ARTICLES

JUDICIAL REVIEW OF FINDINGS OF FACT

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I. THE CONCEPTUAL BACKGROUND

An important and continuing controversy concerns the permissible scope of judicial review of findings of fact. The issue arises either in the context of a trial judge's disagreement with a jury's determination, or an appellate court's dissatisfaction with the trial court's factual determinations, whether made by a jury or by a judge sitting without a jury. In their many unsuccessful attempts to supply an adequate conceptual framework for analyzing the problem, courts have traditionally distinguished among questions of fact, questions of law, and mixed questions of law and fact. Questions of fact are for the jury or the trier of "facts." Questions of law, on the other hand, are for judges either sitting at the trial level, with or without a jury, or sitting at the appellate level. Mixed questions of law and fact are of course those questions on which trial judges and appellate judges will second-guess a jury and on which appellate judges will second-guess trial judges. Perhaps the most frequently given example of a mixed question of law and fact is the question of whether a person is "negligent." Judicial declarations that certain "facts" are jurisdictional or constitutional, and thus open to plenary judicial review, have not eased the task of making sense of these categories.

How to characterize a particular question has continually exercised the intellectual faculties of the justices of the United States Supreme Court. It seems as if no term goes by without a violent disagreement among the members of the Court over whether some trial court determination is a question of law or a mixed question of law and fact, and thus open for re-examination, or a question of fact, whose re-examination is thus foreclosed.¹ This Article will examine why judicial review of find-

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¹ In Maggio v. Fulford, 462 U.S. 111, 117 (1983), for example, the majority in a per curiam opinion concluded that the question of an accused's competence to stand trial in a state court was a factual question to be resolved by a state court whose findings could be overturned in a federal habeas corpus proceeding only if, in the language of 28 U.S.C. § 2254(d)(8) (1988), they were not
ings of fact has generated so much confusion and offer an alternative method of determining the amount of deference to be afforded so-called findings of fact.

Between 1500 and 1650, when juries were summoned to perform their original function of saying what the facts were, there was no basis upon which a court could substitute its own conclusions for those of the jury. It is only with the development of modern methods of trial and the retention of the jury, now transformed into a group who must be instructed about a matter of which they essentially have no specific knowledge, that the problem of judicial review of findings of fact arises. The problem arises not merely because we now have the real possibility of a two-tier system of judge and jury but also because notions about the importance and independence of the jury have carried over into modern times. The Seventh Amendment, for example, provides that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Of course, the "rules of the common law" have always been in a state of evolution. Nevertheless, for political and historical reasons, it continues to be part

"fairly supported by the record." Justice White, concurring in the result, asserted that the competency question was one of mixed law and fact. Maggio, 462 U.S. at 118-19. Justice Marshall, writing in dissent, also found it to be a question of mixed law and fact. Id. at 120. (Justices Brennan and Stevens joined the portion of Marshall's dissent which claimed that § 2254(d) does not apply to questions of competency.) See also Patton v. Yount, 467 U.S. 1025 (1984) (where there was a similar dispute as to the status of a state trial court's ruling on whether a prospective juror had a preconceived opinion that disqualified him from serving on the jury). On the other hand, in Miller v. Fenton, 474 U.S. 104, 115 (1985), the Court held, with Justice Rehnquist dissenting, that the issue of whether a confession was a voluntary one was a question of law and thus not subject to the strictures of § 2254(d)(8). Then, in Burger v. Kemp, 483 U.S. 776, 801 (1987), Justice Blackmun, in dissent, joined by Justices Brennan and Marshall, disagreed with the majority's deference to the lower courts' findings on whether defendant's counsel had "actively represented conflicting interests." The question, they asserted, was one of mixed law and fact. Id. at 802 n.8. More recently still, the Court held that the question of "competency" to waive the right to postconviction review was a factual issue, Demosthenes v. Bax, 493 U.S. 731, 735 (1990) (per curiam); Justices Brennan and Marshall, in dissent, disagreed. Id. at 740. A year later, however, the Court reaffirmed that the question of the "voluntariness" of a confession was a legal issue, Arizona v. Fulminante, — U.S. —, 111 S.Ct. 1246, 1252 (1991).

2. See Theodore F.T. Plucknett, A Concise History of the Common Law 106-38 (5th ed. 1950). The jury, as representative of the community, came to "present the suspicions of the countryside, or, in the case of a petty jury, to express its final opinion." Id. at 127. The modern impartial jury, who came to hear the evidence, developed by the latter part of the fifteenth century. Id. at 129-30. The ancient remedy against a wrongful verdict was by attainder, whereby the first jury was accused of perjury. Id. at 131. The practice of granting new trials for unreasonable verdicts developed in the seventeenth and eighteenth centuries. Id. at 135-36. In certain types of cases trial by wager of law or by wager of battle was possible. The latter was abolished in 1819 in Act to abolish Appeals of Murder, Treason, Felony or Other Offenses, and Wager of Battle, or joining Issue and Trial by Battle, in Writs of Right, 59 Geo. 3, ch. 46, § 2 (1819) (Eng.). The former was abolished in 1833 in An Act for the further Amendment of the Law and the better Advancement of Justice, 3 & 4 Will. 4, ch. 42, § 12 (1833) (Eng.). As will be seen, infra note 4, trial by a judge alone was a late development in the common law.

of our heritage that, even in civil cases, the findings of juries should not be lightly ignored.

Some of this aura has been carried over to the role of a trial judge when he sits without a jury. Considerations of judicial efficiency may perhaps account for some of this transference. Nonetheless, the fact that no such deference was shown in admiralty and equity appeals shows that, when acting as the trier of fact in an action at common law, the trial

4 Before the passage of the Judicature Acts in the 1870s, it has been said that a judge could not try an action at common law without a jury. See A.L. Goodhart, Appeals of Questions on Fact, 71 Law Q. Rev. 402, 407 (1955). Goodhart cites the judgment of Lord Esher, M.R., in Colonial Sec. Trust Co. v. Massey, [1896] 1 Q.B. 38 (C.A. 1895). Lord Esher said that, before the Judicature Acts, only from the chancery courts “could an appeal from a judge sitting without a jury have then come.” Id. at 39.

With regard to the United States, it was not until 1865 that provision was made, in the federal courts, for the waiver of jury trials in actions at law. Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501 (re-enacted as Rev. Stat. §§ 649, 700, 28 U.S.C.A. §§ 773, 875 (1928), and repealed by Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 992). This act provided that “issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury, wherever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving jury.” § 4, 13 Stat. at 501. The act further provided that “[t]he finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury.” Id. Review was by writ of error or appeal upon “a bill of exceptions” and, when “the finding is special, the review may also extend to the determination of the sufficiency of facts found to support the judgment.” Id. Apparently, it was possible to waive a jury before that time by submitting the case to the judge, but this was treated as the equivalent of submitting the case to an arbitrator and findings of fact were unreviewable. See James Wm. Moore & Joseph Friedman, Moore’s Federal Practice § 39.02, at 3026 (1938).

The major nineteenth-century innovation at the state level was the adoption of Code Pleading by New York in 1848 and then afterwards eventually by something over a majority of the states. See Charles E. Clark, Handbook of the Law of Code Pleading 19-20 (1928). Most of these states nevertheless continued to limit appellate review in what were traditionally actions at law to review for errors of law only, and a few states also so limited “appellate review of equity questions.” Id. at 63-67.

5 An appeal in equity “was called a rehearing, since the Court [of Appeal] could set aside the decree or judgment of the judge who had tried the case, and pronounce another decree or judgment.” Colonial Sec. Trust Co. v. Massey, [1896] 1 Q.B. 38, 39 (C.A. 1895) (per Lord Esher, M.R.). “The pleadings are all very full. For in admiralty an appeal means a new trial.” Gustavus H. Robinson, Handbook of Admiralty Law in the United States 26 (1939). The use of affidavits and the elaborate transcription of the evidence was of course what made these more elaborate review proceedings possible, but the general use of verbatim transcripts in trials courts of general jurisdiction has made a comparably complete record available in actions at common law.

In the United States, the Judiciary Act of 1789 was treated as enforcing the same restrictions on review of findings of fact in suits at equity and admiralty as applied to actions at common law. See Wiscart v. D’Auchy, 3 U.S. (3 Dall.) 320, 324 (1796). Congress restored the traditional distinction between actions at law and suits in equity and admiralty in 1803. Some restriction on the scope of appeals to the Supreme Court in admiralty were reintroduced in 1875, but these became inoperative in 1891. See Felix Frankfurter & James M. Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 23-35 (1930). In 1912, the Court promulgated the Rules of Practice of the Courts of Equity of the United States which in Rule 75(b) provided that:

[i]t is evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form,
judge has been clothed with some of the "constitutional" status of the
duty. Of course, judges have always been able to invade the province of
the jury by classifying certain issues as questions of law. In actions for
malicious prosecution, whether probable cause exists has long been clas-
sified as a question of law.6 There are, of course, modern examples as
well. As is well known, the Court has made the question of whether a
plaintiff in a defamation action is a "public figure" a question of law even
though to the untutored this might seem to be more of a factual question
or at most a mixed question of law and fact similar to the question of
whether a defendant has been "negligent."7 This is not the occasion to
discuss the wisdom of these developments. This Article will be con-
cerned only with those questions that the courts are prepared to concede
are "questions of fact" or that the courts are prepared to concede have
sufficient factual associations to be classified as "mixed questions of law
and fact."

save that if either party desires it, and the court or judge so directs, any part of the testimony
shall be reproduced in the exact words of the witness.
226 U.S. 627, 671 (1912).

