . the argument, which must contain . . . for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)." FED. R. APP. P. 28.

7. *See* discussion *infra* Section II.C.

8. *See* Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1434-35 (2001); *see also* discussion *infra* Section I.A.

9. *See* discussion *infra* Section I.A.

10. *See* discussion *infra* Part IV.

11. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984); *see* discussion *infra* Section IV.A.

yet to clarify this important procedural exception to Rule 52(a). Moreover, the Court has failed to explain why it refuses to apply independent judgment to *all* constitutional facts.[12]

When analyzed against the backdrop of the Court's actual malice jurisprudence, an unyielding application of Rule 52(a)'s clear error mandate to intentional race discrimination factual findings is not just doctrinally unsound, it is jurisprudentially untenable. By refusing to apply Rule 52(a)'s constitutional fact exception to findings of intentional discrimination, the Supreme Court effectively has foreclosed the opportunity for race discrimination jurisprudence to develop fuller, more robust legal norms. This inconsistent application of the constitutional fact exception to Rule 52(a) exemplifies the way in which judges selectively exercise passive versus active virtues when deciding constitutional cases that have far-reaching legal, social, or political consequences.

Proponents of judicial minimalism and popular constitutionalism[13] urge passive virtues in judicial decision making. These proponents urge against judicial review and for a "far more modest role for the courts."[14] Particularly weighty issues such as race and rights, it is felt, should be kept within the realm of deliberative politics, where law and policy regarding the scope of those rights are made by duly elected legislators. Perhaps unsurprisingly, judicial decisions re-

12. Other scholars have noted this fact, but none has given it extensive consideration. *See* Ronald J. Allen & Michael S. Pardo, *The Myth Of The Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1786 (2003) ("[T]he Court has applied the [constitutional fact] doctrine in an ad hoc, standardless manner."); Nicki Herbert, *Appellate Review of a "Strong Basis in Evidence" in Public Contracting Cases*, 77 U. COLO. L. REV. 193, 213 (2006) ("[*Bose*] does set forth principles that arguably could be applied more broadly to cases in which the ultimate decision regards a constitutional right."); Scott Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 272 (1987) (asking the question the *Bose* majority did not answer: "Are appellate courts required to conduct an independent examination of the record in all cases involving constitutional issues, or only when the Supreme Court has recently formulated a broad constitutional standard, or only in first amendment cases?"). *But see* ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 556 (1999) ("The implications of the Supreme Court's practice of independent determination are of great potential significance in the legal system generally and not alone in the precise contexts in which this practice has developed.").

13. Though a definition of "popular constitutionalism" is elusive, Erwin Chemerinsky has distilled the common premises from various perspectives on the phrase. Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673. Common themes that undergird this school of thought are that judicial review makes little difference, is unnecessary, and is undesirable. *Id.* at 676.

14. *Id.* at 675.

garding race and rights are offered as Exhibit A in support of their arguments against "judicial activism."[15]

Opponents of judicial minimalism, such as scholars Gerald Gunther, John Hart Ely, or Erwin Chemerinsky, might ask: When *is* it appropriate to engage in legal (or for our purposes, rule) interpretation to exhibit active virtues on behalf of substantive justice?[16] And once the Supreme Court decides to apply actively a procedural tool such as Rule 52(a)'s constitutional fact exception, as it has done in the First Amendment setting, should not that application be consistent? This Article contends that appellate courts should exhibit those active virtues to ensure substantive justice in intentional race discrimination cases.

The Supreme Court's approach to Rule 52(a) and its inconsistent application of the constitutional fact doctrine merit scrutiny. Many scholars have addressed procedural doctrines of abstention,[17] standing,[18] ripeness,[19] mootness,[20]

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15. *See, e.g.*, Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 43 (1961) (arguing that the Court failed to take advantage of the wide area of choice open in deciding whether, when, and how much to adjudicate).

16. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152 (1980) (stating that judicial review exists in part to eradicate "stoppages in the democratic process," for example, "by invalidating legislation which restricts . . . rights"); Chemerinsky, *supra* note 13, at 683 (critiquing popular constitutionalism's underlying assumption that the citizenry can be trusted to protect minorities' rights); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 7-8 (1964) (arguing that passive virtues conceal the basis of judicial decisions and bow to the countermajoritarian difficulty).

17. *See, e.g.*, C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819 (analyzing the ALI's proposals and their promise of judicial economy and consistent outcomes); Barry Freidman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989) (discussing the results of federal courts declining to exercise jurisdiction in favor of state court jurisdiction); Lisa Vanderhoof, *Indian Law*, 73 DENV. U. L. REV. 815 (1996) (discussing the federal jurisdictional inconsistencies that result in confusion and contradiction with respect to Indian affairs).

18. *See, e.g.*, Roy Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85 (1994) (analyzing the effects of race in federal pleading); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999) (arguing against judicial review of agency rulemaking); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985) (discussing standing in cases in which minorities have challenged exclusionary zoning practices, patterns of police brutality, and judicial or administrative bias); Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548 (1993) (asserting that the D.C. Circuit has made decisions unduly influenced by the ideological beliefs of its members); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995) (concluding that the Court is stingier on standing for racial minorities); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L.

subject matter jurisdiction,[21] and political question.[22] The practical operation of Rule 52(a) has also been addressed—but only from a practitioner's standpoint.[23] There are four primary reasons urging further analysis.

REV. 612 (2004) (arguing that federal standing outcomes are not inevitably political, and at times politics appear to play no role whatsoever); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433-34 (1988) (discussing the use of standing as a means to decline exercising proper jurisdiction).

19. *See, e.g.*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000) (discussing the inherent difficulty and confusion in applying the ripeness doctrine to regulatory takings of land); David Floren, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 OR. L. REV. 1107 (2001) (outlining the basics of the ripeness doctrine and issues with its application); Robert Pushaw, Jr., *Justiciability and the Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (analyzing ripeness and political questions).

20. *See, e.g.*, Richard Delgado, *Rodrigo's Book of Manners: How To Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997)) (discussing the appropriate way to have a scholarly discussion about race and multiculturalism); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992) (arguing for the deconstitutionalization of the mootness doctrine).

21. *See, e.g.*, Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1303 (2006) (arguing that the Federal Rules of Civil Procedure "have a dramatic impact on fundamental socio-political and economic concerns . . . and concerns of fairness and equality").

22. *See, e.g.*, K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277 (2001) (discussing political questions); Gunther, *supra* note 16, at 10 (criticizing the use of ripeness and political question doctrines to decline exercising jurisdiction); Pushaw, *supra* note 19 (arguing for a reformulation of the political question, ripeness, and mootness doctrines in light of traditional federalism principles).

23. *See, e.g.*, John Blume & Steven Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163 (1993) (arguing that *Brecht* is only modestly less onerous than *Chapman* and that any harmless error rule vests considerable discretion in the sound judgment of the reviewing court); Michael Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367 (1997) (demonstrating that searching for the difference between "law" and "fact" when applying a standard of review is futile); Casey et al., *supra* note 4, at 279; Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988) (observing how "Rule 52(a) serves a vital institutional role in allocating the responsibility and the power of decision between district courts and the courts of appeals"); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045 (1993) (discuss-

First, Rule 52(a) has not been examined from either an institutional or jurisprudential perspective.[24] Second, few commentators have analyzed intentional race discrimination or its permutations, such as implicit bias or aversive racism, from an explicitly clear error or constitutional fact perspective. Third, much is made of judges engaging in judicial activism when the substance of their opinions or their seemingly outcome-determinative reasoning evinces ideological, social, or political biases. Given Rule 52(a)'s frequent applicability, analysis is warranted to determine how it might be used to pursue such biases. Fourth, Professor Jerry Kang has demonstrated how the Supreme Court aggressively

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ing the updated standards of review in Texas civil appellate litigation); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11 (1994) (discussing the history and future of the standard of review); Richard H.W. Maloy, *"Standards of Review"—Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603 (2000) (exploring the standards of review in civil appellate proceedings and why they exist); Paul R. Michel, *Effective Appellate Advocacy*, 24 LITIGATION 19 (1998) (identifying the elements of a good appellate brief or oral argument); Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731 (2002) (analyzing the "unreasonably erroneous" standard for courts); Nevin Van de Streek, *Why Not "Findings of Law" and "Conclusions of Fact" and Opinions About Both?*, 70 N.D. L. REV. 109 (1994) (arguing that the judiciary is misguided in attempting to observe a rigid and artificial distinction between "findings of fact" and "conclusions of law"); G.K.T., Jr., Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506 (1963) (examining appellate review under Rule 52(a) of a district judge's findings of fact based upon documentary or undisputed evidence).

24. *But see* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025 (2007) [hereinafter Adamson, *Ideological Weapon*]. That article examines Rule 52(a) and the Supreme Court's application of the clear error standard of review using three cases as examples. While the article identifies the Court's inconsistent application of the constitutional fact doctrine, it also offers a more explicit and extensive analysis of actual malice and intentional race discrimination doctrines under Rule 52(a). *See also* Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 629 (2004) [hereinafter Adamson, *All Facts*] (analyzing the Sixth Circuit's *Grutter v. Bollinger* opinion to determine whether invoking the constitutional fact doctrine was appropriate or necessary); Charles Richard Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of* Pullman-Standard v. Swint, 58 TUL. L. REV. 403 (1983) (arguing that whether a trial court finding is one of "fact" for purposes of Rule 52(a) should be determined in light of policy considerations as well as a literal definition of the term "fact"); John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409 (1981) (discussing how appellate courts are increasingly widening their scope of review beyond the strictures of the "clearly erroneous" standard); Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957) (discussing how appellate courts use standards of review to transfer judicial power away from trial courts).

"deployed procedure-like tools to achieve substantive results"—namely, abetting the government's internment of Japanese-Americans and avoiding "the countermajoritarian difficulty."[25] A close examination of Rule 52(a) is needed in order to determine whether appellate courts' passive approach to intentional race discrimination claims, an approach signified by hewing to the clear error standard of review, is another example of courts' avoiding the countermajoritarian difficulty.[26]

Appellate court avoidance of that difficulty where intentional race discrimination determinations are under review ultimately marginalizes equal protection claims.[27] This unprincipled approach to constitutional adjudication exemplifies yet another subtle vice of passive virtues.[28] This Article challenges the Court's own words: If a reviewing court must "exercise its own independent judgment" on constitutionally significant facts in actual malice cases,[29] then ap-

25. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 958 (2004). Kang deconstructs the Japanese internment cases to demonstrate the Supreme Court's use of procedural tools to achieve and affirm racism. Professor Catherine Struve argued that the Supreme Court has ignored the Rules Enabling Act's "substantive rights" provision by failing to invalidate rules of procedure which clearly impinge upon such rights, and she also asserts that its interpretation of rules in order to avoid the operation of their text and advisory notes is unjustified under the Act. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141-69 (2002). Additionally, Professors Gulati and McCauliff examined appellate use of Judgment Orders, and illustrated that, as a matter of practice, even stated procedural rules are not observed and that judges use informal norms to avoid opinion writing on the "hard" cases. Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157, 162, 164 (1998); *see also* Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL EDUC. 61 (2002)(providing empirical support for the argument that federal appellate judges, for example, routinely choose the process instrument over statutory interpretation to reverse administrative agencies and insulate their favored decisions from further review by higher courts).

26. This analysis and critique view intentional race discrimination through a Rule 52(a) analysis. This Article's approach, however, would apply equally to intentional discrimination toward any member of a suspect class. Furthermore, while this Article examines intentional race discrimination from a constitutional vantage point, appellate courts should make independent judgments upon statutorily proscribed discrimination as well.

27. It is important to emphasize that this Article does not attempt to discuss, nor apply, the constitutional avoidance doctrine to rules of procedure. It is not the case that appellate courts do not address the constitutional question because it is unnecessary to reach, but, instead, they avoid it when they should be reaching it.

28. Gunther, *supra* note 16.

29. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984).

pellate courts have an equally critical constitutional responsibility toward intentional race discrimination matters arising under the Equal Protection Clause.[30]

This Article proceeds in five parts. Part I describes the appellate courts' creation of fact "types" which act as exceptions to Rule 52(a)'s application and how that same typology creates the avenue by which the clear error standard affects substantive rights. Rule 52(a)'s clear error standard is explicated in Part II to demonstrate clearly how it operates in comparison to de novo review and review for the purpose of making an independent appellate judgment. Insofar as standards of review serve important jurisprudential interests, Part III attempts to illuminate institutional values advanced by Rule 52(a)'s clear error standard of review and the constitutional fact doctrine. Part IV explicates the way in which the Supreme Court has privileged the actual malice doctrine yet has firmly relegated intentional race discrimination doctrine to Rule 52(a)'s standard. The Article concludes by asserting how Rule 52(a), both on its own terms and in its inconsistent application, works a substantial injustice for intentional race discrimination claims.

I. THE (RULE 52(A)) STANDARD CONTINGENCIES

Rule 52(a) defines the standard of review[31] for factual findings in cases tried by the bench. Rule 52(a)(6) directs that: "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[32] Although adopted in 1938, the roots of Rule 52(a) lie in the Constitution. Article III originally conferred federal jurisdiction over

30. This Article considers intentional discrimination in the subjectivist sense, i.e., according to motive, purpose, and mens rea. The subjectivist approach incorporates the "animus" or "illicit motive" types of discrimination, which call for direct or circumstantial evidence regarding an actor's state of mind. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288 (1997). This Article also includes intentional discrimination contingent upon proof through negligence or impact. *Cf.* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). This Article, however, does not address intentional discrimination as an element of *causation*. Under a causal claim, the inquiry is not into the subjective state of mind but rather objective evidence exists supporting an inference that "an impermissible factor such as race served as the impetus for the challenged action." Selmi, *supra*, at 294 (footnote omitted).

31. At this juncture, it is helpful to clarify what standard of review means. A standard of review is an articulated limit up to which an appellate court will review findings of fact, conclusions of law, or rulings. Standard of review also is used in a narrower sense when referring to the level of scrutiny accorded matters that implicate constitutional rights or obligations impacting a suspect class (e.g., rational basis, intermediate, and strict). The *scope* of review, by distinction, refers to the range of issues an appellate court will examine to determine the soundness of the trial court's ruling.

32. FED. R. CIV. P. 52(a)(6).

questions of both law and fact.[33] When Article III was being drafted, debate arose over the power of federal courts to determine the proper form and scope of appellate review.[34] At that time, appellate courts could review actions at law only for legal error; actions in equity, in which evidence was taken in the form of documents and depositions, were reheard de novo.[35] Rule 52(a), in its initial form, was drafted subsequent to the Rules Enabling Act, through which Congress empowered the Supreme Court to promulgate the Federal Rules of Civil Procedure.[36] Rule 52(a) effectively extended equity practice in nonjury cases to actions at law with one exception: Factual findings were to be treated as conclusive.[37] Rule 52(a) thus originated through an attempt to establish the respective roles of trial and appellate courts and to allocate power and authority between those two tribunals with regard to factual determinations and law declaration.

As a general proposition, standards of review confine appellate inquiry and judgments within a discrete decisional framework. For example, by directing that facts found by a trial court be reviewed only for clear error, Rule 52(a) binds the appellate judge to respond to the facts in a particular way and not to engage in a more active inquiry.[38] Given the inability to draw clear distinctions between law and fact, however, Rule 52(a) has proved to be an inherently imperfect mechanism with which to allocate power and authority between the two tribunals.

A. The Law-Fact "Dichotomy"

Whether Rule 52(a)'s clear error standard or some other standard of review should apply depends heavily upon the law-fact "distinction." "Law" can be de-

33. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

34. Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 192-94 (1937).

35. *See* Adamson, *Ideological Weapon*, *supra* note 24, at 1038-39.

36. Adopted in 1934, the Act gave the Supreme Court the power to create greater institutional uniformity by promulgating the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2072 (2006). The Act has its roots in English equity practice, which developed a substantive doctrine to extend the common law practice, as evidenced by the emergent rules' liberal pleading requirements and class action provisions. Matheson, *supra* note 12, at 223; *see also* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 325 (discussing the debate surrounding the retention of the Act's super-session provision at § 2072(b)).

37. Cooper, *supra* note 23, at 647-48.

38. Whether formal or informal, rules not only guide behavior but also can act as monitors. Gulati & McCauliff, *supra* note 25, at 168.

fined as articulations of rules, policies, norms, or edicts that serve to guide social conduct that are applied in any given case or controversy.[39] A "fact," in its broadest sense, can be regarded as a descriptive claim "about some feature of the physical, mental, or moral world."[40]

In the adjudicative setting, there are two types of findings of fact: historical facts and evaluative facts.[41] Historical facts are "assertions about acts, events, or sets of conditions of the past or present."[42] Historical facts can describe "what exists, in contrast with what should, rightfully, exist,"[43] regardless of their acceptance within the adjudication context.[44] Determinations of actual malice and intentional discrimination rely upon accounts of past or present acts, events, or conditions. Importantly, both are located through assessments of individual motive and conduct—manifested subjectively or objectively, or through direct or circumstantial evidence. Consequently, actual malice and intentional discrimination findings are paradigmatic historical facts.

Evaluative facts are inferences or conclusions articulated out of historical facts. To use an illustrative, if slightly oversimplified, hypothetical: "Mr. Jones, an African-American, was employed by the State of Ohio Division of Financial Institutions for twenty years. Recently, there was an announcement that layoffs would occur. Layoffs were conducted pursuant to the state's layoff procedures manual, which sets forth three grounds for conducting layoffs: 1) lack of funds; 2) decrease in division workload; or 3) abolishment of a position through reorganization. Mr. Jones was the only African-American in that division. His su-

39. *See* BLACK'S LAW DICTIONARY 900 (8th ed. 2004).

40. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992).

41. In addition, the law recognizes predictions of future acts and evaluative predictions. KEETON, *supra* note 12, § 2.8, at 47.

42. *Id.* at 46. Within the legal setting, "historical facts" are sometimes referred to as "adjudicative" facts. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113 (1988).

43. Woolhandler, *supra* note 42, at 114 (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE OF THE COMMON LAW 191 (1898)).

44. The existence of a historical fact is not contingent upon its acceptance in the adjudicative setting. Even if we might reach consensus on the existence of a given fact, its use in cases or controversies turns upon relevance, significance, acceptance, and, ultimately, admissibility. Lawson, *supra* note 40, at 867-68 ("Our legal system structures the justificatory inquiry for factual claims of this kind to address three different, though potentially overlapping, epistemological problems, which I call the problem of *admissibility*, the problem of *significance*, and the problem of *weight* or *magnitude*.") A broader view of what constitutes a historical fact should be considered, especially in light of how "facts" regarding race discrimination often are deemed inadmissible by some fact-finders (e.g., that a party engaged in unconscious bias). This broader view is central to any argument in favor of an expanded acceptance of what it means to engage in intentional discrimination. *See* discussion *infra* Section IV.B.

pervisor, Mr. Smith, who is white, terminated Mr. Jones pursuant to the layoff process." These are descriptions of historical facts—observable, objectively stated, verifiable events. Additional facts are that the Division of Financial Institutions did not receive decreased funding, that the workload was consistent, and that no specific positions were to be abolished. Moreover, with an understanding that Mr. Jones was never absent, received high evaluations, and never had a dispute with any superior or coworker, one might infer that Mr. Jones was a "model employee." In light of that inference, another possible conclusion could be that Mr. Smith terminated Mr. Jones "because of his race."

In the adjudicative setting, those evaluative facts are then applied to determine whether they satisfy the requirements of the applicable legal standards of the relevant rule.[45] It is within the process of constructing historical facts into evaluative statements where any fact-law distinction can become clouded. To make an evaluative statement that "Mr. Smith discriminated against Mr. Jones when he fired him because of his race" is to apply the factual inferences to a legal proscription (nondiscrimination).

This example illustrates that any distinction between law and fact is more theoretical than real.[46] There are four principal reasons. First is the epistemological quandary that emerges whenever one attempts to define a "fact": Must it be true, or objectively verifiable?[47] To revisit the hypothetical, one can debate philosophically what it means to be an "African-American" or "white."[48] Second, articulating a finding of fact, as trial judges are bound to do, is not as easy as it might seem because of the inexactness of words themselves. To refer to Mr. Jones as an "employee" is not to make a "pure" statement of historical fact because the term itself rests upon several factual premises and is imbued with legal

45. KEETON, *supra* note 12, § 2.8, at 46.

46. *See* Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 CORNELL L. REV. 1131, 1154 (2001) (noting the "'elusive' character of a technique for distinguishing fact from law") (citing Miller v. Fenton, 474 U.S. 104, 113 (1985)); *see also* Williams v. Taylor, 529 U.S. 362, 408 (2000) (O'Connor, J., concurring) ("[I]t is sometimes difficult to distinguish a mixed question of law and fact from a question of fact . . . ."); Thompson v. Keohane, 516 U.S. 99, 110-11 (1995) ("[T]he proper characterization of a question as one of fact or law is sometimes slippery."); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990); *Miller*, 474 U.S. at 113 (1985) ("[D]istinguishing questions of fact from questions of law has been, to say the least, elusive."). *But see* Allen & Pardo, *supra* note 12, at 1770 ("[T]he only distinction [between law and fact] is a functional one: [determining] . . . which body does or should decide on issues and under what standard . . . ."); Lawson, *supra* note 40, at 863 ("[T]he law-fact distinction, whatever its utility, is purely a creature of convention.").

47. *See* Walter Wheeler Cook, *"Facts" and "Statements of Fact,"* 4 U. CHI. L. REV. 233, 237 (1936); Lawson, *supra* note 40, at 866 ("[A fact] is a reality that exists independently of its acknowledgment by the consciousness of a perceiver.").

48. This is to say nothing of whether these socially constructed categories are themselves "truth."

character. Thus, it is an evaluative term itself. Third, "fact" and "law" do not occupy two separate ontological spheres, nor are they truly analytically distinct.[49] For example, to say that "the Equal Protection Clause prohibits discrimination" is to describe a law that exists as a matter of fact.[50]

Fourth, and most important, some factual findings, such as the existence or absence of "discrimination" or "actual malice," directly trigger the application of legal norms. When such findings are articulated in a manner that incorporates the legal standard against which it is evaluated, factual findings come to resemble "mixed statements of fact and law"—"constitutional," "ultimate," "legislative," or "sociological" facts.[51] At this juncture, a brief description of mixed statements of fact and law and of constitutional, ultimate, legislative, and sociological facts is warranted.

A mixed statement of fact and law is one in which "pure" evaluative facts are intertwined with indicia of legal principles.[52] Constitutional, ultimate, legislative, and sociological facts are specific types of mixed statements of fact and law. Constitutional facts are those with magnitudes that embody explicit and implicit principles of the Constitution. Facts peculiar to a dispute are examined under the relevant constitutional rule to determine whether a right exists or an obligation has been met.[53] As with any fact type, however, constitutional facts are not always apparent. Often, it is the *inference* from subsidiary facts established, i.e., the evaluative fact, that becomes the constitutional fact. The statements "Mr. Smith intentionally discriminated against Mr. Jones when he fired him because of his race" or "journalist Jane Doe published her article with malicious intent" are not just articulations of constitutional facts; they are ultimate facts. An ultimate fact is one that, when applied to a legal standard, directly triggers legal consequence. Such a fact "must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to

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49. *See* Allen & Pardo, *supra* note 12, at 1776.

50. *Cf.* Lawson, *supra* note 40, at 863. ("From an epistemological perspective, every positive propositional claim about the law in the form 'the law is X' is a factual claim of one sort or another.").

51. To be sure, "mixed" statements of fact and law highlight the "distinction's importance and its unruly nature." Allen & Pardo, *supra* note 12, at 1779.

52. Mixed statements of fact and law can be described as "questions in which historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or, to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

53. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 553 (1991) ("Courts examine constitutional-review facts under the pertinent constitutional rule in order to determine the constitutionality of the state's action. Finally, constitutional cases oftentimes involve adjudicative facts—facts peculiar to the dispute and which must be examined under the pertinent constitutional rule.").

justify the application of the legal principles which must determine the case."[54] An ultimate fact may also compel a determination that a constitutional edict or a statutory, regulatory, or common law rule was or was not violated. It also may compel a legislative or sociological judgment.[55]

Legislative facts are relevant to formulating a legal principle or ruling.[56] Legislative facts can inform a court's legislative judgment or a law or policy, and they can be distinguished further as sociological, political, economic, scientific, or historical (as a body of knowledge).[57] As distinguished from historical facts, legislative facts are predictions in the sense that they are less knowable.[58] To draw an even finer point, legislative facts are "typically predictions about the relative importance of one factor in causing a complex phenomenon."[59]

Legislative facts can be specific to a case or can establish legal norms that extend beyond the case at hand.[60] Legislative facts may serve an adjudicatory

54. Burr v. Des Moines R.R. & Navigation Co., 68 U.S. 99, 102 (1863); *see also* Pullman-Standard, 456 U.S. at 286 n.16 (defining an ultimate fact as the "legally determinative consideration").

55. *See* Adamson, *Ideological Weapon*, *supra* note 24, at 1056.

56. *See* Faigman, *supra* note 53, at 552; Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 10 (1988). *See generally* Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); A.J. Stephani, *Therapeutic Jurisprudence in the Appellate Arena: Judicial Notice and the Potential of the Legislative Fact Remand*, 24 SEATTLE U. L. REV. 509 (2000). Legislative facts also refer to the decision-making process of the courts. *Id.* at 518-19. Legislative facts might also refer to the lawmaking process of a legislative body. Laws of other jurisdictions, special rules, ordinances, and judicial opinions also are termed legislative facts even though they are treated as adjudicative facts for judicial notice purposes. *See* FED. R. EVID. 201(a).

57. *See, e.g.*, Mueller v. Oregon, 208 U.S. 412 (1908) (illustrating the concept of a sociological fact by holding, based on sociological studies, that because of "inherent" differences between the sexes, factories could limit women's work hours); Standard-Vacuum Oil Co. v. United States, 339 U.S. 157, 159 (1950) (typifying a historical fact through a statement about Japanese control of the Philippine Islands from May 1942 until October 1944); Planned Parenthood Minn. v. Rounds, 467 F.3d 716 (8th Cir. 2006) (describing a scientific fact by holding that no scientific consensus exists on when a fetus becomes a human being); Gafoor v. INS, 231 F.3d 645, 656 (9th Cir. 2000) (exemplifying the concept of a political fact through the 2000 uprising in Fiji); *In re* Asbestos Litigation, 829 F.2d 1233 (3d Cir. 1987) (demonstrating an economic fact by holding that denying state-of-the-art defense to asbestos manufacturers does not constitute a violation of the Equal Protection Clause).

58. KEETON, *supra* note 12, § 19.6.4, at 540-41.

59. Woolhandler, *supra* note 42, at 114.

60. Legislative facts are introduced into controversies, either by litigants or by judicial notice. In addition, trial or appellate judges themselves may inject legislative facts into the cases on their own. Federal Rules of Evidence 702 and 201 are particularly

function within a particular legal controversy, what I term an "adjudicative-legislative fact." An adjudicative-legislative fact is one that decides an issue in a way that would have "no substantive implications beyond the specific case in which it is introduced."[61] For example, in his case against the State of Ohio, Mr. Jones may introduce a survey conducted by a third party evidencing the conclusion that Mr. Smith fostered a work environment hostile to minorities. Legislative facts may also make law or encourage a trial judge to establish a particular rule, which I call a "law-legislative fact." A law-legislative fact might not solely influence case-specific outcomes but still carry the power of normative, precedential recognition as law.[62] Whether a case-specific or a general normative assertion, no legal norm is presumed to exist.[63]

It is useful here to illustrate how a law-legislative fact might be established. In the Smith and Jones example, a trial judge might conclude that "while Mr. Smith's racial bias was not explicit, he harbored a type of implicit bias that ultimately led to Mr. Jones's unlawful firing." Underneath that conclusion is the premise that the judge has adopted evidence designed to create rules but narrowed its application to the case-specific context. Were the judge to recast that conclusion to say that "all human beings engage in both conscious and unconscious bias," she would elevate the legislative fact to a normative proposition with potentially far-reaching implications. Because legislative facts do not pre-

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relevant to legislative facts. Federal Rule of Evidence 702 allows for expert testimony. It states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ." FED. R. EVID. 702. Findings that emerge through Rule 702 testimony can illuminate issues in a matter or establish a legal norm to guide future controversies. *See also* FED. R. EVID. 704(a) (Testimony "in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"). Federal Rule of Evidence 201 allows for judicial notice of a legislative fact so long as it is not "subject to reasonable dispute." FED. R. EVID. 201.

61. Stephani, *supra* note 56, at 520-21 (quoting John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485 (1986)). *But see* United States v. Bello, 194 F.3d 18, 22 (1st Cir. 1999) (noting that "[w]hether a fact is adjudicative or legislative depends not on the nature of the fact . . . but rather *the use made of it* (*i.e.*, whether it is a fact germane to what happened in the case or a fact useful in formulating common law policy or interpreting a statute) . . . .") (emphasis added).

62. Legislative facts introduced to prove case-specific propositions will take on normative characteristics if used to support a new legal norm. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Henry Wolf Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

63. Woolhandler, *supra* note 42, at 114 (stating that legislative facts "do not presume a pre-existing legal norm because by definition such facts are used to create law").

sume any existing legal norm, standard of review decisions are contingent upon their presence.

The phenomenon of implicit bias can be understood as a more specific type of legislative fact, a sociological fact. A sociological fact is a "proposition[] that [is] general in nature and describe[s] the status or condition of a subject."[64] Sociological facts are most often located through articulations of experts or other learned observations. The theory that people engage in implicit bias or stereotyping is to accept the premise that has been demonstrated in psychological literature and cited, with limited impact, in appellate decisions.[65] In reference to the hypothetical once again, to frame discrimination against Mr. Jones in terms of sociological facts potentially could have precedential impact. Other examples of sociological facts include the conclusions that segregation has a pernicious impact on African-American children's self-esteem and performance,[66] that "juries are less likely to impose the death penalty when life without parole is available as a sentence,"[67] that "[s]exual behavior is not necessarily a good predictor of one's sexual orientation,"[68] and that juveniles are less susceptible to deterrence measures because they are less likely to engage in a reasoned cost-benefit analysis assigning any weight to serious reprisals.[69] Like law-legislative facts, sociological facts compel application of a heightened standard of review.

In sum, when a trial court articulates findings of constitutional, ultimate, legislative, or sociological facts—mixed statements of law and fact—it does more than make ordinary, objective factual determinations. If one imagines a "law" (as articulations of rules and norms) at one end of a continuum and "fact" at the other, mixed statements of law and fact can lie at any point on the continuum. Thus, what Professor Henry Monaghan observed in one of the more influential articles on constitutional facts is quite apt: Fact and law are re-

64. Adamson, *Ideological Weapon*, *supra* note 24, at 1060 n.202.

65. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 267-68 (2005) (acknowledging but ultimately rejecting unconscious racial bias as a possible ground for the prosecutor's use of peremptory challenges against African-American venire members); United States v. Cherry, 50 F.3d 338, 343-44 (1995) (acknowledging that subconscious racism may have had an effect on the enactment of the Federal Sentencing Guidelines—which prescribed tougher sentences for those convicted of crack cocaine offenses versus powder cocaine offenses—but finding that appellant failed to link such racism to the law's enactment). *But see* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-91 (1988)(acknowledging that even if Title VII could guard against subjective decisions made by supervisors, "problems of subconscious stereotypes would remain[,]" and such latent racism was a form of discrimination that the statute was designed to prohibit).