Subsequently, effective in 1930, Rule 70-1/2 was added to the Equity Rules. 281 U.S. 773
(1929). This rule required the court of first instance to "find the facts specially and state separately
its conclusions of law thereon." Id. A similar provision, Rule 46-1/2 was added to the Admiralty
Rules at the same time. Id. In the meantime, when the Supreme Court promulgated its own revised
rules to reflect the substantial discretion it had been granted by the Act of February 13, 1925, 43
Stat. 636, as amended, to control its own docket, it made review on writ of certiorari discretionary.
See Sup. Ct. R. 38, ¶ 5, 275 U.S. 577, 624 (1928). Moreover, the Court provided that, in appeals in
admiralty cases, when "the power of review is limited to . . . questions of law arising on the record,"
the record itself would be "confined to the pleadings, findings of fact and conclusions of law thereon,
opinions of the court, final judgment or decree, and such interlocutory orders, and decrees as may be
necessary . . ." Sup. Ct. R.10, ¶ 5, 275 U.S. at 602. By these means the scope of review of factual
findings in equity and admiralty cases was materially circumscribed.

The adoption of the Federal Rules of Civil Procedure in 1938, Rule 52(a) of which will be
discussed at some length below, abolished the distinction between law and equity. The Federal
Rules of Civil Procedure, including of course Rule 52(a), have, since 1966, applied to suits in admir-
lity although the Court had already, by judicial decision, imposed in admiralty cases the limitations
on appellate review of the findings of fact of district courts contained in Rule 52(a). See McAllister

6 See 3 RESTATEMENT (SECOND) OF TORTS 406 (1977) (Introductory Note to Chapter 25). See
also JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 221-25
(1898) Thayer was opposed to classifying the issue as a question of law. On the other hand, Thayer
recognized that even in the earliest days of the jury, there were always some factual issues that the
judges of necessity had to decide themselves. See id. at 184-87; see also infra note 60.

7 Starting with Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court has always
decided this question on its own without any deference at all to the trial court's determination. See Wolston
v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time,
Inc. v. Firestone, 424 U.S. 448 (1976). Thus, according to RESTATEMENT (SECOND) OF TORTS
§ 580A cmt. c (1977), "[t]he question of whether a plaintiff is a public official or a public figure . . . is
one of law, not of fact . . ." The RESTATEMENT also makes the question whether an activity is
"abnormally dangerous," and thus subject to the doctrine of strict liability, one for the court. Id. at
§ 520 cmt. 1. For a critical view of this position, see George C. Christie, An Essay on Discretion, 1986
DUKE L. J. 747, 764-78.
Once the classification problem is stated a host of difficult questions arise. Assuming it is possible to distinguish between questions of law and questions of fact, what is a mixed question of law and fact? And, assuming this inquiry can be satisfactorily answered, what is it about mixed questions of law and fact that justifies a greater degree of judicial involvement in their resolution than in the resolution of "factual" questions? Finally, assuming that some greater degree of judicial involvement is mandated when a mixed question of law and fact is presented, what should be the degree of that involvement? Can a trial judge reviewing a jury determination or an appellate court reviewing a trial court disregard the finding under review and substitute its own finding even if the finding under review has a rational basis? And these problems are not the only ones. Attempting to resolve these issues requires examination of a number of statutory and judicial developments which make resolution of the issues more crucial without at the same time making their resolution any easier and, indeed, sometimes making their resolution more difficult. For example, under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court reviewing the findings of fact made by a trial court, trying a case without a jury, must sustain these findings unless they are "clearly erroneous."8 In a somewhat similar vein, Congress has decreed that, in a federal habeas corpus proceeding, the findings of state courts on factual questions can be overturned only if they are not "fairly supported by the record."9

The question of the appropriate level of review of findings of fact has assumed increased practical importance after the Court, in *Bose Corp. v.

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8 FED. R. CIV. P. 52(a). This rule further provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Advisory Committee's note to Rule 52, that accompanied the rule at the time of its original adoption, states that the provisions on review of findings of fact made by the district courts were drafted with the intention of adopting the "scope of the review in modern federal equity practice." See Thomas A. Coyne, *Rules of Civil Procedure for the United States District Courts* 595 (1983) (including the advisory committee's note.) By modern equity practice, they were referring to the type of review exercised after the adoption of Rules 75 and 70-1/2 of the former Federal Equity Rules that had the effect of substantially limiting the traditional scope of review in suits in equity. See supra note 5. In point of fact, the Supreme Court has over the years construed Rule 52(a) to enforce a more restricted form of appellate review of district court findings of fact than that which was followed under the Equity Rules. For example, district court findings based upon physical or documentary evidence, or consisting of inferences from other facts are now subject to the clearly erroneous standard of review. See *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), discussed infra at note 134. In *Orvis v. Higgins*, 180 F.2d 537, 539 (2d Cir. 1950), cert. denied, 340 U.S. 810 (1950), the Second Circuit held that, following the old equity practice, an appellate court could disregard the findings of a trial judge sitting without a jury "if [inter alia] the trial judge's finding . . . rests exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance." *Orvis* was expressly repudiated by the Court in *Anderson*, 470 U.S. at 574. Rule 52(a) has now been amended so that findings based upon documentary evidence are expressly subsumed under the "clearly erroneous" standard. See infra at notes 138-39.

Consumers Union of United States, Inc.,\textsuperscript{10} intensified its continuing flirtation with the notion of “constitutional fact.” As previously noted, one of the principal qualities of a constitutional fact is that it is one which a reviewing court, and ultimately the Supreme Court, must itself decide, even if that fact has been determined after a full hearing in one or more courts of law. As such, it is a much more sweeping notion than the ancient common law notion of “jurisdictional fact” from which it developed. The Court, of course, had already held, in New York Times Co. v. Sullivan,\textsuperscript{11} when it enunciated the constitutional malice requirement, that “we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.”\textsuperscript{12} What makes Bose of interest is its implementation of this “independent judgment” requirement.

In Bose, a federal district court sitting without a jury in a product disparagement case found that actual malice had motivated a Consumers Union engineer to prepare a report criticizing some of Bose’s speakers because the sound moved “about the room.”\textsuperscript{13} The evidence showed, and the engineer admitted, that the sound moved “along the wall” between the speakers. The engineer maintained that his choice of the words “about the room” to describe this phenomenon was an accurate description. He questioned whether anyone would have been any happier if he had used the word “across” to describe this phenomenon.\textsuperscript{14} The federal district judge found these not to be credible assertions. The engineer was “an intelligent person whose knowledge of the English language cannot be questioned.”\textsuperscript{15} The district judge could not believe that such a person could believe that “about the room” meant “along the wall.” The court of appeals, however, disagreed with the finding of actual malice.\textsuperscript{16}

The courts of appeals’s conclusion was in turn challenged in the Supreme Court on the ground that Rule 52(a) of the Federal Rules of Civil Procedure permitted the setting aside of the district court’s findings only if they were clearly erroneous. The Court nevertheless affirmed in an opinion written by Justice Stevens. On the basis of its own review of the record, the Court held that “as a matter of law . . . the record does not contain clear and convincing evidence” that the article was prepared with knowledge of its falsity or with reckless disregard of the truth.\textsuperscript{17} In

\textsuperscript{10} 466 U.S. 485 (1984).
\textsuperscript{11} 376 U.S. 254 (1964).
\textsuperscript{12} Id. at 285.
\textsuperscript{14} 508 F. Supp. at 1276.
\textsuperscript{15} Id. at 1276-77.
\textsuperscript{16} 692 F.2d 189 (1st Cir. 1982), aff’d, 466 U.S. 485 (1984).
\textsuperscript{17} 466 U.S. at 513. As we will have occasion to stress at greater length, see infra text accompa-
dissent, Justice White described the question of actual malice as a “question of historical fact,” and Justice Rehnquist, joined by Justice O'Connor, characterized it as a “pure question of fact.” As such, under Rule 52(a), the district court's finding was not open to de novo review by appellate judges.

In this Article, I shall examine the intellectual problems raised by the attempt to exercise review of findings of fact. In order to focus the discussion, I shall take the Court's elaboration of the doctrine of constitutional fact as my point of departure. I shall then explore the various analytical devices that courts and legal commentators have devised to establish the extent to which the determinations of an initial fact finder may be disregarded by other participants in the judicial process. I shall ultimately submit that analyses based upon the traditional categories do not make sense and cannot be made to make sense. The notion of what is a “finding of fact”—of what indeed is a “fact”—is too crude and encompasses too much to be a useful means of determining the extent to which the conclusions of a trier of fact should be open to second guessing. There is indeed much to be said for granting almost total deference to the findings of triers of fact, particularly of juries. If, nevertheless, the Court is going to continue to insist that some factual determinations made in trial courts are to receive less judicial deference than others, a different approach must be adopted from that which has traditionally been taken. I shall submit that the only sensible method of determining the degree of scrutiny to be accorded various so-called findings of fact is one that does not focus on whether what is being decided is characterized as a “factual” matter or as a question of “primary fact” or “historical fact” but focuses rather, in more than a superficial way, on the intellectual processes by which the particular determination in question has been made.