66. *Brown*, 347 U.S. at 494 & n.11.

67. Baze v. Rees, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring).

68. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 264 n.1 (6th Cir. 1999).

69. Roper v. Simmons, 543 U.S. 551, 571-72 (2005).

ally not "static, polar opposites" but exhibit a nodal quality as "points of rest and relative stability on a continuum of experience."[70] As facts move along the fact-law continuum, they begin to take on characteristics more akin to legal rules or norms. Simultaneously, appellate standard of review choices move along the continuum to exact greater scrutiny of factual determinations. To characterize a finding of intentional race discrimination as a constitutional or ultimate fact is to move it towards "law." Similarly, to characterize implicit bias as a legislative or sociological fact implicates a standard of review other than clear error. Although framed by a trial court as facts found, such pronouncements should be deemed as either law declaration or assertions seeking some normative recognition as law. Because of the normative implications of such conclusions, appellate courts are empowered to reevaluate the evidence in order to support or refute their validity.[71] Given the well-established role of appellate courts to "say what the law is,"[72] appellate courts should engage in heightened review of such facts.

B. The Procedure-Substance "Dichotomy"

As with the law-fact dichotomy, a procedure-substance dichotomy cannot always be framed as one involving static, polar opposites. The Rules Enabling Act's drafters attempted to distinguish procedure from substance. While neither term is intuitively accessible, procedure is defined best as setting forth the processes that govern the function and administration of courts and cases.[73] Substance—or more specifically, the "substantive rights" identified in the Act—refer to the law and the application of the law to the facts in controversy.[74] Even

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70. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985).

71. Appellate courts may review trial findings based on sociological facts de novo. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162 (1986). Without deciding the standard of review, the Court stated that it was "far from persuaded" that Rule 52(a) would apply to the social science evidence admitted at trial to demonstrate juror biases. *Id.* at 168-69 n.3.

72. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

73. Redish & Amuluru, *supra* note 21, at 1305 ("[A procedural rule is] internal to the operation of the judiciary; it has no impact outside the four walls of the courthouse.").

74. 28 U.S.C. § 2072(b) (2006). The Rules Enabling Act clause that states that "[s]uch rules shall not abridge, enlarge, or modify any substantive right" was added by Senator Albert Cummins in the early drafting stages of the Equity Act out of concerns that the Rules Enabling Act would give courts the ability to legislate. Redish & Amuluru, *supra* note 21, at 1306; *see also* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1028 (1982) ("[T]he Act's procedure/substance dichotomy was intended to allocate lawmaking power between the federal government and the states.").

if the procedure-substance distinction did not seem fallacious at the time,[75] in hindsight it is obvious that any distinction lies only at the margins. What is clear is that procedural rules and substantive rights can operate interdependently. Importantly, as procedural rules begin to incorporate substantive considerations, as with the fact-law continuum, heightened appellate standard of review choices are triggered.

A distressingly powerful example of this can be seen when considering the impact of Rule 11 on substantive civil rights claims. Rule 11 allows judges to impose penalties upon lawyers and individuals if they have, among other activity, presented pleadings or other papers to the court for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," or if they have presented contentions without evidentiary support.[76] Several studies have found that a disproportionate number of civil rights cases were the subject of Rule 11 sanctions.[77] Furthermore, federal civil rights claims are subjected to heightened pleading requirements[78] even though they often are premised upon facts and evidence not within the province or possession of the plaintiff. Consequently, a civil rights plaintiff is more vulnerable to Rule 11 sanctions or 12(b)(6) motions to dismiss and thus risks being foreclosed and chilled from pursuing substantive redress.

Procedural rules and substantive rights operate interdependently under Rule 52(a) to disadvantage intentional race discrimination claims as well. The clear error standard purportedly applies to all facts, no matter the type. Thus, on its face, Rule 52(a) limits the authority of appellate courts to reexamine the facts that inform the substantive rights at issue in a given case. As it becomes

75. *See* Carrington, *supra* note 36, at 284 ("[S]ubstance and procedure differ even if, at the margin, they become difficult to distinguish."); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Law*, 42 YALE L.J. 333, 336 n.10 (1933) ("The distinction between substantive and procedural law is artificial and illusory. In essence, there is none.").

76. FED. R. CIV. P. 11(b)(1), (b)(3).

77. Three studies revealed that "the percentage of sanction requests in civil rights cases was disproportionately high relative to the number of civil rights cases in the total caseload," and in one, "civil rights cases were targeted under Rule 11 more than twice as frequently as would be expected." Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 171 (1999).

78. Federal courts traditionally have required specificity in pleading or heightened pleading of plaintiffs bringing § 1983 civil rights actions. Subsequent cases held that "heightened pleading was not to be applied in civil rights cases against municipalities," and one scholar notes that "the application of heightened pleading in actions against individual agents is inconsistent [with the requirements for municipal defendants]." Paula Wolff, *Propriety and Effect of Heightened Standards of Pleading or Production Required of Plaintiff in Action under 42 U.S.C.A. § 1983*, 144 A.L.R. FED. 427 (1998). As a consequence, plaintiffs failing to adhere to the requirements are denied their day in court.

crucial to identify the type of fact, however, Rule 52(a) "can produce errors of over-inclusiveness."[79] The typology that animates the term "fact," as used in Rule 52(a), carries profound substantive consequences. In particular, a determination that a fact is a constitutional one compels departure from the rule because it introduces other institutional goals into the equation—specifically, the need to give doctrinal coherence to constitutional legal norms. To label a trial court finding as a constitutional, ultimate, legislative, or sociological fact is to trigger, at a minimum, de novo review. Consequently, although Rule 52(a) and its clear error standard might constrain appellate judges, its power is not conclusive. Unfortunately, its power is conclusive as to intentional race discrimination findings, because appellate courts refuse to apply any standard other than clear error to such determinations.

Given that Rule 52(a) dictates the level of scrutiny an appellate court will give factual determinations made by the court below, decisions about its applicability can be the primary factor in determining outcomes. Fact types operating beneath Rule 52(a) fortify the interplay between the clear error standard of review and the substantive rights being litigated. Relevantly, the constitutional fact doctrine acts as both a procedural and substantive concept—demanding a heightened standard of review and requiring reexamination of the factual determinations and the underlying premises of those determinations.

A discussion of law-fact distinctions illuminates how intentional discrimination and actual malice determinations should be examined on appeal. Both are paradigmatic examples of pure historical fact inquiry. Thus, factual findings based upon intentional discrimination or actual malice should be located on the same point of the fact-law continuum. On appeal, however, courts evaluate actual malice determinations as constitutional facts, while they review factual findings that articulate the presence or absence of intentional discrimination only for clear error.

II. Standards of Review

Despite the imperfections of the fact-law and procedure-substance distinctions, Rule 52(a) attempts to create a bright line. As a general proposition, a rule can be relatively straightforward and apply to all similarly situated parties. As Kathleen Sullivan has described, a rule "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts" and "aim[s] to

79. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 56 (1992). Catherine Struve has set forth the theoretical sources of the Supreme Court's power to interpret procedural rules by balancing policy arguments for or against a particular interpretation. Discretion to interpret procedural rules is inherent because the Supreme Court itself promulgates those rules. Struve, *supra* note 25, at 1124-32. She even makes the case as to how lower federal courts have "felt free to strain the Rules' text and ignore relevant Notes, in order to implement their own views of desirable policy." *Id.* at 1119.

confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."[80] Rule 52(a) embodies a presumption of finality to factual findings and purports to prevent appellate judges from "scrutiniz[ing] factors irrelevant to the rule's applicability."[81] But, as we have seen, decisional tools such as the constitutional fact doctrine and other Rule 52(a) exceptions allow judges to do just that, i.e., scrutinize trial court findings despite Rule 52(a)'s clear error mandate.

A. *Clear Error Review*

United States v. U.S. Gypsum Co. provides the most commonly cited justification for overturning a trial court's factual findings: Clear error exists when an appellate court, allowing that the trial court's determination is supported by some evidence, is nonetheless left "with the *definite and firm conviction* that a mistake has been committed" after reviewing all of the evidence.[82] The *Gypsum* admonition has as much (or as little) intrinsic meaning as the term it attempts to define.[83] Consequently, subsequent appellate courts have offered variations on the *Gypsum* definition.

A trial court's factual findings are clearly erroneous if they are "without *adequate* evidentiary support,"[84] are without "*sufficient* evidence,"[85] or if "reasonable men could not possibly make such a finding."[86] Moreover, if the findings are "completely devoid of minimum evidentiary support,"[87] if they have "no rational relationship to the supportive evidentiary data,"[88] are "contrary to

80. Sullivan, *supra* note 79, at 58.

81. Ruth Gavison, Comment, *Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 750 (1991).

82. 333 U.S. 364, 395 (1948) (emphasis added).

83. As one appeals court defined "clear error," the trial court decision "must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).

84. Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir. 1984) (emphasis added).

85. Brown v. Dade Christian Sch., Inc., 556 F.2d 310, 312 n.4 (5th Cir. 1977) (emphasis added).

86. Campbell v. Barsky, 265 F.2d 463, 466 (5th Cir. 1959).

87. Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972).

88. *Id.*

the clear weight of the evidence,"[89] or go against "the truth and right of the case,"[90] trial courts have committed clear error.

When examining for clear error, however, a "presumption of correctness" attaches to the trial court's factual findings.[91] An appellate court is not to "substitute [its] own impressions for those of the district court."[92] It should not overturn the trial court decision simply "because [it] 'would have decided the case differently,'"[93] nor should it "retry the facts."[94] Whether factual findings were based on oral or other evidence,[95] appellate courts are not to make "independent findings upon [the] evidence."[96] Even "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."[97] Relevant to mens rea determinations in actual malice and intentional discrimination cases, Rule 52(a) itself states that the "reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[98]

The manner in which an appellate court articulates the clear error standard is a good indication of what it will do with the trial court's ruling. When an appellate court evinces solicitude towards the fact finder's role by stating the rule in the affirmative or by invoking the limits of appellate court's authority, it is likely the judgment will be upheld. But if the appellate court opens its opinion with a critique of the standard, it signals a likely reversal, modification, vacation, or remand of the trial court's judgment.[99]

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89. *In re* Fielder, 799 F.2d 656, 657 (11th Cir. 1986) (quoting *In re* Panama-Williams Corp., 235 F. Supp. 729, 732 (S.D. Tex. 1964)).

90. Moorehead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 283 (5th Cir. 1987) (quoting White v. Arco/Polymers, Inc., 720 F.2d 1391, 1395-96 (5th Cir. 1983)).

91. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984).

92. Adzick v. UNUM Life Ins. Co. of Am., 351 F.3d 883, 889 (8th Cir. 2003).

93. Easley v. Cromartie, 532 U.S. 234, 242 (2001) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).

94. Esenwein v. Pennsylvania *ex rel.* Esenwein, 325 U.S. 279, 281 (1945).

95. FED. R. CIV. P. 52(a)(6).

96. Panaview Door & Window Co. v. Reynolds Metals Co., 255 F.2d 920, 926 (9th Cir. 1958).

97. *Anderson*, 470 U.S. at 574.

98. FED. R. CIV. P. 52(a)(6).

99. For example, consider the case *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), in which the Sixth Circuit court reversed the district court's determination that an amendment to the city's charter violated homosexuals' equal protection guarantees. In the paragraph immediately after the factual exposition, the court noted: "Generally, [it] reviews findings of fact for clear error and conclusions of law *de novo*. . . . However, ..." *Id.* at 265. That "however" immediately leads into a statement that the district court's "ostensible 'findings of fact'" were in reality "findings of 'ultimate' facts which entail

More substantively, the myriad ways in which appellate courts define clear error are not inconsequential. Having a "definite and firm conviction" that a mistake has been made may not necessarily be the same as finding, for example, that "reasonable men could not possibly make" factual findings. The latter layers an objective legal standard onto clear error, while *Gypsum's* "definite and firm" language invites an intuitive assessment of the evidence upon which the factual findings are premised.

The existence of any procedural rule creates a presumption that it should be followed. In civil cases tried without a jury, the presumption holds that Rule 52(a) must be followed. The standard articulated in Rule 52(a), namely clear error, however, does not demand such fealty. A *standard* such as clear error "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."[100] If compelling reasons dictate a deviation from the clear error standard of review, appellate judges, with consideration towards the standard's underlying principles, may take one of three roads: ignore it, resort to another rule, or create a new rule.[101] The clear error standard of review can be (and has been) disregarded under various circumstances: 1) The record below is based entirely upon documentary or other evidence (ignoring the plain language of the rule);[102] 2) The trial court got the law wrong (resorting to another rule);[103] or 3) The trial court's factual determinations fall within a category, such as a "constitutional," "ultimate," "legislative," or "sociological" fact, thus taking the factual determinations entirely out of the clear error realm and into de novo-independent judgment territory.[104]

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the application of law, or constitute sociological judgments which transcend ordinary factual determinations . . . ." *Id.* As such, they were subject to plenary review. *Id.* Contrast this result with the Eighth Circuit's affirmation of a district court's decision denying the appellant relief under an Equal Pay Act violation claim: "Our duty in reviewing these determinations is to uphold them unless they are 'clearly erroneous.' This standard of review does not permit us to substitute our own impressions for those of the district court." Horner v. Mary Inst., 613 F.2d 706, 713 (8th Cir. 1980) (citation omitted).

100. Sullivan, *supra* note 79, at 58.

101. Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 674-77 (1991); Gavison, *supra* note 81, at 740-41.

102. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234 (2001); *see also* Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 916 (11th Cir. 1989) ("The appellate court, in reviewing the documentary evidence presented, is in as good a position as the district court to determine the existence of personal jurisdiction. Our review, therefore, is plenary." (citation omitted)).

103. *See* discussion *infra* Section IV.A.

104. *See* discussion *supra* Section I.A.

B. De Novo *Review*

Juxtaposed against Rule 52(a)'s clear error standard is de novo review. In comparison with clear error review, de novo compels a more rigorous review of the trial court's determinations. De novo review is also called "independent,"[105] "plenary,"[106] or "full"[107] review. Applicable to bench trials and to certain dispositive rulings and jury verdicts,[108] de novo review is sweeping but not the most searching scrutiny appellate courts can perform.[109]

De novo review does not require that the appellate court give the trial court determinations any formal deference and allows the appellate court to reach an independent determination on the record.[110] Importantly, de novo review does not *demand* a different conclusion on the record; it infers that appellate courts are vested with the *power and competence* to reach a different conclusion.[111] Thus, de novo review does not automatically compel a different outcome.

This conclusion is apparent upon a closer look at what it means to conduct de novo review. As described earlier, in reaching judgments, a trial court applies factual findings to the relevant legal principles. On appeal, de novo review refers to engagement on four levels of scrutiny. Certainly, appellate courts will examine whether the trial court applied *settled* law to the facts.[112] If the appellate court is satisfied with the trial court's application of the law application, discretion—even under the de novo standard—would allow it to affirm the trial court's conclusion. If, however, the trial court's decision raises the specter that the trial court misinterpreted (and by extension, misapplied) the law,[113] created new law,[114] or failed to explain fairly the legal basis for its conclusions,[115] an ap-

105. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994); Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991).

106. Miller v. Fenton, 474 U.S. 104, 115 (1985).

107. Edmundson v. Turner, 954 F.2d 510, 513-14 (8th Cir. 1992), *cert. denied*, 502 U.S. 1101 (1992).

108. For example, summary judgment motions, motions to dismiss, dispositive decisions on injunctions, and jurisdictional rulings are reviewed de novo. *See, e.g.*, Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2443-44 (1998).

109. *See infra* Section II.C.

110. Casey et al., *supra* note 4, at 290 n.35.

111. *Id.* at 291.

112. McFarlin v. Conseco Servs., 381 F.3d 1251, 1259 (11th Cir. 2004).

113. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 n.15 (1982).

114. *See, e.g.*, Magan v. Lufthansa German Airlines, 339 F.3d 158, 163 (2d Cir. 2003).

115. *See, e.g.*, Sprint/United Mgmt. Co. v. Mendelson, 128 S. Ct. 1140, 1144 (2008) ("[T]he Court of Appeals erred in concluding that the District Court applied a *per se* rule. Given the circumstances of this case and the unclear basis of the District

pellate court will engage in its most thorough reexamination of the record. Even under those circumstances, although it becomes more likely that an appellate court will reach a different conclusion, it is not *required* to do so.

In summary, how the trial judge treated the law is the first consideration on appeal, which may then compel a reexamination of the facts adduced.[116] That reexamination may result in an appellate court reversing, modifying, vacating, or remanding the trial court judgment. Certainly, the reviewing court could just as well affirm the trial court's decision after de novo review.[117] Nonetheless, such expansive review allows appellate courts to examine the bases of factual findings. Allowing that findings on intentional race discrimination are constitutional facts, this ability is crucial.

C. *Independent Appellate Judgment as a Matter of Constitutional Obligation*

Independent appellate judgment entails something more than de novo review. The Supreme Court, upon a determination that certain factual findings implicate constitutional rights or obligations, speaks of a corresponding *obligation* to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion" upon a constitutional right.[118] If de novo review suggests that appellate courts enjoy the *power* to examine closely the bases of the lower court's conclusions, they have no option under the independent appellate judgment standard but to exercise that power when presented with constitutional facts.

The distinction between independent judgment and de novo review may seem minimal, and though the distinction may be fine, the two terms are qualitatively different. To exercise one standard of review rather than another triggers different, outcome-determinative cognitive frameworks. When an appellate court exercises de novo review, the trial court's factual findings and reasoning behind those findings are treated with heightened skepticism. If only informally, however, those findings and processes are given some degree of regard. On the other hand, to make an independent appellate judgment connotes a wholesale reassessment of the trial court's factual and legal conclusions. The implication of that standard potentially provides support for taking issues away from the jury or trial judge and, at all levels of litigation, treating those issues as

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Court's decision, the Court of Appeals should have remanded the case to the District Court for clarification.").

116. Casey et al., *supra* note 4, at 292.

117. *See, e.g.*, United States v. Abdulle, 564 F.3d 119, 125 (2d Cir. 2009) (affirming, through de novo review, challenges to sufficiency of evidence at trial); Marshall v. Taylor, 395 F.3d 1058 (9th Cir. 2005) (applying de novo review and upholding the trial court's denial of petitioner's habeas corpus application).

118. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (quoting New York Times, Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

ones to be decided as matters of law.[119] Under this standard, which was announced in *Bose v. Consumers Union*,[120] when the appellate court is under a duty to elaborate upon constitutional principles, it must examine fully the record to protect those principles without reference to the trial court's findings or reasoning. Independent appellate judgment is thus a matter of constitutional obligation.[121]

Independent review of constitutionally significant facts first appeared forty-five years ago in *New York Times Co. v. Sullivan*,[122] a case in which the Supreme Court weighed actual malice liability against First Amendment principles. Yet, as the late professor and federal judge Robert E. Keeton documents, the notion of independent review as a concept, and the terminology associated with it, already had evolved in a variety of settings before the *Sullivan* decision fully and formally introduced it into the Supreme Court's jurisprudence.[123]

In *Schneiderman v. United States*,[124] a 1943 denaturalization proceeding raising First Amendment issues, the Supreme Court rejected the appellate court's clear error review of the trial court's ruling.[125] By embarking upon a "broad view" of the testimony, evidence, and trial court findings, the Court held that the government had failed to meet its burden of proof to demonstrate that the petitioner had procured his citizenship fraudulently.[126] Early opinions such as *Schneiderman* spoke of "closer scrutiny" of facts found rather than "'independent' review."[127] In cases after *Sullivan*, independent appellate review emerged as "independent determination" and then "independent judgment."

Independent determination on constitutionally significant findings of historical fact has been invoked under constitutional provisions other than the First Amendment. The Supreme Court has applied the standard when deciding

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119. KEETON, *supra* note 12, § 19.7.4.

120. *Bose*, 466 U.S. at 499.

121. *Id.* at 510-11 ("The requirement of independent appellate review . . . emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.").

122. 376 U.S. 254 (1964).

123. KEETON, *supra* note 12, § 19.7.3, at 550.

124. 320 U.S. 118 (1943).

125. *Id.* at 125.

126. *Id.* at 130.

127. KEETON, *supra* note 12, § 19.7.3, at 550; *see also* Baumgartner v. United States, 322 U.S. 665 (1944). The Court revoked a naturalization certificate based on allegations of fraud and found that, because the case implicated the "nature of our Government and the duties and immunities of citizenship," the evidence below should not be "deemed a 'fact' of the same order as all other 'facts,' not open to review here." *Id.* at 671.

controversies involving the Fourth Amendment,[128] the Fifth Amendment,[129] the Seventh Amendment,[130] and the Tenth Amendment.[131] A few examples follow.

Miller v. Fenton, decided on the heels of *Bose*, raised Fifth and Fourteenth Amendment challenges in a habeas proceeding under 28 U.S.C. § 2254(d).[132] The Supreme Court held in *Miller* that, although the question of whether a confession was voluntary or not constituted an issue of fact and was entitled to a presumption of correctness, "the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review."[133]

In *U.S. Term Limits, Inc. v. Thornton*, the Court affirmed the Arkansas Supreme Court's ruling that its state constitutional amendment, which effectively barred persons who had served a defined number of terms in the state legislature from running for federal congressional office, violated the U.S. Constitution.[134] The Supreme Court agreed that the amendment violated Article I, Section Five's Qualifications Clause[135] and that the Tenth Amendment did not repose in the states the ability to alter or add to those qualifications.[136] From its interpretation of the Qualifications Clause and the Tenth Amendment, the Court noted the "constitutional significance" of the question, i.e., "whether the fact that [the Amendment] is formulated as a ballot access restriction rather than as an outright disqualification."[137] On summary judgment, the Court refused to cede that question to a trial on the merits, finding that the Tenth Amendment had an "avowed purpose and obvious effect of evading the Qualification Clauses."[138]

A third case bearing on the meaning and applicability of independent review of historical-constitutional facts was *Thompson v. Keohane*.[139] Like *Miller*, *Thompson* was a habeas petition calling for an interpretation of § 2254(d)'s pre-

128. *E.g.*, Ornelas v. United States, 517 U.S. 690 (1996).

129. *E.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

130. *E.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

131. *E.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

132. 474 U.S. 104 (1985).

133. *Id.* at 115.

134. 514 U.S. 779, 783 (1995).

135. U.S. CONST. art. I, § 5, cl. 1 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.").

136. *Thornton*, 514 U.S. at 837.

137. *Id.* at 787.

138. *Id.* at 831.

139. 516 U.S. 99 (1995).

sumption of correctness.[140] Thompson had argued that his alleged confession occurred without the proper Miranda warnings; the critical factual issue was whether Thompson was "in custody" for purposes of deciding if or when his constitutional right would arise.[141] Justice Ginsburg writing for the majority, stated that "in custody" determinations for Fifth Amendment purposes are not "entitled to a presumption of correctness."[142] After reviewing § 2254 cases in which the Court categorized certain issues as fact and others as law, she wrote that "[c]lassifying 'in custody' as a determination qualifying for independent review" was appropriate so as to "unify precedent" and "stabilize the law."[143] As will be shown, that same rationale provided the basis for the Court in *Bose* to embark upon an independent evaluation of the trial court's actual malice findings.

Eight years ago, the Supreme Court seemed poised to apply Rule 52(a)'s constitutional fact exception to an intentional race discrimination case. Re-evaluating the evidence, it reversed a direct appeal from the district court finding that the North Carolina Legislature had violated the Equal Protection Clause. In *Easley v. Cromartie*, the substantive issue was the extent to which voting patterns of African-Americans could be used to draw district boundaries.[144] The district court had found that the state legislature had improperly used race, not politics, as a predominant consideration when it redesigned the Twelfth Congressional District.[145] In a 5-4 decision authored by Justice Breyer, the Court determined that the question of whether the North Carolina Legislature was motivated by race in redrawing the Twelfth Congressional District lines was "constitutionally critical."[146] The majority described the issue as such even as it acknowledged clear error was the proper standard of review, noting that the "ultimate finding"[147] of race as a predominant motivating factor was an evidentiary one.[148] While that standard would entail a high degree of deference to the trial court determination, as well as to legislative decision making, the majority

140. *Id.* at 102.

141. *Id.*

142. *Id.* at 107.

143. *Id.* at 115 ("Classifying 'in custody' as a determination qualifying for independent review should serve legitimate law enforcement interests as effectively as it serves to ensure protection of the right against self-incrimination. As our decisions bear out, the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.").

144. 532 U.S. 234, 240-41(2001).

145. *Id.* at 240.

146. *Id.*

147. *Id.* at 241.

148. *Id.*

decided to operate under a more searching standard, an "*extensive review* . . . for clear error."[149]

That unprecedented twist on clear error seemed to push the question of race and intent into constitutional fact-independent judgment territory. The majority highlighted the "unique" circumstances and posture of the litigation, however, reducing the likelihood that constitutional fact and independent judgment concepts would come to embrace fully intentional discrimination inquiries. First, much of the evidence in the case was based on documents and expert testimony.[150] Second, the case was on direct appeal from the district court. Third, the Supreme Court itself had passed on *Easley* three other times in the preceding decade.[151] Finally, and crucially, the majority made virtually no effort to "legitimize" its rationale by, for example, grounding it in precedent or articulating it as a new legal norm. The Court could have ruled that because of the constitutional implications for the factual conclusion that race was a predominant factor in redrawing the Twelfth Congressional District, findings regarding the existence or absence of intentional race discrimination require it to make an independent judgment of the trial court's conclusion. Failing to do so ultimately gave the *Easley* decision less precedential value than it otherwise could have carried for standard of review and intentional race discrimination doctrinEach standard of review determines the degree of deference an appellate court is to give the trial judge's findings. The standard of review applied is contingent upon the issues being reviewed or the character of the factual findings. Understanding the distinctions between clear error, de novo, and independent judgment, the range of standards of review on appeal might look something like this:[152]

149. *Id.* at 243 (emphasis added).

150. *Id.* at 242-43. This reasoning was given despite Rule 52(a)'s explicit mandate.

151. *Easley* began in 1992 as *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992) and was reviewed as *Shaw v. Reno*, 509 U.S. 630 (1993) [hereinafter *Shaw I*]; *Shaw v. Hunt*, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; and *Hunt v. Cromartie*, 526 U.S. 541 (1999).

152. *Cf.* Casey et al., *supra* note 4, at 287. For a discussion of these and other standards of review, see Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir. 1950).

Standard of Review	Independent Appellate Judgment	De Novo/ Independent/ Plenary	Clear Error	Substantial Evidence	Abuse of Discretion
Trigger	Constitutional Facts	Ultimate, Legislative, or Sociological Facts; Misapplication or Misinterpretation of Law; Motions (e.g., Summary Judgment)	Historical/ Adjudicative Facts	Jury Determinations/Agency Decisions	Evidentiary Rulings
Level of Deference Accorded to Trial Court Findings	No Deference	No Formal Deference on Facts nor Law	Deference as to Factual Findings	High Deference to Jury Determinations, Agency Findings and Agency Rule Interpretations	Very High Deference

In deciding to deviate from the clear error standard, appellate judges must first weigh important considerations. Competence, administrative efficiencies, and doctrinal coherence are the core values Rule 52(a) embodies. Consequently, appellate judges must balance the institutional and jurisprudential values at stake when they decide whether the clear error standard should be followed.

III. Rule 52(a) and Institutional Values

In light of the fact that intentional race discrimination and actual malice findings are treated differently under the clear error standard of review and the constitutional fact doctrine, it is useful to examine the institutional values that lie beneath the standard and the doctrine. Doing so allows us to explore whether there may be a deeper rationale for treating the legal concepts differently.

As a general proposition, procedural rules express institutional goals. If properly crafted and applied, they act transsubstantively to further jurisprudential and institutional values.[153] In one sense, Rule 52(a) is an action-guiding norm that channels the subjects (e.g., litigants and witnesses) and objects (rele-

153. Matheson, *supra* note 12, at 229.

vant legal and factual elements) through the appellate process.[154] Most important, Rule 52(a) allocates duties and confers powers between trial and appellate judges. It performs those functions by allocating responsibilities for fact identification, law declaration, and law application.[155] Directing that findings of fact "shall not be set aside *unless*" demonstrates that Rule 52(a) aimed to fix the realm of authority trial courts would possess, namely province over fact identification.[156] That the drafters did not have Rule 52(a) state that factual findings "shall be set aside *if*" reflects that they did not intend Rule 52(a) to articulate the reach of the appellate courts *over* the trial courts. By negation, however, Rule 52(a) reinforces the principle that appellate courts ultimately retain the responsibility and authority to declare law or articulate and develop legal norms.

Several institutional values militate in favor of Rule 52(a)'s edict that places factual determinations with the trial court and legal determinations with the appellate courts. Judge Richard Posner observed that procedural rules serve two primary functions: to reduce both error costs and direct costs.[157] Error costs, or social costs, are those incurred in the absence of accurate or "fair" outcomes.[158] For example, appellate review serves in part to reduce the likelihood of incorrect results that might arise from the trial court's misinterpretation or misapplication of law. Direct costs are those economic or temporal losses incurred by the litigants and judicial system. Judge Posner's economic framework incorporates institutional values of tribunal competency, administrative efficiency, and the need for doctrinal coherence. But, as will be shown, those laudable institutional values embodied in Rule 52(a) and the constitutional fact doctrine apply equally to intentional race discrimination and actual malice determinations.

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154. *See* Gavison, *supra* note 81, at 740-41.

155. Facts are identified through collection and distillation within the adjudicative framework. Adamson, *Ideological Weapon*, *supra* note 24, at 1043. Law application is a judgment that a particular law "is relevant to . . . facts [identified], or stated conversely, that the facts, by meeting the standard instantiated in the law, trigger legal consequences." Alogna, *supra* note 46, at 1155 ("Application of law to facts entails a judgment that that [a] law is relevant to [certain] facts, or stated conversely, that the facts, by meeting the standard instantiated in the law, trigger legal consequences."). Law declaration, on the other hand, is the creation or development of legal norms. Adamson, *Ideological Weapon*, *supra* note 24, at 1043.

156. FED. R. CIV. P. 52(a) (emphasis added).

157. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 448 (1973) (articulating a goal of legal procedure as "minimizing the sum of error costs and of the direct costs"); *see also* Warren F. Schwartz & Gordon Tullock, *The Costs of a Legal System*, 4 J. LEGAL STUD. 75, 79 (1975) (discussing policy proposals for minimizing the efficiency costs of legal systems).