II. SOME HISTORY ON JURISDICTIONAL AND CONSTITUTIONAL FACTS

The concept of a “jurisdictional fact,” of which so-called constitutional facts are a modern analogue, is a difficult one. The idea is that some facts go clearly to the jurisdiction of some inferior decision-maker, often some statutory authority, whereas other facts, however crucial to the merits of the case, are not relevant to the question of the decision-maker's jurisdiction. The doctrine can be traced back as far as the late seventeenth century. Louis Jaffe traces its evolution through a number

18 466 U.S. at 515.
19 Id. at 517.
20 One of the earliest expressions of the doctrine of jurisdictional facts is Terry v. Huntington,
of early eighteenth-century cases involving orders made by magistrates in the course of administering the Poor Laws. For example, in one of the cases he cites, an order of bastardy was quashed because there was no express averment in the order that the child was born in the parish in which the relief was ordered. In another early case, not cited by Jaffe, but which perhaps shows more clearly the theoretical rationale for these early decisions, the court quashed an order that the "Inhabitants of Manchester" should support a widow and her four poor children because the order did not set forth that the woman was indigent, "which is the very foundation of the justices [sic] jurisdiction." The willingness of reviewing courts to hear cases involving challenges to the jurisdiction of officials issuing a multitude of administrative orders became sufficiently great that it created administrative problems. As a result, attempts were made in the nineteenth century to restrict the scope of that review. A distinction was thus made between the nature

Hardres 480, 145 Eng. Rep. 557 (Ex. 1680). The case involved a statute providing for a tax on strong wine and was in the form of an action of conversion against those who took the plaintiff's goods pursuant to a warrant of the commissioners of excise. In the course of the discussion it was said that if rose water were adjudged to be strong wine that finding could be attacked in a later action but not a finding that small beer was strong beer, at least if the plaintiff were a brewer or retailer. Hardres at 483-84, 145 Eng. Rep. at 559.


22 Rex v. Butcher, 1 Strange 437, 93 Eng. Rep. 620 (K.B. 1721). In The King v. Gully, 10 Mod. 307, 88 Eng. Rep. 740 (K.B. 1715), the court quashed an order requiring a father to maintain his daughter because the order did not set forth that the daughter was "unable to work." See also The Queen v. Dunn, 10 Mod. 221, 88 Eng. Rep. 702 (Q.B. 1714) (Order requiring a father-in-law to maintain his son's widow was quashed because the order did not set forth that he was of "sufficient ability" to maintain her.). Jaffe treats the Dunn case as one in which the order was quashed because there was no finding that the woman's father could not support her rather than for the lack of a finding that the father-in-law was able to support the woman. JAFFE, supra note 21, at 650. Jaffe's misreading of the case was perhaps occasioned by the fact that in one place in the report of the case the word "father" is used but in a context where what is meant is clearly father of the son and not father of the son's widow.

23 The Queen v. The Inhabitants of Manchester, 10 Mod. 220, 88 Eng. Rep. 702 (Q.B. 1714).

24 See JAFFE, supra note 21, at 630-31. The key cases were Britannia v. Kinnauld, 1 Brod. & B. 432, 129 Eng. Rep. 789 (C.P. 1819), and The Queen v. Bolton, 1 Q.B. 66, 113 Eng. Rep. 1054 (Q.B. 1841). In Britannia, the plaintiff brought an action in trespass against magistrates who had taken his vessel under the "Burn-boat act." The plaintiff tried to introduce evidence that the vessel in question was not a boat within the meaning of the act. The verdict of the magistrates was held to be conclusive on the issue.

Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged, that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally, and, if the decision were so gross as to call a ship of seventy-four guns a boat, it would be a good ground for a criminal proceeding.

Britannia, 1 Brod. & B. at 438-39, 129 Eng. Rep. at 792 (per Dallas, Ch.J.). "[T]he fallacy lies in assuming, that the fact, which the magistrate has to decide, is that which constitutes his jurisdiction. If a fact decided as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction." Id. at 442, 129 Eng. Rep. at 793 (per Richardson, J.).

In Bolton, a magistrate's order evicting a pauper from a parish house was challenged on certio-
of the matter before a magistrate or other office or body and the truth or falsity of any charges made against a party to the proceedings before the magistrate or officer or body. Under this view, on certiorari or in an action of trespass against an officer, only jurisdiction over the subject matter could be challenged. At least until recently, even some errors of law could not be challenged if they did not go to the jurisdiction of the officer or tribunal. These limits on the scope of the notion of jurisdictional fact were followed in some cases, but were ignored in others. When a court is prepared to re-determine a so-called jurisdictional fact, the modern English procedure is to permit the use of affidavits to supplement the record where necessary, rather than to insist on a new evidentiary hearing.

rari on, among other grounds, that Bolton had occupied the house as a paying tenant and not as a pauper. Bolton, 1 Q.B. at 67-68, 113 Eng. Rep. at 1055. Bolton submitted affidavits in support of his contention. The court ruled that, if the charge were not within a magistrate’s jurisdiction or if it could be shown by affidavit that the magistrate misstated the charge in drawing up the proceedings, a reviewing court would entertain the challenge but not if the question was the sufficiency of evidence. Id. at 75-76, 113 Eng. Rep. at 1058.

. . . Upon principle, therefore affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry. Id. at 74, 113 Eng. Rep. at 1057 (per Lord Denman, C.J.).

The change in English law is generally ascribed to Lord Denning’s, M.R., judgment in Peckman v. Keepers and Governors of Harrow School, 1979 Q.B. 56 (Eng. C.A.), in which he declared “no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends.” Id. at 70. Perhaps in anticipation of such a shift, some years earlier, in Anisminic, Ltd. v. Foreign Compensation Comm’n, [1969] 2 App. Cas. 147 (appeal taken from C.A.), the House of Lords took a very broad view of what constituted a jurisdictional error. Lord Wilberforce declared:

A tribunal may quite properly validly enter upon its task and in the course of carrying it out may make a decision which is invalid—not merely erroneous. This may be described as ‘asking the wrong question’ or ‘applying the wrong test’—expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal’s area and doing something wrong within that area—a crucial distinction which the court has to make.

Id. at 210. See also Lord Reid’s speech, id. at 171. (“But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.”) For the assertion that there has now been a major change in English law, and for a discussion of the current state of English law on the question of judicial review of jurisdictional defects, see G.L. Peiris, Jurisdictional Review and Judicial Policy: The Evolving Mosaic, 103 LAW Q. REV. 66 (1987), and especially id. at 70-74. See also S.A. de Smith, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 114-15, 136-37 (J. M. Evans ed., 4th ed. 1980); H.W.R. WADE, ADMINISTRATIVE LAW 264-67 (5th ed. 1982).

26 For citation to earlier cases see JAFFE, supra note 21, at 631 n.33. For more recent cases see Peiris, supra note 25.

27 For citation to earlier cases see JAFFE, supra note 21, at 631 n.34. For more recent cases see Peiris, supra note 25.

28 Procedures for seeking judicial review are set forth in 1 THE SUPREME COURT PRACTICE 1991 (Sweet & Maxwell, 1990). Ord. 53, r.6 provides for the use of affidavits. Ord. 53, r.8 also permits applications for discovery, for the taking of depositions, and for the serving of interrogatories. The acceptance of fresh evidence that may be proffered in affidavits or otherwise is of course
This doctrine of review of jurisdictional fact by certiorari was carried over to the United States. It was, however, eventually extended to include review by certiorari of all questions of law and the issue of the adequacy of the evidence, which, of course, could also be considered a question of law. In this expanded version, which characterizes much current state court practice, however, the courts merely look for reasonable evidentiary support in the record for the administrative findings. They do not normally re-determine the "jurisdictional" facts themselves.29

The development of the notion of constitutional fact by the United States Supreme Court from those common law antecedents is well known. In Ohio Valley Water Co. v. Ben Avon Borough,30 a case involving a public utility's challenge to a rate order, the Court held that, "if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."31 Justice Brandeis, joined by Justices Clarke and Holmes, dissented.32 A few years later, however, in Ng Fung Ho v. White,33 Justice Brandeis took a different approach. Writing for a unanimous Court, he held that two brothers, who claimed in an administrative deportation hearing that they were foreign-born sons of a native-born citizen, were entitled to have the factual issue determined by a court on a writ of habeas corpus. He reasoned that "[t]he claim of citizenship is thus a denial of an essential jurisdictional fact."34

Finally, in the most famous case of all, Crowell v. Benson,35 the Court, per Chief Justice Hughes, held that courts are to determine not only questions of law, but certain "fundamental or 'jurisdictional' " facts discretionary with the court. See Ladd v. Marshall, [1954] 1 W.L.R. 1489 (C.A.), one of the very few cases to discuss the questions of when and how fresh evidence can be adduced at the appellate level. In Ladd, the court considered a motion for a new trial in support of which the appellant, the moving party, sought to introduce fresh evidence. Id. at 1491. The appellant claimed that one of the principal witnesses against him in the trial had given false testimony because she had been coerced by her husband. Id. An affidavit by the witness was presented in support of the motion to call further evidence. Id. The Court of Appeal considered the affidavits but ruled that they failed to show that the witness had lied because of a fear of her husband. The motion to permit the calling of further evidence was denied. One of the concurring judges treated the motion as one for "allowing this fresh evidence [i.e. the evidence contained in the affidavits] to be admitted." Id. at 1493 (Hodson, L.J.). A more recent case on the admission of fresh evidence, this time in a case arising out of an administrative proceeding, is Regina v. Secretary of State for the Home Dep't, ex parte Monin Ali, [1984] 1 W.L.R. 663 (C.A.).

29 For the history of the introduction of the notion of jurisdictional fact into the United States, see JAFFE, supra note 21, at 633-35.
30 253 U.S. 287 (1920).
31 Id. at 289 (McReynolds, J.) (emphasis added).
32 Id. at 292.
33 259 U.S. 276 (1922).
34 Id. at 284.
35 285 U.S. 22 (1932).
as well. 36 *Crowell* involved a proceeding challenging an award under the Longshoremen's and Harbor Workers' Compensation Act. The fundamental or jurisdictional facts at issue were whether the injury occurred on the navigable waters and whether, at the time of injury, an employer-employee relationship existed. The existence of these facts was indispensable "not only because the Congress has so provided ... but also because the power of the Congress to enact the legislation turns upon [their] existence. . ." 37 Accordingly, in a suit to enjoin the enforcement of the award of a deputy commissioner, the Court held that the employer was entitled to have the existence of these facts tried de novo in the federal district court. In *Crowell*, the finding of the deputy commissioner that was challenged was the existence of the employer-employee relationship. The district court found that no such employment relationship existed, and this finding was in turn affirmed by the court of appeals and by the Supreme Court. Justice Brandeis, joined by Justices Stone and Roberts, dissented. 38 A few years later, however, in *St. Joseph Stock Yards Co. v. United States*, 39 a case challenging a rate-making order of the Secretary of Agriculture under the Packers and Stockyards Act, the Court, again per Chief Justice Hughes, was prepared to accept that "this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings [of the Secretary] upon hearing and evidence." 40

While the requirement, which appears most clearly in *Crowell*, of a trial de novo of facts found in an administrative setting is no longer of major significance—at least on the federal level—the "exercise of independent judgment" requirement is still invoked from time to time. The Court has extended the doctrine beyond the administrative context in which it arose and has expressly invoked it in defamation cases, such as *Sullivan*, and in cases that bear a very strong resemblance to defamation cases, such as *Bose*. The Court in *Bose* 41 asserted that the requirement had also been invoked in cases involving the question of whether words are likely to cause a "breach of the peace" 42 or to incite "iminent

36 *Id.* at 54.
37 *Id.* at 55.
38 *Id.* at 265.
40 *Id.* at 53.
42 *Id.* at 505 ("'fighting words' which are 'likely to provoke the average person to retaliation and thereby cause a breach of the peace,'" quoting *Street v. New York*, 344 U.S. 576, 592 (1969)). It should be noted, however, that, although Justice Harlan, writing for the Court in *Street*, reviewed the evidence in some detail, he never said it was a case where the Court must exercise an independent judgment on the key factual issues. Justice Harlan also said that he was considering the evidence in the light most favorable to the state, *id.* at 590, but concluded that the defendant, who had burnt a flag, had neither uttered fighting words nor shocked passers-by by the content of his words. *Id.* at 592. This sounds like a conclusion that there was no basis in the record for the findings by the jury.
lawless action" and in obscenity cases where the issues have been what appeals to "prurient interest" and what "is patently offensive" to the community. It is not at all clear from reading these cases, however, that the requirement of an independent judgment on the facts was actually applied in those cases or thought to be applicable to them, particularly in the obscenity cases where the Court has expressly eschewed the imposition of uniform national standards. That, of course, is not to deny that Bose will now be cited to support the proposition that an independent judgment on the facts is required in these areas.

Over the course of time, not only has the requirement of an independent review of the facts been carried over to the judicial context, but the nature of the requirement has been materially altered. In Ben Avon, Ng Fung, and Crowell, the question was whether the courts (the state courts in Ben Avon, the federal courts in Ng Fung and Crowell) were required to accept the findings of administrative bodies if those findings were reasonable. In the later cases such as Bose, the doctrine has been interpreted to mean that each court in the judicial hierarchy that might consider a case must itself review the record and exercise its own independent judgment on the facts singled out for this, so-to-speak, heightened scrutiny. That is, whereas in the earlier cases all that was required

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43 466 U.S. at 505-06 (citing Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (per curiam)). It is possibly less clear in this case that the Court thought it was exercising an independent judgment on the facts. The Court held that there was no evidence to support the conclusions of the trial court. It said nothing about the exercise of independent judgment on any factual questions. Justice Rehnquist, in dissent, writing for the Chief Justice and Justice Blackmun as well as himself, characterized the majority's actions as "substituting a different complex of factual inferences for the inferences reached by the courts below." Id. at 109.

44 466 U.S. at 506-07 (citing Miller v. California, 413 U.S. 15 (1973), and Jenkins v. Georgia, 418 U.S. 153, 159-61 (1974)). It is even more questionable whether the Court in these cases was subscribing to an independent judgment rule. In Miller, Chief Justice Burger declared that the appellate courts had the "ultimate power . . . to conduct an independent review of constitutional claims when necessary," 413 U.S. at 25, and then went on to hold that there were no "uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'" and that historically these sorts of issues have been decided by lay jurors. Id. at 30. In Jenkins, the Court again said nothing about an independent review of the facts. It merely ruled that a jury's determination that the film, CARNAL KNOWLEDGE, was obscene because it depicted "a woman with a bare midriff," 418 U.S. at 161, could not stand. If the relevant community is taken to be the State of Georgia rather than Albany, Georgia, where the case arose, this must be a ruling that no reasonable jury could find the material patently offensive. In this regard, Jenkins was prosecuted under a state statute not a local ordinance. The Court in Bose also cited New York v. Ferber, 458 U.S. 747, 774 n.28 (1982), a case involving "child pornography." In the material cited, the Court in Ferber declared that since ""[t]here is no argument that the films . . . do not fall squarely within the category of activity we have defined as unprotected . . . no independent examination of the material is necessary." Id.

45 See supra notes 42-44.

46 See, e.g., Doe v. City of Minneapolis, 898 F.2d 612, 616 (8th Cir. 1990); Jones v. Heyman, 888 F.2d 1328, 1330-31 (11th Cir. 1989); Melton v. City of Oklahoma City, 879 F.2d 706, 713 (10th Cir. 1989); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1021 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).
was that some facts be determined by a court (which could be sitting with a jury), in the latter cases, a single independent judicial judgment is not enough. Each court that hears the case must exercise its own independent judgment on these factual questions. Obviously, a court that disapproved of the factual findings of a jury or an appellate court that disapproved of the finding of a trial court could characterize those findings as unreasonable (i.e., as "clearly erroneous") and under orthodox doctrine, strike the findings down. The problem raised by the notion of jurisdictional or constitutional facts arises only when a court is candid enough to concede that the finding before it is not unreasonable but is nevertheless not the finding that the reviewing court would have made.47

III. SOME ANALYTICAL APPROACHES TO THE CONCEPTS OF JURISDICTIONAL AND CONSTITUTIONAL FACT

John Dickinson, who appears to have coined the term "constitutional fact" in his vigorous criticism of Crowell, suggested, with some plausibility, that whether a fact is jurisdictional or not is in the eye of the beholder.48 What the doctrine boils down to is that facts held to be jurisdictional will be re-examined, while facts held not to be jurisdictional will not.49 The same infirmity attends the notion of "constitutional" fact. As Dickinson noted, the constitutionality of many governmental actions depends in one way or another upon their reasonableness.50 Since the assertion of reasonableness brings into play many, if not most, of the factual determinations that must be made in a given case, there was no limit to the facts that might be eligible for judicial re-examination.51 Of course, the courts had never exercised any such power on a large scale and would be unlikely to do so in the future. Crowell merely opened up the road to quixotic decision-making.

Louis Jaffe by and large accepted the validity of Dickinson's logical strictures against Crowell and his equation of "jurisdictional" fact with

47 Since the decision in Bose the question has arisen whether the requirement of an independent review of the facts applies when the trial court has upheld a first amendment challenge or is only necessary when the trial court has rejected a First Amendment claim. See Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981 (1988) (White, J., dissenting from denial of certiorari).

48 John Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact", 80 U. PA. L. REV. 1055, 1059-63 (1932). I am indebted to David Schwartz, Esq., a recent graduate of the Duke Law School, for providing me a copy of a letter from Justice Frankfurter to Justice Reed in which Justice Frankfurter objected to Justice Reed's en passant inclusion, in his draft opinion in Gray v. Powell, 314 U.S. 402 (1941), of the statement that he was not concerned in that case with "constitutional facts." To Frankfurter, talk about constitutional or jurisdictional facts was "rubbish" or "worse than rubbish, misleading irrelevancies." (original in Library of Congress; copy on file in with the author). The opinion in Gray v. Powell does not contain the offending terms.

49 Dickinson, supra note 48, at 1059-63.

50 Id. at 1067-68, 1071, 1078.

51 See id. at 1072-82.
"constitutional" fact. Nevertheless, Jaffe felt that Dickinson's "logical critique [w]as overly stringent."52 Jaffe argued that it "is possible to think of certain facts as more likely than others to involve constitutional limits."53 Certainly, he asserted, Chief Justice Hughes in Crowell thought that this was the case.54 Nevertheless, Jaffe accepted that the net effect of the doctrine was to allow courts to intervene in certain types of cases, and he believed that this was not altogether a bad development. Such intervention might be appropriate "to the review of fact determinations (a) carrying grave consequences to the individual and (b) involving a relatively low degree of expertise."55

The Court's decision in Bose has brought forward another important contributor to this debate, Professor Henry Monaghan.56 Monaghan begins his analysis by noting that the difficulty which the Court experienced in Bose in trying to apply (and extend) the doctrine of constitutional fact "has its origins in the 'vexing' distinction between 'questions of law' and 'questions of fact.'"57 While as Monaghan recognizes, some commentators have rejected this distinction as "fundamentally incoherent," he believes that "[t]he incoherence argument seems vastly overdrawn."58 Law and fact are not opposites but rather concepts that have a "nodal quality; they are points of rest and relative stability on a continuum of experience."59 In an argument reminiscent of Jaffe, Monaghan asserts that the critical question is the allocation of functions among the various actors in the decision-making process.60 And, as he notes, "quite plainly, the actual distribution of authority between judges and other decision-makers has often been governed by other factors, such as the nature of the substantive issue and the character of the decision-makers."61 The trouble arises when "judges seek to force such allocation