158. *See* Posner, *supra* note 157, at 400.

A. *Respective Tribunal Competencies*

Rule 52(a) is a deep bow to the competence of trial courts in finding facts, no matter the type or form. To be sure, this rationale serves as the primary justification for the deference ceded to trial judges on intentional race discrimination findings. Trial courts are best suited to take evidence, empanel juries, and (of particular relevance to actual malice and intentional discrimination findings) evaluate witness credibility, demeanor, context, and atmosphere. In other words, trial judges have a better familiarity with both common and unique aspects of a given case.[159] Although one can argue legitimately that trial judges enjoy no special advantage when facts based on, for example, documentary evidence constitute the entire record, heightened competence has served as one justification for reposing fact-finding responsibilities with trial courts.[160]

Conversely, Rule 52(a) acknowledges the expertise of appellate courts in applying or declaring law and developing norms. The role of appellate judges is to consider and apply thoughtfully the law with a high degree of intellectual rigor. By extension, appellate judges are better able to ensure decisional accuracy as it relates to law application and declaration. The presumption of finality to factual findings gives appellate judges that deliberative space by limiting the scope and quantity of appeals. Thus, as factual findings begin to look more like law declaration or norm elaboration—as constitutional facts do—the clear error standard yields to de novo review, or the exercise of independent judgment.

B. *Administrative Efficiencies*

By directing trial court authority over oral or other forms of evidence and urging "due regard" for witness credibility determinations,[161] Rule 52(a) also reduces direct costs. Put another way, since trial courts are better positioned to make such determinations, appellate costs will not be "sunk" into relitigating credibility determinations capably found earlier. Direct costs are lowered also because litigants, aware of the presumptive finality of factual findings, are compelled to prosecute their cases more vigorously. If litigants operated under the assumption that they could get a second bite at the apple and relitigate facts on appeal, they might not pursue their claims diligently and thus would increase direct costs to the system, if not to themselves. The presumption of finality to factual findings reduces direct costs to the appellate system, reduces appellate judge workload, and furthers appellate judges' ability to reduce error costs

159. Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 239-41 (1991); Wright, *supra* note 24, at 781-82.

160. *See* Ornelas v. United States, 517 U.S. 690, 702 (1996) ("Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct . . . .") (Scalia, J., dissenting) (internal quotation marks and citation omitted).

161. FED. R. CIV. P. 52(a)(6).

through decisional accuracy. Decisional accuracy imperatives supplant administrative efficiencies when constitutional facts are at issue. The need to give deliberate consideration to law application and norm development outweighs direct cost reduction.

C. *Doctrinal Coherence*

Rule 52(a) does no violence to appellate courts' power and authority to maintain control of and clarify legal principles. This third institutional value underlying Rule 52(a) seeks to ensure that legal norms are articulated, applied, and developed properly.[162] To expand appellate review to encompass factual finding redeterminations would generate decisions of marginal weight or precedential value due to the number and fact-specific nature of opinions.[163] By limiting the scope of review of factual findings, the judicial system avoids the doctrinal dissonance that otherwise would arise should different circuit panels interpret the same legal norms differently.[164]

Doctrinal coherence becomes most essential when federal—especially constitutional—rights are at issue. Indeed, a critical aspect of the Supreme Court's *Erie Railroad Co. v. Tompkins*[165] decision touches upon appellate court powers under Rule 52(a). The separation of powers aspect of the *Erie* doctrine echoes the Rules Enabling Act provision that enjoins federal judges from creating or applying rules that "abridge, enlarge, or modify" a substantive right.[166] *Erie* enjoined the articulation of judge-made common law in the absence of a federal constitutional or statutory provision,[167] and the case therefore has stood for the proposition that appellate judges should not allow, under any circumstance, a federal rule to override a substantive right.[168] Similarly, the constitutional fact doctrine embodies substantive rights. The doctrine stands as an exception to Rule 52(a)'s clear error standard to ensure that procedural rules do not abridge substantive rights and to allow appellate courts to establish a consistent set of

162. *Cf.* Allen & Pardo, *supra* note 12 at 1776; Alogna, *supra* note 46, at 1154; Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 918 (1992).

163. Martin B. Louis, *Allocating Adjudicative Decision Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1014 (1986).

164. Consider that, for example, a nine-member court can yield eighty-four different three-member panel combinations.

165. 304 U.S. 64 (1938).

166. 28 U.S.C. § 2072(b) (2006).

167. Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by* Erie, *the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 527 (2004).

168. *Id.* at 528.

principles that animate the constitutional right or obligation. If doctrinal coherence is imperative for some constitutional facts, however, it would seem that, despite the costs of intracircuit dissonance or appellate caseload, norm coherence should be imperative for all constitutional facts.

As facts move from the category of the "pure" historical fact type to those that would concretize legal norms or rules, appellate authority to reexamine lower courts' decisions is triggered. Rule 52(a) attempts to strike the proper balance in furthering the values respecting tribunal competencies, administrative efficiencies, and doctrinal coherence. Yet, these institutional values underlying Rule 52(a) and the constitutional fact exception do not fully explain why intentional race discrimination factual determinations are treated differently than actual malice determinations.

IV. Active Virtues, Passive Virtues, and Constitutional Facts

Given that institutional values inherent in Rule 52(a) and the constitutional fact exception cannot explain fully this differential treatment, it is now appropriate to examine the respective jurisprudence of actual malice and intentional discrimination. What follows is an account of how the Supreme Court has applied the constitutional fact exception to actual malice jurisprudence yet has remained steadfast in its refusal to apply that exception to intentional race discrimination doctrine.

In 1982, the Supreme Court emphasized a type of judicial minimalism regarding intentional race discrimination factual findings. In *Pullman-Standard v. Swint*,[169] a case alleging intentional race discrimination in Pullman-Standard's seniority system, the standard of review choice was squarely at issue. The Court was unequivocal:

> [Rule 52(a)] does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.[170]

Despite that pronouncement, the Supreme Court urged two years later an active approach to Rule 52(a) as it regards actual malice findings; the constitutional fact exception must be applied, and independent appellate judgment must be made on such findings. Thus, the Supreme Court has concluded that to fulfill the institutional value of doctrinal coherence, appellate courts must ignore Rule 52(a)'s plain language when it comes to constitutional facts—but only some of the time.

169. 456 U.S. 273 (1982).

170. *Id.* at 287-88.

A. *Actively Privileging Actual Malice*

The constitutional fact doctrine emerged out of the jurisdictional fact controversies arising in appeals from administrative agency decisions on due process and takings issues.[171] The doctrine gained force when it first appeared in a criminal case, *Near v. Minnesota*.[172] *New York Times v. Sullivan*[173] was the first case that placed actual malice into the constitutional fact setting, as the Supreme Court announced its obligation to make an independent determination on the factual record. A series of additional cases further refined malice as a constitutional fact.[174] It was with *Bose Corporation v. Consumers Union of U.S., Inc.*[175] that the Court applied this exception and announced a new standard of appellate review on actual malice findings.[176]

Bose was a product disparagement claim brought by the manufacturer against the publisher of *Consumer Reports* and the authors of a review of the latest Bose loudspeaker. The primary author of the loudspeaker test report wrote that the loudspeaker caused the sounds of individual musical instruments to wander "about the room," language which found its way into the published article.[177] The trial judge ruled that the author made a false and disparaging statement and did so with actual malice.[178] The court of appeals, reviewing the district court decision on liability de novo, reversed.[179] While affirming the court of

171. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932); Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). For a more extensive discussion of the constitutional fact doctrine, see, for example, Hoffman, *supra* note 8; Monaghan, *supra* note 70; Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988); Judah A. Shechter, Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLO. L. REV. 1483 (1988).

172. 283 U.S. 697 (1931).

173. 376 U.S. 254 (1964) (stating that plaintiffs must prove actual malice against media defendants in a libel action).

174. *E.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (actual malice and nonpublic figures); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) (fair reporting and actual malice); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (actual malice, public figures, and the meaning of "official conduct"); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970) (jury instruction on actual malice); Time, Inc., v. Hill, 385 U.S. 374 (1967) (newsworthiness defense); Garrison v. Louisiana, 379 U.S. 64 (1964) (actual malice and criminal libel).

175. 466 U.S. 485 (1984).

176. *Id.* at 501 n.17, 514.

177. *Id.* at 488.

178. *Id.* at 489-91.

179. Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 189, 195 (1st Cir. 1982).

appeals decision, the Supreme Court invoked its constitutional responsibility of independent review "to test challenged judgments against the guarantees of the First and Fourteenth Amendments."[180]

The Supreme Court went on to discuss why Rule 52(a) did not apply to actual malice. The crux of the Court's justification for independent judgment can be found in Footnote Seventeen. It is entirely textually based, with no citations to other cases whatsoever. There, the majority noted how the term "actual malice" blurs the line between fact and law:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must *exercise its own independent judgment*. . . . Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.[181]

In the text surrounding that footnote, Justice Stevens also makes the point that, though Rule 52(a) prescribes deferential review even for "ultimate" findings of fact, i.e., those that directly impel a legal consequence, Rule 52(a) does "not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicted on a misunderstanding of the governing rule of law."[182] Thus, at a minimum, the majority acknowledged actual malice determinations as mixed questions of law and fact.

Given the majority's rationale in part, it could have taken a minimalist approach to its review. The majority reasoned that "Rule 52(a) never forbids" a more expansive review of the trial proceedings.[183] The majority asserted that the *Gypsum* Court "expressly contemplated a review of the entire record" when it emphasized that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed."[184] Instead, the Court articulated reasoning that went far beyond the confines of *Gypsum*'s clear error definition.

The Court identified three characteristics of the *Sullivan* actual malice rule relevant to the decision to apply independent judgment instead of clear error. First, due to the common law evolution of the standard, trial judges were ac-

180. 466 U.S. at 508 n.27 (quoting Jacobellis v. Ohio, 378 U.S. 184, 190 (1964)).

181. *Id.* at 501 n.17 (emphasis added).

182. *Id.* at 501.

183. *Id.* at 499. *But see* discussion *supra* Section II.A.

184. *Id.* at 499 (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)) (emphasis added).

corded "an especially broad role . . . in applying it to specific factual situations."[185] Second, the meaning of "actual malice" had evolved only through case-by-case adjudication—making it largely a judge-made rule of law.[186] Third, "the constitutional values protected by the rule [made] it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied."[187] Based upon that reasoning, the *Bose* majority felt no need whatsoever to be "bound by the conclusions of lower courts, but [could] re-examine the evidentiary basis" for the appellate court's conclusions on actual malice.[188]

The announced constitutional obligation outweighed any policies or principles underlying Rule 52(a) that otherwise might justify fidelity to the clear error standard. Even so, the majority acknowledged that the core determination of actual malice, namely actual knowledge of falsity or subjective, reckless disregard for falsity, involved nothing more than findings on the mens rea of the author.[189] The court reexamined the appellate court's and district court's findings, including those regarding the subjective state of mind of the review's author and sound expert.[190] Thus, beginning with an unprecedented Rule 52(a) interpretation, and ending with its three-pronged *Sullivan*-based rationale, the majority ruled that independent appellate judgment on actual malice determinations is not only appropriate but also imperative.

B. Passively Marginalizing Intentional Race Discrimination

In contrast, the Supreme Court has taken a far more modest approach with intentional race discrimination findings, insisting that this particular type of fact finding mandates neither independent appellate judgment nor independent review. In deeming that Rule 52(a)'s clear error standard must guide appellate inquiry into such findings, the Court has frequently invoked the tribunal competency value reflected by the rule.[191]

Rule 52(a) directs appellate courts to give "due regard" to the trial judge's assessment of the "witnesses' credibility."[192] Since intentional race discrimination is a state of mind determination, often turning upon witness demeanor, the

185. *Id.* at 503.

186. *Id.* ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance.").

187. *Id.* at 502.

188. *Id.* at 509-10.

189. *Id.* at 498 ("It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'").

190. *Id.* at 493-98.

191. *See, e.g.*, Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

192. FED. R. CIV. P. 52(a)(6).

Court has insisted that the trial judge is best situated to make the most credible conclusions on intent.[193] This rationale, however, is especially unpersuasive given that the bases of intentional race discrimination evidentiary findings and actual malice findings are essentially the same.

Like actual malice, intentional race discrimination calls for an inquiry into an actor's motivation or mental state to determine animus or illicit motive. Direct, circumstantial, oral, or other evidence can serve as evidence of intentional discrimination. Regardless of the form of the discrimination ("subtle or overt, conscious or unconscious"),[194] the fact finder is charged with ferreting out the discriminatory purpose.

It is necessary to discuss briefly the evolution of the intent standard under the Equal Protection Clause in order to address fully the substantive injustice done by the Court's failure to extend the constitutional fact exception to intentional race discrimination determinations. That clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[195] Ratified in light of the ineffectiveness of the Thirteenth Amendment, which sought to eliminate all badges and incidents of slavery,[196] the Fourteenth Amendment transformed the bulk of Congress's 1866 Civil Rights and Freedman Bureau Acts into constitutional mandates.[197] The Equal Protection Clause, which is the primary constitutional remedy for racial discrimination, makes no distinction between cause or effect, intent, or even negligence.

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193. As Justice Breyer noted in his concurring opinion in *Rice* (a case of race discrimination in jury selection) an appellate court is not as ideally situated to make credibility determinations as the trial court because, on a cold record, it cannot detect "a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. . . . These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*." 546 U.S. at 343.

194. Selmi, *supra* note 30, at 283.

195. U.S. CONST. amend. XIV, cl. 1.

196. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1121 (1997) ("Because there was dispute about whether the Thirteenth Amendment's prohibition of slavery vested Congress with the power to define and protect civil rights in this fashion, Congress began work on the drafting and ratification of the Fourteenth Amendment.").

197. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (2006)) ("[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.").

If a law, policy, or regulation explicitly classifies citizens on the basis of race, the Supreme Court precedent has required a strict scrutiny analysis.[198] Once the existence of a suspect classification is established, courts presume discriminatory intent and apply strict scrutiny.[199] For a time, that presumption and analysis would apply also to facially neutral initiatives with racially disproportionate impacts.

The presumption based upon racially disproportionate impact disappeared with *Washington v. Davis*.[200] *Davis* was a due process challenge brought by two African-American applicants for the Washington, D.C. police department. They charged that the department used racially discriminatory hiring procedures; specifically, the applicants asserted that the department's personnel test demonstrated a racially disproportionate impact. The petitioners put forth evidence that African-Americans failed Test 21, a verbal skills examination, at a rate four times higher than white applicants.[201]

The Court rejected the appellate court's application of its *Griggs v. Duke Power Co.*[202] ruling that a demonstration of disparate impact was sufficient itself to demonstrate a violation of Title VII of the 1964 Civil Rights Act.[203] Marking a seismic shift in its jurisprudence regarding burdens of proof, the Supreme Court concluded that when challenging facially neutral laws, policies, or regulations, plaintiffs must prove discriminatory intent.[204] In addition to heightened pleading requirements in other public employment cases like *Davis*,[205] plaintiffs bear that heightened burden in public housing,[206] school desegregation,[207] redistricting,[208] and voting rights equal protection contexts.[209]

198. This standard first appeared in *Korematsu v. United States*, 323 U.S. 214 (1944).

199. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.") (citations omitted).

200. 426 U.S. 229 (1976).

201. *Id.* at 237.

202. 401 U.S. 424 (1971).

203. *Davis*, 426 U.S. at 238.