52 Jaffe, supra note 21, at 641.
53 Id.
54 Id.
55 Id. at 648.
57 Id. at 232.
58 Id. at 233. Monaghan notes that among those who have argued that the distinction is "fundamentally incoherent" are Louis Jaffe (supra note 21, at 546-45), Leon Green (Leon Green, Judge and Jury 270 (1930)), and John Dickinson (John Dickinson, Administrative Justice and the Supremacy of Law in the United States 55 (1927)). Green and Dickinson make the point more strongly than Jaffe.
59 Monaghan, supra note 56, at 233.
60 Id. at 234-35. See Jaffe, supra note 21, at 546-55, 636-48. Monaghan expressly cites Thayer who also argued that merely because something was called a question of fact did not necessarily determine whether the question should be decided by a jury rather than by a court. There were many questions of fact that, for historical reasons or reasons of policy, were decided by the courts. James B. Thayer, Law and Fact in Jury Trials, 4 HARV. L. REV. 147 (1890). This article, in a revised and expanded form, was incorporated into Thayer, supra note 6, at 183-262. Leon Green, again citing Thayer, also stressed the allocative features of the terms "law" and "fact." Green, supra note 58, at 278-79.
61 Monaghan, supra note 56, at 234.
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decisions into the conventional categories of law and fact. Distortions in
the analytic content of the categories occur. These distortions are wholly
unnecessary if we separate the allocative uses from the analytic content of
these categories.62

Monaghan's suggestion that the basic issue is one of the allocation of
power was explicitly adopted in Miller v. Fenton,63 where the Court, per
Justice O'Connor, held that the question of the voluntariness of a confes-
sion required an independent federal judicial determination not with-
standing the congressional mandate in 28 U.S.C. § 2254(d) that, in
federal habeas corpus proceedings, the findings of state courts on factual
questions can be overturned only if they are not "fairly supported . . . by
the record." Citing Monaghan, and its prior decision in Bose, the Court
referred to its reluctance to "give the trier of fact's conclusions presum-
tive force" where "as with proof of actual malice in First Amendment
libel cases, the relevant legal principle can be given meaning only
through its application to the particular circumstances of the case."64 To
do so would "strip a federal appellate court of its primary function as an
expositor of law."65 The Court also mentioned the appropriateness of
independent federal or appellate review as a means of compensating for
"perceived shortcomings of the trier of fact by way of bias or some
other factor."66 Disclaiming in the end any intent to question the con-
scientious performance of their duties by state judges, the Court
grounded its decision in favor of independent federal review of the volun-
tariness of a confession on the considerations that this had been the his-
torical practice before enactment of § 2254(d) and that "the critical
events surrounding the taking of a confession almost invariably occur in
a secret and inherently more coercive environment" than, for example, a
state trial court's taking of a guilty plea or its ruling on a question of
juror partiality.67

Monaghan's analytic framework for resolving the allocation of
power among the various participants in the judicial process distin-
guishes among law declaration, fact identification, and law application.68
The analysis thus bears some resemblance to the traditional distinction
among questions of law, questions of fact, and mixed questions of law
and fact. Not surprisingly, it also shares many of the unsatisfactory qual-

62 Id. at 234-35.
64 Id. at 114.
65 Id.
66 Id. (quoting from Justice Rehnquist's dissenting opinion in Bose Corp. v. Consumers Union of
United States, Inc., 466 U.S. 485, 518 (1984)).
67 See Miller, 474 U.S. at 114-18. The quoted phrases are from id. at 117. The court argued that
§ 2254(d) was "patterned . . . after Townsend v. Sain, 372 U.S. 293 (1963), a case that clearly as-
sumed that the voluntariness of a confession was an issue for independent federal determination."
Id. at 115.
68 Monaghan, supra note 56, at 235-39.
ities of that traditional analysis. Monaghan's analysis is driven by somewhat different concerns, however. It is not simply the old analytical framework with different labels. According to Monaghan, law declaration is concerned with the production of propositions that are "general in character."69 In the decision of cases, "the important point for our purposes is that law declaration occurs only to the extent that further general norm elaboration occurs."70 "Fact identification, by contrast, is a case-specific inquiry into what happened here. It is designed to yield only assertions that can be made without significantly implicating the governing legal principles."71 The assertions yielded in the process of fact identification generally "respond to inquiries about who, when, what, and where," inquiries which, quoting Jaffe, "can be made 'by a person who is ignorant of the applicable law.'"72 Finally, for Monaghan:

Law application, the third function is residual in character. It involves relating the legal standard of conduct to the facts established by the evidence. If all legal propositions could be formulated in great detail, this function would be rather mechanical and require no distinctive consideration. But such is not the case. Linking the rule to the conduct is a complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment. Thus, law application frequently entails some attempt to elaborate the governing norm. But in contrast to the generalizing feature of law declaration, law application is situation-specific; any ad hoc norm elaboration is, in theory, like a ticket good for a specific trip only. Moreover, in this kind of situation, specific norm elaboration is generally invisible. By definition, when law application occurs, further explicit norm elaboration ceases. And any implicit norm elaboration may be buried in a general verdict and in the decisionmaker's resolution of the controversy over the facts. The typical jury verdict in a negligence case provides a good example.73

For Monaghan, it is "law application" that quintessentially raises the allocative question: namely, which decision-maker should decide the issue. This was the type of question involved in Bose. As Monaghan sees it, "[c]onstitutional fact review presupposes that appellate courts will render independent judgment on any issues of constitutional 'law' presented. Its distinctive feature is a requirement of similar independent judicial judgment on issues of constitutional law 'application.'"74 Monaghan thinks it is indisputable that federal appellate courts, and particularly the Supreme Court, possess that authority. He argues, however, "that constitutional fact review at the appellate level is a matter for judi-

69 Id. at 235.
70 Id. at 237.
71 Id. at 235 (footnotes omitted).
72 Id. citing JAFFE, supra note 21, at 548.
73 Monaghan, supra note 56, at 236 (footnotes omitted).
74 Id. at 238.
cial (and legislative) discretion, not a constitutional imperative.”75 The only constitutionally mandated duty of appellate courts was “[l]aw declaration, not law application.”76 Thus, he argues that “independent judgment on the evidence is constitutionally mandated only when the application issue involves an appreciable measure of additional norm elaboration—that is, where it seems correct to state that the judicial duty to ‘say what the law is’ is implicated.”77 Unless the Court kept this principle in hand, it would be unable to escape the criticism, which has in fact been levied against it, that its declarations of when it is under a duty to exercise an independent judgment have been made on an ad hoc basis with no consideration of “the systemic ramifications of its decisions.”78 Monaghan finds “confusion about these matters . . . unsettling,” because, among other reasons, “it leaves unclear the nature of the responsibilities of the state and federal judges, both trial and appellate.”79 Do all questions of constitutional law application demand independent appellate review? Or is the doctrine more limited, applying merely to “every instance of [F]irst [A]mendment law application”80 and perhaps a limited number of other situations?

As previously noted, when explicit norm elaboration is not involved, and thus the duty of independent review at the appellate level is not implicated, Monaghan generally would confine the exercise of the recognized appellate discretion to engage in such review to situations raising two types of institutional concerns, namely, “the danger of systemic bias of other actors in the judicial system,” and “the perceived need for a case-by-case development of the law in a given area.”81 In a footnote, Monaghan states that “[a] third institutional concern that may provide a basis for independent judgment by the Supreme Court is the necessity of an authoritative decision to settle an issue of enormous practical importance.”82 The cases cited for this proposition involved suits by the United States against the states and suits between states. At any rate, Monaghan leaves no doubt that the second concern, “the perceived need for case-by-case development of constitutional norms[,] is likely to be the single most important trigger for constitutional fact review.”83 He gives the Fourth Amendment cases concerning what constitutes an unreasonable search or seizure as possible illustrations of when such an approach has been appropriately triggered.84

75 Id.
76 Id. at 239.
77 Id. at 264.
78 Id. at 267.
79 Id.
80 Id. at 269.
81 Id. at 271.
82 Id. at 271 n.235.
83 Id. at 273.
84 Id. at 273-74.
Since Monaghan is concerned principally with an independent review of the facts at the appellate level, he does not consider the need for such an independent review to overcome a "legitimacy deficit," that is when an independent judicial review is important because the initial decision-maker, such as an administrative agency, does not enjoy the public respect that is accorded the reviewing body. For that reason, Monaghan does not consider cases like Ben Avon, Ng Fung Ho, and Crowell as directly relevant to his concerns. Like Monaghan, I, too, am principally interested in the analytical problems created by the doctrine of independent review of facts. I have nevertheless discussed the administrative agency cases because they are the historical context out of which the American doctrine of constitutional fact evolved. In addition, they present the same problems of classifying the factual and legal issues and of distinguishing among them as arise when the factual determinations of courts are being reviewed.

IV. The Distinction Between the Elaboration of Norms and the Application of Norms

According to Monaghan, sometimes the process of applying norms involves the (further) elaboration of norms. When this is the case, an independent judicial assessment of factual conclusions is warranted, even at the appellate level. Monaghan's crucial assumption underlying this contention is that it is possible to distinguish clearly between norm (or law) elaboration and norm (or law) application. The assumption that the process of norm elaboration is distinguishable from the process of norm application is, however, untenable on both theoretical and practical grounds. On the theoretical level the assumption is undermined by the difficulties surrounding the holding/dictum distinction that often make it impossible to agree on what a court has actually done other than decide the case before it. Moreover, there are always some differences between any two cases. Application of a norm supposedly established in the first case will therefore always to some greater or lesser extent be an elaboration of the norm established in the first case. Even if one is not prepared to accept—as obviously Monaghan is not—that the distinction between elaboration and application is in the eye of the beholder, the distinction is certainly always one of degree and not one of discrete logical categories. Monaghan himself partially concedes that point because he talks in terms of cases of norm application that involve an "appreciable measure of ad-

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85 Id. at 262, quoting David P. Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 443-45 (1983).
86 Monaghan, supra note 56, at 262.
87 If further discussion and citation are desired on this point, see George C. Christie, Law, Norms and Authority 45-52 (1982). See also Julius Stone, Legal System and Lawyer's Reasoning 267-80 (1964).
ditional norm elaboration.”88 I say “partially” concedes the point because his analysis is premised on the assumption that, in theory, it is possible to have some cases of law application that involve no measure of law elaboration at all, in which instance, under his theoretical scheme, an independent judicial review of the facts would be impermissible.89

Even if the theoretical inadequacy of Monaghan’s analysis is ignored, its practical utility is questionable. Monaghan, as previously noted, suggests that an appropriate area for constitutional fact review might be the Fourth Amendment cases involving what constitutes an unreasonable search or seizure.90 The two principal cases that he cites are Florida v. Rodriguez91 and New Jersey v. T. L. O.92 How should these cases most appropriately be characterized? In Rodriguez, the Court upheld an airport search in which only “articulable suspicion” but not probable cause had been shown. Is Rodriguez, as Monaghan suggests, a case in which the Court “applied” a norm, namely the Fourth Amendment’s prohibition of unreasonable searches and seizures, in the course of which application the Court also elaborated upon that norm? Or is Rodriguez a case in which the Court was primarily “elaborating” a norm which it then largely mechanically applied to the case before it? Or is the cynical correct who would assert that Rodriguez, in dispensing with the need for a showing of probable cause, was not, in any common-sense use of these terms, either applying or elaborating a norm; the Court was simply creating a new norm. I appreciate that Monaghan equates law elaboration with law declaration but elaboration conjures up some notion of coherence, of continuity with what has gone before. That is presumably why Monaghan treats the case as an elaboration of the search and seizure clause of the Fourth Amendment. Abrupt changes in the direction of the law hardly conjure up the image of elaboration.

New Jersey v. T. L. O. is an even harder case to characterize. In T. L. O., the Court first determined that the Fourth Amendment applied to searches of student lockers conducted by school officials and then decided that such searches did not require a warrant. Next, the Court

88 Monaghan, supra note 56, at 264 (emphasis added).
89 For example, to revert to a portion of a quotation from Monaghan’s article that has already been presented in the text, supra note 73, he asserts:

If all legal propositions could be formulated in great detail, this function [i.e. “law application”] would be rather mechanical and require no distinctive consideration. But such is not the case. Linking the rule to the conduct is a complex psychological process, one that often involves judgment. Thus, law application frequently entails some attempt to elaborate the governing norm. But in contrast to the generalizing feature of law declaration, law application is situation-specific; any ad hoc norm elaboration is, in theory, like a ticket good for a specific trip only. Moreover, in this kind of situation, specific norm elaboration is generally invisible. By definition, when law application occurs, further explicit norm elaboration ceases.

Id. at 236 (footnotes omitted) (emphasis added).
90 Id. at 273-74; see also supra note 84.
ruled that such searches are valid "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."\textsuperscript{93} Finally, the Court ruled that, in invalidating the search conducted in the instant case on the basis of a "reasonable ground" standard—a standard "not substantially different from the standard that we have adopted today"—the New Jersey Supreme Court took "a somewhat crabbed notion of reasonableness."\textsuperscript{94} Is the case best viewed as an "application" of the Fourth Amendment's prohibition of unreasonable searches and seizures? As an "elaboration" of the law? Or is the case best regarded as the creation of new law which was then applied to the facts of the case at hand?

Another line of cases shows that the often tortured course of the Supreme Court's decision-making puts in question the utility of an analysis in which the legitimacy of an independent judicial review of lower court determinations of fact is based upon a distinction among the concepts of pure norm elaboration, norm elaboration in the course of application, and pure norm application. Take the area of defamation to which the Court in \textit{Bose}—Monaghan's point of departure—analogized that case. Since 1964, the Court can be said to have engaged in deciding (i.e., "elaborating?") how the Constitution limits the traditional common law of defamation through a course of decisions "applying" the First Amendment to various factual situations. Eventually, in \textit{Gertz v. Robert Welch, Inc.,}\textsuperscript{95} the Court adopted a set of distinctions based on the status of the plaintiff in an action for defamation—whether he was a private person as opposed to a public official or a public figure—in place of the criterion enunciated by the plurality in \textit{Rosenbloom v. Metromedia, Inc.,}\textsuperscript{96} namely, whether the issue involved was of "public or general interest." Justice Powell, writing for the majority in \textit{Gertz}, explained that "[w]e doubt the wisdom of committing this task to the conscience of judges. Nor, does the Constitution require us to draw so thin a line between the drastic alternatives of the \textit{New York Times} privilege and the common law of strict liability for defamatory error."\textsuperscript{97}

\textit{Gertz} ostensibly decided that, in order to recover in defamation, plaintiffs who were either public officials or public figures had to prove either knowledge of falsity or reckless disregard of truth or falsity, whereas private figures merely had to prove some kind of fault. At the same time, the Court also supposedly decided that, before presumed or punitive damages could be assessed in a defamation action, knowledge of falsity or reckless disregard of truth must be established. Who would have thought that, after this supposedly landmark decision, the Court

\textsuperscript{93} \textit{Id.} at 342.
\textsuperscript{94} \textit{Id.} at 343.
\textsuperscript{95} 418 U.S. 323 (1974).
\textsuperscript{96} 403 U.S. 29 (1971).
\textsuperscript{97} \textit{Gertz}, 418 U.S. at 346.
would decide, as it did in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, that “permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”

The author of the plurality opinion from which this quotation is taken was, of course, Justice Powell, who told us in *Gertz* that it was unwise to intrust to judges the task of deciding what is and what is not a matter of “general or public interest.”

If issues that arise in defamation cases, such as whether plaintiff is a “public figure” or whether the defendant has been guilty of “constitutional malice” or, now, whether a matter is of “general or public interest,” are to be picked out by the Court as particularly appropriate for determination by judges rather than juries, is it totally scurrilous of the cynic to suggest that it is because the development of the law in this area borders on the incoherent? It is well known, for example, that in obscenity cases, juries decide issues, such as whether the challenged material offends contemporary standards of decency, that do not seem different in kind or importance from the issues that the Court has reserved for judicial determination in the field of defamation.

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99 *Gertz*, 418 U.S. at 346.

Nor is the *volte face* on the relevance of whether a matter is of “general or public interest” an isolated example of the confusing manner in which the court applies the First Amendment to defamation. Consider that it was only by a 5-4 vote that the Court held, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that *Gertz* required the burden of persuasion on the issue of falsity to be placed on the plaintiff. The *Restatement (Second)* of Torts, like most observers, thought that, after *New York Times Co. v. Sullivan* and its progeny, this was a foregone conclusion. *Restatement (Second)* of Torts § 580B cmt. j (1977). Moreover, the Court in *Philadelphia Newspapers*, per Justice O’Connor, framed its opinion in such a way as to indicate—what most observers would have rejected as absurd—that *Gertz*, and its requirement of some showing of culpable falsity, may be limited to actions against media defendants. 475 U.S. at 779 n.4. Indeed, only ten months earlier, in *Dun & Bradstreet*, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (White, J., concurring), at least five Justices committed themselves to the proposition that the distinction between media and nonmedia defendants was untenable. Perhaps none of these decisions is surprising when Justice White found in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-91 (1975), a privacy case decided a year after *Gertz*, querying, in his opinion for the Court, whether the Constitution even requires that truth be recognized as a defense in a defamation action brought by a private figure.

Finally, one cannot resist pointing out that, in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), a false-light invasion of privacy case, the Court, per Justice Stewart, went out of its way to note that the case before it was not the occasion “to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard [of intentional or reckless falsehood] announced in *Time, Inc. v. Hill* applies to all false-light cases. *Cf. Gertz v. Robert Welch, Inc. . . .*” *Id.* at 250-51. It made the reference to *Gertz* even though *Gertz* explicitly recognized that, in allowing a defamation action by a private figure merely on a showing of some culpable “falsity,” “[o]ur inquiry would involve considerations somewhat differ-

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In sum, I do not at all disagree with Monaghan’s suggestion that, in the Fourth Amendment area, the process of law application is (whatever else it may be) at the very least a process of norm elaboration. My point is that I do not see the matter as being different in any other area of constitutional law, and certainly not in any area that is drawing the recurrent attention of the present ideologically divided Court. I have even suggested that sometimes what the Court is doing when it purports to be applying its prior decisions is more accurately described not as elaborating law but as fabricating law. My main point though, is that, if we want somehow to limit the occasions when the Court should engage in independent review of the facts, we will not get very far by asking “is the Court in this case to some extent elaborating a norm or is it only applying a norm?” Such an inquiry not only is unanswerable; it also focuses on the wrong question.

V. JUSTICE HOLMES AND THE “LEGISLATIVE” APPROACH

An analysis requiring the courts, and especially appellate courts, to exercise an independent judgment with regard to questions of fact if a question of general norm elaboration is involved and providing the courts with discretion to exercise such independent judgment when law application is involved simply will not do. The distinction between norm elaboration and norm application is a difficult one. Furthermore, to say that the courts have discretion to exercise an independent judgment in cases involving norm application is to say that they have it in all cases. 101 This was the argument of Justice Holmes. For Holmes, the so-called mixed question of law and fact, the traditional and confusing way of attempting to describe what Monaghan calls norm application, was really a question of law. 102 Using negligence questions as an example, Holmes accepted that one of the functions of the jury was to determine what in fact happened. This was purely a factual determination. But, when the jury is called upon to decide whether, on the facts found to exist, a party was negligent, the jury is deciding a question of law, and it is doing so by making law. The jury in effect is performing a legislative function.