204. Before *Davis*, lower courts had used the disproportionate racial impact theory to overturn legislation that did not have a racial criterion of selection but did have a disparate impact. *See* Samuel Issacharoff, Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982).

205. *E.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993) (emphasizing that the burden always rests with the plaintiff to prove intentional discrimination in a disparate treatment case).

206. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

207. Keyes v. Sch. Dis. No. 1, 413 U.S. 189, 198 (1973).

208. Easley v. Cromartie, 532 U.S. 234, 257 (2001).

If *Davis* effectively heightened the burden of proving race-based discrimination as a matter of substance, *Pullman-Standard* effectively narrowed appellate redress of such claims as a matter of procedure.[210] In *Pullman-Standard*, another Title VII case, African-American employees sued their employer, railway freight manufacturer Pullman-Standard, and its employees' unions, alleging that its two seniority systems had the intent and effect of excluding African-Americans from particular bargaining units and promotion opportunities.[211] In reversing the district court's finding of no intentional racial discrimination by the terms or operation of the seniority system, the court of appeals treated the lower court's factual findings as "ultimate facts," thus warranting an "analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system."[212] The Supreme Court concluded that the court of appeals erroneously failed to apply Rule 52(a):

> [D]iscriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent.[213]

Since *Pullman-Standard*,[214] the Supreme Court has been steadfast in applying Rule 52(a)'s clear error standard to intentional discrimination factual find-

209. Gomillion v. Lightfoot, 364 U.S. 339 (1960); *see also* Siegel, *supra* note 196, at 1130 (arguing that the Supreme Court embraced discriminatory purpose as the touchstone for unconstitutionality under the Equal Protection Clause for facially neutral state action).

210. Pullman-Standard v. Swint, 456 U.S. 273 (1982).

211. *Id.* at 275 n.1.

212. *Id.* at 287.

213. *Id.* at 289.

214. In his dissent, Justice Marshall did not quarrel with the character of intentional race discrimination findings (e.g., that they were "ultimate" facts) but rather supported appeals court's conclusions on more traditional rationales. *Id.* at 295 (Marshall, J., dissenting). He noted that the Fifth Circuit itself acknowledged that the "clearly erroneous" standard controlled but that the Court's conclusion was justified because the district court's findings were based on "an erroneous view of controlling legal principles." *Id.* at 300. It therefore was "irrelevant that the Court of Appeals did not specifically hold that the District Court's other factual findings were clearly erroneous." *Id.* n.5. Justice Marshall also conceded that the premise underlying Rule 52(a) deference is the reality that findings of fact "depend peculiarly upon the credit given to witnesses by those who see and hear them." *Id.* at 301 (citing United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949)). Because the district court's findings were based entirely on documentary evidence, however, the "usual deference [was] not required." *Id.*

ings.[215] Furthermore, the clear error standard of review applies not only to the ultimate finding on discrimination but also to the so-called subsidiary facts and inferences from the facts.[216] Even when the Supreme Court had full opportunity to revisit the clear error rule for intentional race discrimination in light of *Bose*, it remained resolute. In *Hernandez v. New York*,[217] the Court rejected the petitioner's argument that the New York Court of Appeals should have reviewed independently the prosecutor's stated reasons for exercising its allegedly racially discriminatory peremptory challenges. Evincing an utter lack of appreciation for any possible similarity between actual malice and intentional race discrimination determinations, the Court found *Bose* of "no relevance."[218]

Despite the significance of the constitutional violation that follows a finding of intentional discrimination, the Supreme Court has insisted that intentional discrimination "does not lose its factual character because its resolution is dispositive of the ultimate constitutional question."[219] Yet, somehow "the constitutional values protected by the [actual malice] rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied."[220] Given that inconsistency, we can explore the doctrinal and institutional soundness of the Court's reasoning to see whether its display of passive virtues vis-à-vis intentional race discrimination determinations is warranted.

V. The Subtle Vices of Passive Virtues

It now is useful to explore the inconsistent treatment of actual malice and intentional race discrimination findings from three perspectives. First, this Part tests the soundness of the *Bose* reasoning, looking at whether any fundamental differences between actual malice and intentional race discrimination concepts account for the differential treatment. Second, it asks which underlying institutional values argue for treating the two concepts differently. From there, it finally articulates more fully how Rule 52(a) and the Supreme Court's selective application of the constitutional fact exception work a substantive injustice on

215. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 243 (2001) (affirming that race rather than politics was a motivating factor in the state's redistricting plan, finding that the decision was reviewable under the clear error standard, and ultimately applying a different standard); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) (holding that the trier of fact's rejection of the employer's asserted nondiscriminatory purpose is subject to review under a clear error standard); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 532 (1991) (finding the issue of purposeful employment discrimination reviewable under the clear error standard).

216. 1 Steven Alan Childress & Martha S. Davis, Federal Standards of Review § 2.24, at 146-48 (3d ed. 1999).

217. 500 U.S. 352 (1991).

218. *Id.* at 367.

219. Miller v. Fenton, 474 U.S. 104, 113 (1985).

220. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501-02 (1984).

intentional race discrimination determinations. Before concluding, it sets forth consequences that might arise from according intentional race discrimination factual findings independent appellate judgment.

A. *Actual Malice and Intentional Race Discrimination—A Doctrinal Critique*

The *Bose* majority's parsing of *Gypsum*'s definition of Rule 52(a) is wholly disingenuous, as it seems the majority wanted to adhere to the rule while simultaneously departing from it. The *Bose* majority tortures the *Gypsum* language, substituting "reviewing . . . the entire evidence"[221] with a reweighting of the evidence. As one scholar observed, *Gypsum*'s "definite and firm conviction" language did not signal intent "to extend the scope of factual review" but merely did "no more than suggest a means of approach to the nebulous problem of when a finding of fact is subject to reversal under Rule 52(a)."[222] In other words, the *Gypsum* Court correctly assumed that appellate judges are doing their jobs when it speaks of the "reviewing court" looking at the "entire evidence" in reaching a "definite and firm conviction" of a trial court mistake.[223] If the *Bose* majority's interpretation of *Gypsum* is warranted, then the clear error standard is utterly meaningless. The *Bose* majority's reinterpretation of *Gypsum* marks a unique departure from the clear error standard.

Notably, while all nine justices in *Bose* agreed that an independent review was warranted in the context of previous decisions presenting underlying constitutional claims, two did not subscribe to the majority's independent judgment language.[224] In its final footnote, the majority opinion seems to sense its own overreaching. Justice Stevens assures us that the Court did not make an independent judgment in the sense of conducting "an original appraisal of all of the evidence" but instead took "an independent assessment only of the evidence germane to the actual-malice determination."[225] In offering what comes across as a post hoc rationalization, he introduced confusion as to which elements of libel itself would, as a constitutional imperative, demand "independent assessment" going forward.[226]

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221. United States v. U.S. Gypsum Co., 333 U.S 364, 395 (1948).

222. Comment, *Scope of Appellate Fact Review Widened*, 2 STAN. L. REV. 784, 787 (1950) (opining on the impact of *Gypsum* on Rule 52(a)).

223. *Gypsum*, 333 U.S. at 395.

224. *Bose*, 466 U.S. at 519 n.2 (Rehnquist, J., dissenting); *id.* at 515 (White, J., dissenting).

225. *Id.* at 514 n.3.

226. *Id. Bose* has been interpreted as requiring independent review regarding the "of and concerning" prima facie libel element. David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts To Circumvent* New York Times v. Sullivan, 9 VAN. J. ENT. & TECH. L. 551, 584 (2007); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litiga-*

It is possible that the Court went too far in *Bose* when announcing that actual malice determinations must be subjected to independent appellate judgment. To be sure, its core holding both has been criticized and distinguished by lower courts.[227] In his dissent, Justice Rehnquist lays out a compelling case as to why appellate courts were not as competent to assess the pivotal determination, the author's credibility on the stand,[228] which we have seen is an issue that appears in intentional discrimination cases. Nonetheless, even Rehnquist conceded that independent appellate review should follow when "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."[229] The fact that *Bose* has been followed by the Court in cases in which the issue of independent appellate judgment on constitutional issues was squarely before

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tion, 58 OHIO ST. L.J. 1753, 1772 (1998); Matheson, *supra* note 12, at 272. Independent review also may apply to findings of falsity, negligence, and the opinion-fact distinction; may mandate review only of actual malice; may mandate de novo review; may apply to appeals by both parties or only to defense appeals; and may apply only to appeals from trial verdicts. Gilles, *supra*, at 1772-73; *see also* Tigran W. Eldred, Note, *Amplifying* Bose Corp. v. Consumers Union*: The Proper Scope of De Novo Appellate Review in Public Defamation Cases*, 57 FORDHAM L. REV. 579 (1989) (discussing how the *Bose* decision left unanswered many questions regarding the scope of de novo review in libel cases).

Some appellate courts have interpreted *Bose* as not requiring de novo review of the subsidiary facts going to the presence or absence of actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 690-91 (1989), may have launched a retreat by suggesting that, even with independent review, the appellate court must accept undisputed facts and those which the jury "must have" found as a given. But, the Court repeated its independent review of "the factual record in full" language, which would entail an examination of "the statements at issue and the circumstances under which they were made." *Id.* at 688. By not clearly answering the question of which factual elements of actual malice would be subject to independent review—the historical facts or the evaluative inferences made from those facts—the *Bose* decision has given appellate courts permission to reweigh fully the facts underlying a district court's finding on actual malice and other libel elements.

227. *See, e.g.*, Robinson v. City of Edmond, 68 F.3d 1226, 1230 (10th Cir. 1995) (discussing *Bose*); Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 160 (4th Cir. 1993) (distinguishing *Multimedia Publishing* from *Bose*).

228. *Bose*, 466 U.S. at 520 (Rehnquist, J., dissenting) ("Because it is not clear to me that the *de novo* findings of appellate courts, with only bare records before them, are likely to be any more reliable than the findings reached by trial judges, I cannot join the majority's sanctioning of factual second-guessing by appellate courts.").

229. *Id.* at 516 (quoting Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)).

the Court is some testament to the staying power of that announced principle.[230]

So if the independent appellate judgment rule as to First Amendment (actual malice) factual findings is correct, what of other constitutionally significant findings? The majority's rationale for independent judgment in *Bose*—the common law evolution of the actual malice standard, the protection of constitutional values, and ensuring that constitutionally-based legal norms are correctly applied—could pertain to most any legal concept implicating constitutional rights or obligations that are not defined solely by the precise language of the relevant constitutional clause.[231] One most certainly could apply identical reasoning to justify independent appellate judgments on intentional race discrimination findings. This point becomes clear when tracing the roots of actual malice and intentional discrimination concepts.

Both actual malice and intentional discrimination have similar roots in the line of English cases involving scienter and the law of deceit.[232] The antecedents of race discrimination prohibitions lay in common law and go far back to before the passage of the Thirteenth Amendment and the Civil Rights statutes.[233] Before this, at least thirty-two states had codified antidiscrimination provisions in their innkeeper statutes.[234] The Supreme Court itself has recognized that racial discrimination proscriptions have shared histories with the common law torts of insult and indignity[235] and has characterized intentional discrimination as "tantamount to malice."[236]

Considering the historical roots shared by actual malice and intentional discrimination, one must ponder whether something about the respective structures of the First Amendment and Fourteenth Amendment would account

230. *See* Randall v. Sorrell, 548 U.S. 230, 232-33 (2006); Gentile v. State Bar of Nev., 501 U.S. 1030, 1038 (1991).

231. Allen & Pardo, *supra* note 12, at 1776.

232. *Bose*, 466 U.S. at 502 n.10.

233. The language of the Thirteenth Amendment incorporates that of the Northwest Ordinance of 1787, which proscribed slavery and involuntary servitude. The primary effect of the ordinance was the creation of the Northwest Territory as the first organized territory of the United States out of the region south of the Great Lakes, north and west of the Ohio River, and east of the Mississippi River. On August 7, 1789, the U.S. Congress affirmed the Ordinance with slight modifications under the Constitution. Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 303 (2006).

234. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260 (1964).

235. Curtis v. Loether, 415 U.S. 189, 196 (1974).

236. Courts have referred to the term "intent" as "invidious" discrimination on par with "animus, malice, or a conscious awareness." Selmi, *supra* note 30, at 288; Siegel, *supra* note 196, at 1134-35 (discussing *Feeney*, which parses motive, intent, and volition).

for the double standard. The First Amendment is widely interpreted as creating positive rights,[237] while the Equal Protection Clause is seen as creating a negative right, i.e., to be free from discrimination.[238] Actual malice establishes a protective boundary around those venerable First Amendment guarantees. Intentional discrimination, on the other hand, prosecutes a right in the face of a presumption of nondiscriminatory animus. What the Equal Protection Clause *obligates* (that is, not to discriminate), however, is no less a constitutional imperative than First Amendment guarantees.

Thus, the Court's "protecting constitutional values" justification simply begs the question. The protected value is rooted in general federalism principles and the power of the Court to unify legal norms. An intentional race discrimination finding also triggers a constitutional right, i.e., to be free from such discrimination. It therefore is difficult to see why the Court deems actual malice doctrine more worthy of constitutional protection than intentional discrimination.

If the values protected by the legal concepts arguably are of the same constitutional importance, then perhaps a difference between how actual malice and intentional race discrimination concepts are substantiated from an evidentiary perspective might account for the differential treatment. Constitutional malice is defined as a knowing or reckless disregard of the falsity of statements made of or concerning a person.[239] Constitutional malice can also be found where the defendant engaged in "highly unreasonable conduct" in his investigation and reporting.[240] In judging whether the defendant evinced knowing falsity, reckless disregard, or even unreasonable behavior, the trial court is charged to determine whether the "defendant in fact entertained serious doubts as to the truth

237. *See* Orville Lee, *Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society*, 26 LAW & SOC. INQUIRY 847 (2001) (arguing that access and enhanced participation are positive rights which maximize the First Amendment's right to free speech). *But see* Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735 (2002) (stating that judges often feel that positive rights are outside of their ability to enforce).

238. *See* Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2226 n.136 (2003) (arguing that it makes sense to structure equal protection as a negative right since it sometimes is difficult to measure baseline discrimination against a person or group); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675, 696-97 (1992) (stating that the Equal Protection Clause has been applied most often as a negative right).

239. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); *see* Elder, *supra* note 226, at 600.

240. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

of his publication."[241] In doing so, the trial judge can make factual findings on any subjective animus the defendant may have had towards the plaintiff.[242]

Alternatively, the trial judge, in reaching a constitutional malice determination, can find that a defendant engaged in a course of conduct in spite of its ultimate impact, namely publishing a false statement. In other words, reckless behavior can be proffered to evidence actual malice.[243]

On the other hand, in trying to prove racial discrimination, evidence demonstrating "reckless disregard" or the entertainment of serious doubts about the impact of one's behavior that resulted in discrimination can never carry the day. As the majority in *Personnel Administrator of Massachusetts v. Feeney* insisted, intentional discrimination is not so calibrated or nuanced; "[i]t either is a factor that has influenced [a decision] or it is not."[244] Thus, despite the fact that actual malice and intentional discrimination historically are commonly rooted in scienter and deceit doctrines, the range of probative evidence demonstrating actual malice is greater. That seemingly sensible contrast also manifests the substantive injustice that occurs when refusing to apply the constitutional fact exception to intentional race discrimination findings in two important ways. First, a core tenet of antidiscrimination adjudication is to "select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects."[245] The task of the trial judge is to ferret out the perpetrator of discrimination.[246] In looking for race-dependent decisions made by the perpetrator, the court must look to fault. To do so, the trial court must not just examine whether the perpetrator proceeded on a course of conduct with a purposeful desire to create discriminatory results. The court must also explore which aspect, if any, of that person's conduct contributed to the violation.[247]

If it is true that a court's role in discrimination cases is to identify from "the maze of human behaviors" the cause of the discrimination, then it becomes apparent that intentional race discrimination has as many permutations in possi-

241. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

242. Elder, *supra* note 226, at 555-600 (summarizing libel cases since *Near v. Minnesota*, 283 U.S. 697 (1931)).

243. *Sullivan*, 376 U.S. at 279-80.

244. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 277 (1979).

245. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

246. *See id.* at 1056. Freeman critiques the perpetrator perspective that antidiscrimination cases have reinforced. *Id.* at 1052-57. While acknowledging that antidiscrimination adjudication focuses on individual harm and a co-extensive remedy for the harm, he urges an expanded vision that antidiscrimination proscriptions should achieve, i.e., a focus on the broader conditions of racial discrimination.

247. *Id.*

ble evidence presented as actual malice. To be sure, most discrimination is not the result of conscious, direct malice or bigotry but instead arises out of more subtle, complex motivations.[248] Stereotyping, unexamined or implicit bias,[249] aversive racism,[250] or mixed-motive cognitions are each a form of discrimination marked by some degree of illicit volition. In addition, racially discriminatory effects arise not only from intentional acts but also acts taken without regard to their impact. The Supreme Court has rejected evidence of disparate impact or negligent discrimination as independent proof of an equal protection violation.[251] Furthermore, the Court has failed to embrace the theory of negligent discrimination as grounds for an equal protection claim.[252] By viewing intentional discrimination as a binary phenomenon (either it has influenced a decision or not), the Court has foreclosed the incorporation of other evidence of discrimination into race discrimination jurisprudence.

Second, the notion that discrimination either exists or not unjustly cabins intentional discrimination within the clear error standard of review framework.

248. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 903 (1993) (reviewing studies on stereotyping to theorize that many acts of racist behavior may be motivated by unconscious racism).

249. Unlike traditional racial discrimination, where an actor actively and consciously discriminates against someone based on her race, unconscious bias takes place without the actor even knowing that he may be "treating others differently even when [he is] unaware that [he is] doing so." Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 969 (2006); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) ("Improper motives are easy to hide. And because behavior results from the interaction of a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions.").

250. Aversive racism has much in common with unconscious bias. Aversive racism suggests an inner conflict between denying personal prejudice and unconscious negative feelings and beliefs. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1808 n.349 (2000) (describing the aversive racism thesis as positing "that Whites experience anxiety and discomfort (rather than overt hostility) in the presence of minorities because of a conflict between consciously held egalitarian norms and unacknowledged racial biases"). Far from wearing hoods or burning crosses, aversive racists "support policies that promote racial equality and regard themselves as not prejudiced" but at the same time experience feelings of uneasiness in the presence of African-Americans and tend to engage in racial discrimination when there are "race-neutral justifications for their behavior." Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89, 113 (2007).

251. *See* Washington v. Davis, 426 U.S. 229, 238 (1976).

252. Oppenheimer, *supra* note 248, at 972 (analyzing employment discrimination jurisprudence under Title VII, and criticizing its failure to recognize a negligent discrimination theory).

While there are compelling reasons for treating the legal concept itself as a constitutional fact subject to independent appellate judgment, to incorporate the subtler, more complex motivations into intentional race jurisprudence would fortify significantly the appropriateness of engaging in the fullest appellate review. Evidence pointing to aversive racism, implicit bias, and even discriminatory racial impact findings can be characterized more easily as constitutional, sociological, or legislative facts warranting full appellate review. Moreover, appellate courts even may introduce such evidentiary propositions in the first instance of appeal.

The Court allows reckless acts to serve as a basis for applying the constitutional fact doctrine to actual malice claims. Similarly, the Court should confer the same normative framework to allow for full inquiry into the question of whether a perpetrator engaged in a course of conduct without regard for its racially discriminatory effect or could not justify the rationality of his course of conduct.[253] If the Court is to be consistent doctrinally, it should allow for the myriad forms of discrimination to undergo independent appellate judgment.

B. Actual Malice and Intentional Race Discrimination—An Institutional Values Critique

An examination of the actual malice and intentional race discrimination doctrines demonstrates their similarities in many respects, and yet we are still left without a satisfactory answer as to why they are subject to different standards of review. Consequently, we must revisit the institutional values that motivated Rule 52(a)'s passage. As stated earlier, the application of any articulated standard entails consideration of the underlying policies and their application to the immediate factual situation. By evaluating these values—respective tribunal competencies, administrative efficiencies, and doctrinal coherence—one can assess whether it makes sense to apply independent appellate judgment to actual malice but not to intentional race discrimination.

With actual malice, the Supreme Court weighs the institutional interests in a way that requires a departure from the clear error standard. As the Court explained in *Bose*, resort to the constitutional fact exception for actual malice determinations privileges doctrinal coherence by furthering accurate law application, law declaration, and norm development. Any presumption of finality that would attend trial court fact finding under Rule 52(a) is disregarded. In other words, the decision to exercise independent appellate judgment ensures that actual malice doctrine evolves in a unified, orderly manner. Devalued in the institutional interests balancing are administrative efficiencies. Because litigants effectively are given another opportunity to have facts reheard, trial court determinations are reevaluated (thus adversely impacting comity between the

253. *See* Freeman, *supra* note 245, at 1098 (interpreting *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) to require that ostensibly race-neutral practices with disparate racial impacts be rationalized).

tribunals),[254] and direct economic and temporal costs to appellate tribunals and litigants are increased. Moreover, if one accepts the premise that trial judges are more competent to make the witness credibility assessments that often mark actual malice determinations, the risk of error costs, i.e., a wrong decision, in appellate exercise of independent judgment is also sublimated in favor of ensuring doctrinal coherence.

Yet, with its fidelity to the clear error standard for intentional race discrimination findings, the Court instead has balanced institutional interests in a manner that sacrifices doctrinal coherence for administrative efficiencies. Clear error review lowers direct economic and temporal costs because of the primacy placed upon the finality of trial court findings on intentional race discrimination claims. Litigants and trial courts save time and money due to the limited ability to engage in a subsequent, independent review of factual findings. Appellate courts also run more efficiently if the scope of appeals is narrower. Tribunal comity is enhanced, but, in contrast to actual malice evidentiary findings, decisional error costs are weighed in favor of the presumption that the trial court is best positioned to make credibility and demeanor assessments. With intentional race discrimination findings, the apparent conclusion is that independent appellate judgment would ensure neither the accuracy of decisions nor the confidence in outcomes.

Credibility and demeanor evaluations are the persistent arguments in favor of clear error review for intentional race discrimination determinations. But, the *Bose* Court was undaunted by the task of making those assessments in order to expose the author's motives. Trial judges are undoubtedly better positioned to assess motivation from testimonial responses, rebuttals, vocal tone, nuances, and visual reactions. And, of course, "any inquiry into a person's motivation or mental state (such as intent or knowledge) is necessarily complex, context-specific, and depends upon application for shape."[255] Those complexities obtain, though, regardless of whether the trial judge is considering what a stereo critic meant when he wrote that the sound emanating from a Bose loudspeaker wandered "about the room" or whether considering an employer's testimony on his reasons for firing his only African-American employee.

From an intentional discrimination perspective, clear error review impedes the ability to develop a more robust intentional discrimination doctrine. The Court's refusal to integrate the more nuanced, complex forms of race discrimination into intentional discrimination doctrine deprives courts and society of unified, coherent legal norms of constitutional dimension.[256] Were such ques-

254. Adamson, *Ideological Weapon*, *supra* note 24, at 1081 (claiming that appellate re-evaluation undermines the presumption that trial courts are more competent fact-finders and that trial courts may perceive review as second-guessing).

255. Allen & Pardo, *supra* note 12, at 1776.

256. Professor Linda Hamilton Kreiger compares Title VII race discrimination claims with those based on age discrimination and the varying types of proof needed. While rejecting that implicit racial bias could operate in discrimination, Kreiger notes that the Seventh Circuit embraced such a possibility in age discrimination

tions fully reexamined on appeal, race discrimination doctrine would develop in a way that more broadly encompasses the forms of discrimination as citizens experience them.[257] By extension, giving doctrinal coherence to a broadened understanding of intentional race discrimination would lower direct and social costs by offering stability and predictability to the constitutionally proscribed contours of race discrimination. At the same time, the Supreme Court could further federalism interests and solidifies its authority as the final arbiter of matters directly affecting constitutional rights.

C. *The Subtle Vices of Passive Virtues*

Appellate courts have weighed the institutional values of Rule 52(a) in a manner favoring certain constitutional rights and obligations over others. By discussing the double standard existing between actual malice and intentional race discrimination, one can examine whether Rule 52(a), by its own terms, perpetuates a substantive injustice with respect to race discrimination claims. Finally, one can assess whether the refusal to apply the constitutional fact doctrine (and the independent appellate judgment standard) in the intentional race discrimination setting reinforces any of those substantive injustices.[258]

1. Enforcing Passive Virtues Through Rule 52(a)

Rule 52(a) operates in a way so that its essential terms—"facts," "findings," "oral or documentary evidence," and "clear error"—ensure that intentional race discrimination findings never will receive the benefit of thorough appellate consideration.[259] This is so not only under circumstances in which intentional race discrimination is explored from the perspective of the perpetrator's mo-

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claims. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). *But see* Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 925 (6th Cir. 1984) (quoting 113 Cong. Rec. 34,742 (remarks of Rep. Burke)) ("Unlike race discrimination, age discrimination may simply arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce . . . .").

257. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004). Solum correctly states: "We want outcomes that are substantively just, judgments that are legally correct, and findings that are factually true." *Id.* at 184. Moreover, fair procedures "must, at a minimum, strike a fair or reasonable balance between the benefits of accurate outcomes and the costs imposed by the system of procedures." *Id.* at 185.

258. ROY L. BROOKS, CRITICAL PROCEDURE 43 (1998).

259. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 26 (2001). Words and institutional racism influences the law, its language, and legal structures. By extension, it influences the content of procedural rules. *Id.*

tives and decisional impacts but also when claims are based upon its more subtle forms. What follows is a parsing of Rule 52(a)'s operative terms.

Scholars have noted that the adjudicative processing of "facts" fails to capture adequately the discrimination experience.[260] Every litigant comes to the courthouse armed with a construct of the experience bringing him or her there in the first place. That construct is "any artificial, causal, or interdependent arrangement of facts, factors, elements, or ideas that flows from our inner awareness."[261]

It is the individual's construct of the racial grievance that must receive primary consideration in the adjudicative setting. Overt racial discrimination might be seen readily by others. Yet, not all forms of racial discrimination are viewed as "fact" in a manner that the law is equipped to accept. Stories of or by discrimination victims are not always reductive; they can be intangible and hard to pin down.[262] Even the term "intentional" discrimination fails to capture fairly the experience of victims of unconscious or implicit bias or aversive racism. As a result, intentional discrimination, broadly understood, is more difficult to capture authentically in the adjudicative setting.[263] If a racial grievance cannot be constructed adequately as a "fact" in the more traditional, epistemological sense of being tangible and objective, the result can be the labeling of authentic grievances as opinion, perspective, or worse: imagination. Consequently, the term "fact" might fail to capture legitimate forms of discrimination that cannot be objectified easily.

Finding a fact adds another layer to the quandary. First, to construct a finding of fact requires that a judge do more than simply identify and describe a "reality"; it requires that the judge interpret, choose among, make inferences from, and synthesize data and then evaluate and articulate one or more "*rele-*

260. *See, e.g.*, D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 363 (1992) ("The individual employer's state of mind, his malice or irrationality, is not the source of the injured victim's discrimination experience.").

261. Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1368 (2004).

262. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1261 (1993); Gregory J. O'Meara, S.J., *The Name Is the Same, but the Facts Have Been Changed To Protect The Attorneys:* Strickland, *Judicial Discretion, and Appellate Decision-Making*, 42 VAL. U. L. REV. 687, 692 (2008) ("[T]he law is built around the facts found in a case; facts cannot be analyzed because they consist of matters beyond the courts' control. A close study of narrative theory undermines seeing facts in a case as either bit players or insurmountable forces of nature.").

263. One author has posited that if racism is often unconscious, employment discrimination should be seen more as negligence than intentional action. Oppenheimer, *supra* note 248.

vant realities."[264] Human beings are limited by what they believe, and those beliefs are articulated as reality.[265] In the adjudicative context, those articulations shape one of the competing realities a trial judge must embrace if he is to articulate findings. From the perpetrator's perspective, race-dependent actions or omissions—whether intentional, negligent, or reckless—constitute the other competing reality.

Finding a fact also requires an act of reductionism that, if successful, captures the subordinating experience in a manner that is intellectually and morally accessible. The subordinating experience may manifest itself in its intentional, negligent, reckless, or more subtle forms. If the trial judge cannot or refuses to legitimize the discrimination experience, then that experience will not emerge in a manner that truly does justice to the wound.[266] For those reasons, competent appellate review of the myriad forms of intentional race discrimination is contingent upon, and ultimately defeated by, the a priori "finding of fact" requirement of Rule 52(a).[267]

Decisions interpreting Rule 52(a) further reinforce its deterministic nature. In a relevant case, the Supreme Court reminded appellate judges that their utmost fidelity is to the rule: "[A]pplying the clearly erroneous standard to the findings of a district court sitting without a jury, *appellate courts must constantly have in mind* that their function is not to decide factual issues *de novo.*"[268] Going further, Justice White in *Zenith Radio Corp. v. Hazeltine Research, Inc.* reminds appellate judges that a tie goes to the trial judge: Even in instances "where there

264. Adamson, *All Facts*, supra note 24, at 631 (citing Emmet T. Flood, Note, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795, 1808-13 (1991).

265. *See* Robinson, *supra* note 261, at 1371.

266. *See, e.g.*, Anita Bernstein, *Foreword: What Clients Want, What Lawyers Need*, 52 EMORY L.J. 1053 (2005); Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581 (2006); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule Of Law*, 73 FORDHAM L. REV. 2081 (2005); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219 (2003).

267. Appellate judges and federal courts have acknowledged in varying ways the role that implicit bias and stereotyping may play in racial discrimination. *See, e.g.*, Rice v. Collins, 546 U.S. 333, 343 (2006) ("How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?") (Breyer, J., concurring) (citing Miller-El v. Dretke, 545 U.S. 231, 267-68 (2005) ((Breyer, J., concurring)); Gratz v. Bollinger, 539 U.S. 244, 300-01 (2003) ("'Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.'") (Ginsburg, J., dissenting) (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting)).

268. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (emphasis added).

are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[269] Add to these admonitions the fact that they apply regardless of whether the evidence is in oral, documentary, or some other form. These directives fortify the injustices inherent in Rule 52(a)'s terms. Those admonitions act as checks on appellate court judges even under circumstances for which intuition, common sense, human experience, equal appellate competence (to review documents or even make credibility determinations), and even resort to another rule (such as the constitutional fact exception) would provide the better answer.

The hortative directives offered by the Supreme Court reinforce the substantive injustice of Rule 52(a). That the rule must guide appellate judges—that there can be no clear error even if there is another view to be had—even if the appellate court is as in as good a position to evaluate the evidence as the trial court was means this: Appellate judges might see race discrimination (overt or subtle, conscious or unconscious) after reviewing the evidence (for clear error), yet they cannot come to a conclusion contrary to one trial judge's and provide relief to a substantial injustice.