In his classic work, The Common Law, Holmes explained that the

101 Monaghan, as previously noted, lays special emphasis upon situations in which “the[re] is a perceived need for case-by-case development of law.” See supra note 56, at 271.

102 O LIVER W. HOLMES, JR., THE COMMON LAW 122-27 (Little Brown ed., 1881). The argument to be presented in the next few pages starts from and then extends an argument sketched out in Christie, supra note 7, at 773-74.
jury was left to determine the applicable standard of reasonable conduct in a given situation because the judge
not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.¹⁰³

He made the point even more explicit later after he had become a judge.
From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact.

I venture to think, on the other hand, now, as I thought twenty years ago, before I went upon the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street.¹⁰⁴

Holmes contended that, if a judge felt sure about the matter or if several juries had brought in similar verdicts on similar facts, the judge should no longer submit the question of the appropriate standard to the jury but should declare it himself, in which case the jury’s function would be strictly limited to determining what had happened.¹⁰⁵

Justice Holmes applied his theoretical perspective in *Baltimore & Ohio Railroad Co. v. Goodman*,¹⁰⁶ in which the Court, writing through Holmes, overturned a jury verdict for the plaintiff that had been sustained by the trial court and then by the Sixth Circuit on appeal. Justice Holmes ruled that the plaintiff’s decedent was contributorily negligent when, upon approaching a railroad grade crossing, he did not get out of his truck and make sure that a train was not approaching. Fortunately, Holmes’s attempt to justify and extend the “stop, look, and listen” rule ultimately failed. In *Pokora v. Wabash Railway Co.*,¹⁰⁷ a case very similar to *Goodman*, a unanimous Court, writing through Justice Cardozo, reversed the Seventh Circuit’s affirmance of the trial court’s granting of a directed verdict. Cardozo pointed out the difficulties of applying a rigid stop, look, and listen rule to the myriad variations of grade-crossing accidents.
Illustrations such as these bear witness to the need for caution in framing

¹⁰³ Holmes, supra note 102, at 123.
¹⁰⁵ Holmes, supra note 102, at 123; Holmes, supra note 104, at 457-60.
¹⁰⁷ 292 U.S. 98 (1934).
standards of behavior that amount to rules of law . . . . The opinion in Goodman's case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.\textsuperscript{108}

The late Roger Traynor was one of the very few judges to have accepted Holmes's argument, including Holmes's contention that the jury's function was to advise the judge on the law but that, in the final analysis, the question of what is the law is the responsibility of the judge.\textsuperscript{109} On the other hand, James Bradley Thayer, Holmes's contemporary, disagreed with this analysis. All so-called questions of fact, regardless of whether they were to be decided by the court or by the jury, were in a sense "mixed questions of law and fact . . . for they must be decided with reference to all relevant rules of law; and whether there be any such rule, and what it is, must be determined by the court."\textsuperscript{110} Nevertheless, though all questions of fact were in this sense mixed questions of law and fact, they could nonetheless be classed simply as questions of fact. To use one of Thayer's own illustrations, "questions of reasonable conduct, while requiring a 'judgment' of the evidence, and the application of the rule of law to the facts, submit, none the less, to a classification as questions of fact,—sometimes fact for the court, but generally fact for the jury."\textsuperscript{111} The decision of questions that "depend on no legal rule, but only on the rules, principles, or usages of language and grammar, as applied by sense and experience" were decisions about matters of fact and not questions of law even if those questions were decided by courts rather than juries.\textsuperscript{112} In commenting upon the disagreement between Holmes and Thayer, Jaffe accepted Holmes's analysis but not his conclusion that because questions like negligence were questions of law, they could properly be decided by judges rather than jurors.\textsuperscript{113}

If we are dissatisfied with the implications of Holmes's conclusion that the characterization of conduct as "negligent," to use his example, or as displaying "actual malice," to return to the Bose case, is always the decision of a legal question and not a factual question, how are we to

\textsuperscript{108} Id. at 105-06 (footnotes omitted).


\textsuperscript{110} THAYER, supra note 6, at 225.

\textsuperscript{111} Id. at 253.

\textsuperscript{112} Id. at 204; see also id. at 250. Thayer argued that the interpretation of writings, when conducted on the basis of the ascertained facts, involved questions of fact not law. Id. at 203-04. By questions of fact, Thayer meant questions of "ultimate fact," the facts "in issue to be decided by the jury." Id. at 197. He distinguished what he called "matter of evidence," which pertained to the trier of fact's "reasoning." Id., that is, to the process by which the trier of fact moved from the "primary facts" to the "secondary or ultimate facts." Id. at 194. The discussion in the remainder of this Article will make clear why I have described Thayer's position at greater length than might seem necessary at this point in the Article.

\textsuperscript{113} JAFFE, supra note 21, at 553-55.
proceed? Whether we accept Holmes’s analysis or some other analysis, should all these questions potentially be open to re-examination by trial judges, dissatisfied with jury verdicts, and by appellate judges, dissatisfied with the work of the trial courts whether the latter are sitting with or without a jury? Is the only possible limit the fact that judges, and particularly appellate judges, do not have the time to engage in such inquiries in the great mass of cases so that they will engage in such inquiries at best only when they are outraged by the decision under review, or, at worst, quixotically? In order to make any headway in resolving these difficult problems, it is necessary to start by re-examining what is meant by a question of fact and what is meant by a question of law. It is also important to explore what features are captured by the terms “mixed questions of law and fact” or “law application.” This is what I propose to do in the next part.

VI. SOME EPistemOLOGICAL CONSIDERATIONS

The basic assumption underlying the traditional distinctions among questions of fact, mixed questions of law and fact, and questions of law is that there is something epistemologically different between what Monaghan calls “fact identification” and all the other sorts of questions that confront judicial tribunals. This process of fact identification is sometimes described as the process of establishing “historical fact.” Monaghan, it will be recalled, describes it as the inquiry into “who, when, what and where,” an inquiry that, quoting Jaffe, “can be made by a person who is ignorant of the applicable law.” This analysis, however, is too simplistic. Ascertaining “who, when, what and where” can be complex activities. Sometimes these questions can be answered by what, in common sense terms, would be considered simple observation. But sometimes, in addition to observation, they require some degree of conscious inference and/or evaluation; that is, these determinations can sometimes involve the exercise of considerable judgment and to that extent are no different from what might be called mixed questions of law

114 For a discussion of the policy reasons why it might be desirable to have these questions decided by juries, see Christie, supra note 7, at 772-78. One might, for example, concede that, in deciding questions like negligence, the jury is exercising a legislative role. The question then becomes whether the court or the jury is better suited to exercising this role.

115 See supra text accompanying notes 68-80.

116 See, e.g., Goodman v. Lukens Steel Co., 483 U.S. 656, 665 (1987). Holmes described the process as “hearing evidence . . . concerning what the conduct was.” Holmes, supra note 104, at 459 (emphasis added). Thayer asserted: “The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true.” THAYER, supra note 6, at 191.

117 See supra text accompanying note 72. Jaffe insisted, however, that the phenomena described as “facts” could be “past, present, or future;” a “finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.” JAFFE, supra note 21, at 548. This obviously encompasses more than historical fact and encompasses phenomena that do not exist and may never exist.
and fact (or questions of law application), such as "did the defendant behave reasonably under the circumstances?" or "is this picture obscene?"

A more useful method of analysis would focus not so much on what type of question was being asked, but on how the question would be answered. There are, for example, those questions whose answers can be determined by direct observation and by accepting or rejecting the testimony of witnesses who are reporting their own direct observations. Under normal circumstances, questions such as "is the defendant red-haired?", "was it raining on the night of May 14, 1977?", and "was the plaintiff hit by a large object?" would fit into this category. These are questions uniquely suited for jury determination, and there would have to be a complete absence of evidentiary support for a jury's verdict before a judge could reject the jury's conclusion on such issues.

There are, however, questions that most people would ordinarily consider to be questions of fact that cannot be decided by direct observation. Such questions arise when doubt remains even after all the evidence is in. Their resolution by the decision-maker will be achieved not by resort to further reports by witnesses of their direct observations, but by reflection. In a negligence action such questions would include "Did the defendant behave as a reasonable person?", "Was there an appreciable risk of injury to third persons?" etc. In the traditional analysis, these questions usually would be considered mixed questions of law and fact. The only thing that distinguishes such questions from so-called questions of fact *simpliciter*, however, is the method by which the question would be decided, and for any given question the method by which it will be answered is not fixed in concrete. Questions that, in the abstract, would be considered questions resolvable by direct observation often cannot be decided by evidence of direct observations. Yet these questions must be decided.

Take, for example, the question of whether it was raining on the evening of May 14, 1977. Let us assume that the question becomes crucial because the defendant has taken advantage of a clause in his contract with the plaintiff that excuses him from his obligation to provide a band for plaintiff’s lawn party "in case of rain." Suppose the reports of direct observers indicate that, on that evening, the condition that the English describe as "spitting" existed. That is, throughout the evening there were periods when a few drops of water fell. How would one characterize this situation? Was it raining or was it not raining? No amount of direct observation would answer this question in the situation posited. The answer to the question depends entirely on what is meant by "raining," and this question must be determined by a process of reflection, not observation.

This process of reflection will undoubtedly also include a consideration as to why it is necessary to decide the question and what will be the
consequences of deciding the question one way or the other. The late Roy Stone, to whom I am indebted for suggesting this type of approach,\textsuperscript{118} felt that judges are rather freer in disregarding the conclusions of juries on such questions not because they are not questions of fact but because the answers to such questions are ultimately not derived from observation. It should be obvious that Stone was not relying on any scientific theory as to the nature of perception. In a sense, all our perceptions are filtered through some sort of mental processes.\textsuperscript{119} He was merely relying on the common experiences of all of us that there are some questions we resolve directly by looking or listening and without any conscious reflection, and other questions whose resolution we would immediately recognize as requiring some degree of conscious reflection. Finally, in Stone's legal universe, there are legal concepts, or what are more usually referred to as questions of law, that are for the judges alone to decide. These are questions such as "what duty of care does a possessor of land owe to a trespasser?" and "is contributory negligence a complete defense to the plaintiff's action for damages?"