In contrast, under the de novo or independent appellate judgment review standard, any presumptive correctness of a trial judge's determinations is minimal or nonexistent. Indeed, under the latter standard, appellate judges have a constitutional obligation to disregard the trial court's factual determinations. Although one can see that Rule 52(a)'s operative terms cannot capture effectively intentional discrimination in all of its forms, applying the constitutional fact exception to such grievances would help to ensure that appellate courts are receptive to developing more vigorous, textured legal norms that inform intentional discrimination doctrine.

2. Engaging Active Virtues Through the Constitutional Fact Exception (Some of the Time)

With intentional race discrimination findings, appellate courts enforce a narrow construction of the constitutional fact exception in a bow to judicial minimalism and passive virtues.[270] By hewing to the clear error standard, how-

269. 395 U.S. 100, 123 (1969) ("The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.").

270. At least one author has asserted in the past that that the selective deployment of the constitutional fact doctrine or, conversely, the enforcement of the clear error standard can be guided by ideological biases. Adamson, *Ideological Weapon*, *supra* note 24 at 1082. Attitudinal and personal interests can and do play a role even when deciding on matters of procedure. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 64-65, 206 (1993) (demonstrating the degree to which the ideological attitudes and values of Supreme Court justices influence their preferences on procedural tasks such as certiorari decisions and opinion writing).

ever, those courts simultaneously marginalize and depreciate minority grievances.[271]

Many scholars have lamented that the nascent Equal Protection Clause did little to ensure that African-Americans would receive equal treatment.[272] While the Equal Protection Clause is regarded justifiably as one of the most significant laws to benefit minorities, subsequent Supreme Court jurisprudence has erected burdens that impede realization of its true purpose. Scholars have criticized the intent requirement to establish equal protection violations and the minimized probative force of demonstrated disparate racial impact evidence.[273] To be sure, as recently as the October 2008 Term, the Court established in *Ricci v. DeStefano*[274] a relaxed standard for demonstrating reverse discrimination and seemed poised to deem unconstitutional any consideration of disparate racial impact whatsoever. Concurring in this Title VII reverse discrimination case, which considered white New Haven firefighters' challenging the City's nullification of promotion test results demonstrating that they had outperformed African-American firefighters, Justice Scalia warned that "the war between disparate impact and equal protection will be waged sooner or later."[275] He observed that "Title VII not only permits but affirmatively *requires* such [remedial race-based considerations] when a disparate-impact violation *would* otherwise result."[276] Title VII's "disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory."[277]

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271. Kang, *supra* note 25, at 972 (arguing that passive virtues "forsake[] the constitutional rights of those on the outside to promote the constitutional rights of those situated more toward the inside") (footnote omitted).

272. Such has been the result even though its drafter, John Bingham, made clear that the purpose of the Fourteenth Amendment was to ensure that every person, "no matter whether an Asiatic or African, a European or an American sun first burned upon them" would be equal in the eyes of the law. Aynes, *supra* note 233, at 304. Justice Miller, in the *Slaughterhouse* cases, conceded that African-Americans would benefit from the Equal Protection Clause. *Id.* Yet, between 1873 (the year of the *Slaughterhouse* cases) and the decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), only 15 of the 150 Fourteenth Amendment cases before the courts involved African-Americans. *Id.*

273. *See, e.g.*, Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005).

274. 129 S. Ct. 2658 (2009).

275. *Id.* at 2683 (Scalia, J., concurring).

276. *Id.* at 2682.

277. *Id.*

Others scholars have noted the toughened burdens of proof imposed, particularly in the employment discrimination context.[278] Added is the burden of demonstrating the presence of subtler forms of discrimination. Although the phenomena of unconscious or unexamined racial bias and aversive racism increasingly have been documented and verified, discrimination claims on those grounds remain difficult to sustain. As Justice Scalia portends, openly considering merely the racial impact of one's decisions will be per se unconstitutional. It is enough that *intentional* race discrimination now must be proven to show an equal protection violation;[279] that barrier rises even higher because intent findings are filtered invariably through Rule 52(a)'s clear error standard with no recognition as constitutional fact.[280]

Professor Laurence Tribe has advocated that appellate courts remain flexible in their use and application of procedural rules.[281] "Structural due process" already is implicit in some of the constitutional doctrines that we ordinarily treat either as aspects of substantive due process or as parts of procedural due process. An unyielding application of the clear error standard improperly concretizes (and thus legitimates) majoritarian principles. It does so by reaffirming the philosophy that undergirds judicial minimalism, i.e., that the role of courts should be a modest one, leaving issues of race and rights to the arena of deliberative politics and constituent majorities. An unyielding refusal to acknowledge other forms of intentional race discrimination also concretizes majoritarian viewpoints on the meaning of intentional race discrimination.

Case-by-case decisionmaking requires a court to resolve a dispute on its own terms while articulating some coherent explanation for the decision reached. Where the issues at hand are flexible, such as the constitutional fact doctrine or the meaning of intentional discrimination, those decisionmakers should adopt decisional approaches that are as open as possible. Once consensus amongst appellate tribunals has united around additional themes that in-

278. *See* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. L. REV. 657, 657-60 (2003). The issue is exacerbated further when one considers that certain evidentiary findings are reviewed only for abuse of discretion.

279. Siegel, *supra* note 196, at 1136 ("[T]he discriminatory purpose requirement now insulates many, if not most, forms of facially neutral state action from equal protection challenge.").

280. The Supreme Court's position regarding intentional race discrimination is even more worrisome when one considers its affirmative action jurisprudence. Intent determinations are virtually absent in claims of reverse discrimination. Thus, although anti-affirmative action grievances warrant not only independent, but also strict scrutiny, intentional race discrimination findings fall victim to the "non-presumption of animus" underpinnings of *Davis*. *See* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 664-65.

281. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

form intentional race discrimination, the judicial system then can incorporate broader, bright-line norms and per se rules.

Time and again with regard to racial justice, appellate courts have ceded to the countermajoritarian difficulty. The belief that somehow independent appellate judgment on intentional race discrimination findings is inappropriate, if not unnecessary, is grounded largely in the notion that only trial judges have the capacity and can be trusted to hold actors to their constitutional obligations. To allow for appellate review of race discrimination findings only on the narrowest grounds ignores the critical role appellate courts have played in the advancement of minority rights.[282]

The presumption of nondiscriminatory animus on the part of those creating or implementing facially neutral laws, regulations, or policies places those denied their constitutional rights at a proof disadvantage from the start. Furthermore, the intentional discrimination requirement has the effect of aborting proof of and remedy for the countless examples of the racially discriminatory impact of ostensibly neutral laws, regulations, or policies.[283] The refusal to confer constitutional fact status to intentional race discrimination findings reinforces the difficulties placed in the way of historically subordinated groups, retrenches majoritarian principles surrounding race and discrimination, and adds to the now legion indicia of the Supreme Court's retreat from hearing and allowing for redress of those grievances.

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282. Chemerinsky, *supra* note 13, at 683 ("Laws enforcing segregation existed throughout the South and likely would have lasted long beyond their invalidation by the Supreme Court if it had been left to the political process.").

283. Hutchinson, *supra* note 280, at 666-67 (noting that evidence of disproportionate impact alone, while not irrelevant, no longer can carry the day under equal protection jurisprudence). Even though evidence of disparate impact can be proffered to demonstrate intentional discrimination circumstantially, "doctrinal explications of 'discriminatory intent' after *Davis* and *Arlington Heights* seem to close whatever room these cases provided for utilizing impact evidence to prove intent." *Id.* at 667. Chemerinsky also notes that that trial judges often fail to articulate findings of fact in a manner that will shield them from appellate review. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2026 (2002) (arguing that Supreme Court opinion rhetoric often fails to "articulate its standards in a consistent manner and to follow consistent approaches to interpreting particular constitutional provisions"). Moreover, appellate judges often fail to explain their choice of standard of review and the decisional tools used to arrive at that choice. When an appellate court exerts its power to depart from Rule 52(a)—and then fails to express its reasoning with clarity—it makes the decisional outcome look lot like whimsy or worse. *See* Adamson, *Ideological Weapon*, *supra* note 24, at 1082.

D. *Consequences of Active Virtues for Intentional Race Discrimination Factual Determinations*

As we have seen, appellate courts possess the authority to exercise independent judgment over findings of intentional race discrimination. The Supreme Court could determine, once and for all, that intentional discrimination findings are constitutional facts that demand independent appellate judgment, as it has done with the actual malice doctrine. Alternatively, trial court evidence of racial discrimination through implicit bias or aversion also could be reviewed as ultimate, legislative, or sociological facts warranting full review. Moreover, like appellate opinions that discuss stereotyping and its pernicious manifestations, judicial notice can be taken by appellate courts. In this manner then—whether labeled as a mixed question of law and fact, an ultimate fact, even a law-legislative or sociological fact—the trial court's factual findings would require, at a minimum, independent review.

Imagining a world in which intentional race discrimination factual determinations are regarded as constitutional facts for purposes of appellate review entails consideration of tradeoffs. There are several. One tradeoff would require consideration of who is entitled to have factual determinations in race discrimination cases reviewed independently and under what circumstances. Crafting the emergent rule asymmetrically, an argument might be made that independent appellate judgment should occur only when a trial court has found no intentional discrimination. Such an approach might seem unworkable and fundamentally unfair. Another attractive, yet fundamentally unfair, consideration would be to mandate that independent appellate judgment should follow only when the grievant is a member of a historically subordinated group.[284] After all, if the fundamental concern is ensuring that procedures are implemented to allow for outsider voices to be heard and that decisions made adversely to those outsiders are accurate, then one crafting the rule asymmetrically would worry less about trial decisions that vindicate majoritarian interests (e.g., the employer or the municipality).[285] Such a selective application of an independent judgment standard for intentional race discrimination findings, however, would be impractical and fundamentally unfair. The ideal proposition would be applying the independent judgment standard in the same manner to intentional race discrimination factual findings regardless of the outcome and regardless of the status of the grievant or defendant.

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284. *Cf.* BROOKS, *supra* note 258. This re-imagination of Rule 52(a) applies critical race theory concepts of asymmetry and standpoint. Asymmetrical construction of a law, or, in this case, a standard, envisions a model of equality where it is assumed that minorities are differently situated in society, and thus the rule should be designed (or interpreted) to compensate for racial disadvantage. *Id.* at 16. This Rule 52(a) construction also responds to the interpretation that it fails to give voice adequately to outsiders' perspectives of racial grievances. *Id.*

285. *Id.* at 24-26.

A second tradeoff would be the diminution of comity between the courts. Under an independent appellate judgment standard, trial judges' factual findings would no longer carry presumptive correctness for intentional race discrimination cases. As a result, trial judges may be subject to less regard by the litigants before them and may perhaps suffer morale issues as they see what was once their fact-finding province arrogated further by appellate judges. On the other hand, with a bright line judgment that intentional race discrimination findings are constitutional facts, trial judges eventually would yield to the underlying rationale for treating them as such.

A third significant tradeoff would be the increased direct economic and temporal costs. Those costs would be borne both by litigants and the appellate system. An abiding concern with appellate courts always has been their caseloads.[286] More specifically, scholars have noted an apparent effort by courts over time to limit the scope of relief available in discrimination claims due to the sheer numerical magnitude of such cases and the potential strains on the trial and appellate dockets.[287] The Supreme Court itself has remarked upon this concern. In her *Hernandez* concurrence, Justice O'Connor worried about a rule allowing for discrimination determinations based solely on proven racially disparate impacts "would give rise to an unending stream of constitutional challenges."[288] It is a mark of intellectual dishonesty if concern for the number of possible constitutional grievances is part of a spoken or unspoken rationale for restricting questions of constitutional magnitude to clear error review.

To treat intentional race discrimination findings as constitutional facts for independent judgment would require litigants and the courts to invest more time and resources in prosecuting claims. Appellate dockets and time needed to try cases certainly would swell. At the same time, expenses incurred at the trial court level would increase if litigants fail to prosecute cases with the vigor they otherwise might exert. Conflicts in outcomes for intentional race discrimina-

286. *See* Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645 (2006); Paul R. Michel, *The Court of Appeals for the Federal Circuit Must Evolve To Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177 (1999); Carl Tobias, *Chief Judge Martin and the Modern Sixth Circuit*, 49 AM. U. L. REV. 1059 (2000); J. Jason Boyeskie, Comment, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 961 (2008) (noting a seventy-seven percent increase in cases appealed between 1988 and 2006). The concern is hardly new. The increasing complexity and volume of litigation "[s]harply curtailed" appellate review as early as the 1840s. Clark & Stone, *supra* note 34, at 200.

287. Supporters of the intent requirement in discrimination cases cite the costs of impact alone and the burdens on appellate courts. Issacharoff, *supra* note 204, at 336 (suggesting that, in the face of "the sheer magnitude of cases and the limits of the appellate docket," one response is to "reduce the scope of relief is to redefine what constitutes the violation").

288. Hernandez v. New York, 500 U.S. 352, 374 (1991) (O'Connor, J. concurring).

tion claims within circuits would add to the direct costs, as those conflicts would require reconciling.

Direct costs incurred by litigants are no small issue—particularly with poor plaintiffs prosecuting discrimination claims. Furthermore, it is no small thing to minimize the doubtless administrative efficiency and system costs that would come from treating intentional race discrimination findings as constitutional facts. Those costs can be foreseen readily. The Supreme Court, however, could have foreseen its inability, as a matter of unerring principle, to justify why certain constitutional rights deserve more vigilant protections than others.

Conclusion

What appears on the surface as a principled, minimalist application of Rule 52(a)'s clear error mandate in intentional race discrimination cases is in fact a selectively passive application of a procedural rule. Whether driven by pragmatism or ideology, this approach is neither doctrinally nor institutionally defensible. The passive treatment of intentional race discrimination determinations ultimately impairs the ability of appellate courts to ensure that the constitutional principles undergirding the Fourteenth Amendment are upheld. So here lie the subtle vices of passive virtues with respect to Rule 52(a), intentional discrimination, and the constitutional fact doctrine.

First, findings regarding intentional race discrimination and actual malice are constitutional facts. The invariable application of Rule 52(a) to intentional race discrimination findings signifies an ill-considered balancing of institutional values that privilege administrative efficiencies and costs over decisional accuracy, doctrinal coherence, and substantive justice. The Supreme Court's faulty balancing illustrates again that ostensibly neutral, nonsubstantive objectives such as institutional competence and decisional accuracy are never neutral.

Second, the Supreme Court has failed to clarify its independent appellate judgment standard and why it does not apply to all constitutional facts. By refusing to acknowledge the constitutional significance of intentional race discrimination findings, the Supreme Court deprives discrimination jurisprudence of robust doctrinal norming when a more sensible and consistent approach could develop a body of law drawing fully upon the actual complexity of facts and considerations involved in intentional discrimination cases. Although cases must be decided on their own terms, appellate courts must be able to adopt rules of decision that ensure both substantive and procedural due process. Only through a determination that intentional race discrimination findings are constitutional facts will the Court articulate proper legal norms that can guide future cases and behaviors.

Finally, Rule 52(a) is a vital procedural tool that serves to legitimize the trial and appellate processes. All litigants deserve outcomes that are legally correct. Equally important is the fact that litigants deserve assurance that the procedural rules have been applied fairly and equitably. When the Court purports to apply the same procedural rule yet uses it passively towards intentional race discrimination and actively towards other constitutionally critical issues, it delegitimizes

the adjudicative process. The double standard critically delegitimizes the substantive outcomes as well. Those aggrieved come to perceive—rightly or wrongly—that procedural tools are employed in outcome-determinative ways and that appellate courts are failing to vindicate constitutional rights as to race with the vigor they exert over other constitutional claims.

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