Questions that must be decided upon reflection would, as previously noted, roughly include the sorts of questions that Monaghan treats as questions of law application, such as "was the defendant negligent?" and "was the defendant motivated by actual malice?", etc., questions that the traditional analysis would usually classify as mixed questions of law and fact. The point is, however, that this category, of what from a common sense perspective seem to be factual questions, includes much more. The ascertainment of much of what are considered questions of historic fact sometimes requires the same processes of reflection and judgment as does the question of whether the defendant was negligent. I have already given as an example the question of whether it was raining on some hy-

\textsuperscript{118} Roy L. Stone-deMontpensier, The Compleat Wrangler, 50 MINN. L. REV. 1001, 1009-10 & n.27 (1966). In his analysis, Stone broke down the legal universe with which we are concerned into three categories: \textit{alpha} facts, \textit{aleph} facts, and questions of law. \textit{Alpha} facts were the facts determined by direct observation; \textit{aleph} facts were the facts determined by reflection after all the evidence is in; and questions of law, or legal concepts, involved (legal) issues such as what is the duty of care owed to a trespasser.

\textsuperscript{119} This obvious point is sometimes expressly recognized by courts. In Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161-70 (1988), the Court noted that the term "factual findings," as contained in an exception to the hearsay rule concerning factual findings contained in an investigation made pursuant to authority granted by law, should not be construed to mean simply "facts," as opposed to "opinions" or "conclusions." Among the authorities cited was MCCORMICK ON EVIDENCE 27 (Edward W. Cleary et al. eds., 3d ed. 1984) ("There is no conceivable statement however specific, detailed and 'factual,' that is not in some measure the product of inference and reflection as well as observation and memory.") The Court also cited RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 449 (2d ed. 1982) ("A factual finding unless it is a simple report of something observed, is an opinion as to what more basic facts imply." Beech Aircraft, 488 U.S. at 168.) The fact, however, that all our conclusions are the product of some mental processes does not prevent some of our conclusions from being more open to challenge than others.
pothetical date in the past. It does not take too much imagination to produce countless other possible examples. The point is that the processes of law application and fact identification are not necessarily epistemologically different sorts of activities. Indeed, they are often the same type of activity. Holmes would presumably have argued that questions of fact that cannot be decided by observation but must rather be decided upon reflection, such as whether it was “raining” on the night of May 14, 1977, when the condition that the English call “spitting” existed, are really normative questions. That is, in deciding what is meant by the term “raining” we are exercising a legislative function. I certainly can accept that, in ascribing meaning, one is exercising a normative function. But, as Thayer implicitly recognized, it is a normative or legislative function about the meaning of words and not necessarily the exercise of a normative or legislative function with regard to the law.\footnote{See supra text accompanying notes 110-12.} Not every evaluation made by a jury or other legal decision-maker can appropriately be considered the decision of a question of law or even a decision about the application of law.\footnote{“[I]t is no test of a question of fact that it should be ascertainable without reasoning and the use of the 'adjudging' faculty; much must be conceived of as fact which is invisible to the senses, and ascertainable only in this way.” Thayer, supra note 6, at 194.}

Despite its clarity, Stone’s suggestion that we might usefully wish to distinguish between factual questions that can be decided by direct observation and those that cannot but require instead reflection and the exercise of judgment has not been widely adopted. It has some superficial resemblance to the distinction between specific facts and the inferences made from those facts that was stressed by the House of Lords in \cite{Bennax v. Austin Motor Co.}\footnote{1955 App. Cas. 370.} and that has been noted by people like Thayer\footnote{Thayer distinguished “between the primary facts, what may be called the raw material of the case, and the secondary or ultimate facts.” Thayer, supra note 6, at 194. Thayer argued that “the right inference or conclusion from these primary facts, in point of fact, is itself [a] matter of fact.” Id. Thayer’s analysis is deficient in two respects. First, the distinction between primary and ultimate facts is a tenuous one. See infra text accompanying notes 161-64. Second, as we have already seen, the suggestion that only the ultimate facts but not the primary facts are the result of what Thayer called “reasoning” is untenable. Third, as the succeeding discussion will show, the notion of “inference” does not capture the richness of what is being done when a trier of fact is trying to evaluate, to characterize the mass of evidence that has been presented to it.} and Jaffé.\footnote{Jaffé, supra note 21, at 548-50.} The analysis suggested by Stone, however, is a different and more far-reaching one.

In \cite{Bennax v. Austin Motor Co.}, Viscount Simonds and several other of their Lordships discussed the role of an appellate court in reviewing the findings of fact of a trial judge sitting without a jury. Their discussion of the matter was undertaken in light of the Judicature Acts which made appeals from trial courts to the Court of Appeal “rehearings,” an approach markedly different from that prevailing at English common law, when trial by jury
was the norm, or the approach still ostensibly prevailing in the United States. The Court of Appeal was specifically authorized to make inferences of fact. In *Benmax*, their Lordships distinguished between findings of "primary" fact, as to which an evaluation of the credibility of witnesses was crucial, and inferences from those primary facts. With regard to factual questions turning on the credibility of witnesses an appellate court should rarely, and only in cases of clear error, substitute its conclusions for those of the trial judge. With regard to inferences drawn from the primary facts, the appellate court was in as good a position to draw those inferences as was the trial judge and should therefore, in the words of Lord Simonds, form its own "independent opinion about the proper inference of fact," subject of course to the obligation (of politeness) to "naturally attach importance to the judgment of the trial judge." 125 The discussion was influenced by a paper of Professor Arthur L. Goodhart that had been previously privately circulated and then published subsequent to the *Benmax* decision. 126

As noted, their Lordships in *Benmax* largely distinguished between the findings of specific facts based on the testimony of the witnesses and inferences from these facts. Only Lord Simonds considered the "evaluation" of facts—a term that comes close to capturing the point that some factual matters can only be resolved by a process of reflection—but he did so in a passage in which the distinction between the "perception and evaluation of facts" was treated as the equivalent of the distinction between specific facts and inferences from those facts. 127 Moreover, the situation Lord Simonds had in mind was a case of negligence in which Lord Simonds felt that one had to distinguish between "what the defendant in fact did and . . . whether what he did amounted . . . to negligence." 128 Thus, in addition to not making clear whether he regarded evaluation as the equivalent of inference, he also failed to recognize that the question of what the defendant did may, as we have seen, require every bit as much reflection upon the evidence as the question of whether the defendant was negligent. 129 That is, what are called specific or primary facts are not necessarily the result of direct observation, but may require a considerable degree of evaluation by the witnesses of what they have observed and by triers of fact trying to make sense of the witnesses' testimony.


126 Goodhart, supra note 4, at 403 (referred to as "certain writings by Professor Goodhart" by Lord Simonds, 1955 App. Cas. at 374).

127 But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts.

128 *Id.*

129 The analysis is very similar to that of Thayer. *See Thayer supra* note 6, at 126.
The term "evaluation" appears more frequently in Goodhart's paper. At some places in his paper Professor Goodhart seems to equate the two concepts, but at other places he appears to suggest that they are somewhat different.\textsuperscript{130} At any rate, it is clear that both Lord Simonds and Professor Goodhart regarded the appellate courts in England as free to substitute their evaluations for those of the trial court as they would be to substitute their inferences for those of the trial court. I submit, on the contrary, that what I would call the evaluation of facts presented by direct observation is not the same thing as inferences from these facts. The notion of inferences conjures up logical processes and potentially right answers, whereas evaluation conjures up the exercise of judgment. One might go even further and suggest that there are very few true inferences made in the trial process. What is involved in the trial of most so-called issues of fact is in fact a series of evaluations. Calling these evaluations inferences might serve to legitimate the decision of, say, appellate courts to overturn the conclusions of trial courts by suggesting that, when a superior court disagrees with the conclusions of a trial court, it is merely correcting a mistake. That is, however, merely cloaking the exercise of power with the aura of logical calculation.

A case like \textit{Summers v. Tice}\textsuperscript{131} illustrates the difference between what might legitimately be called a logical inference and what is clearly evaluation and not inference. The trial court, sitting without a jury, considered the case as one in which the plaintiff had been hit in the eye by a shotgun pellet. The judge further found that both of the defendants, who had been the plaintiff's hunting companions, had fired their shotguns negligently. On these presumed facts, the trial judge entered judgment against both the defendants, who then appealed. The principal ground of appeal was, not surprisingly, the issue of causation. If causation is defined as the characterization of the situation in which an asserted event X is more likely than not the reason that event Y occurred, then the trial court was clearly wrong. Accepting, as the trial judge did, that it was equally probable that either defendant had fired the pellet that hit the plaintiff in the eye, the inference that either of the defendants or that both of the defendants caused the plaintiff's injuries is impermissible. A trial court determination to the contrary would deserve no deference from an appellate court.

If, on the other hand, legal cause is defined in terms of "substantial cause" and if, as under the \textit{Restatement (Second) of Torts},\textsuperscript{132} a substan-
tial cause need not be a cause in fact, then the question in a case like *Summers v. Tice* is no longer one of inference, but one where the decider has to characterize, to evaluate if you will, the assumed facts. An appellate court might not feel itself bound to accept the evaluations of a trial court, or even of a jury, but it cannot disregard them the way it might disregard faulty inferences. Inferences, as a logical matter, can sometimes be just plain wrong. The evaluation of the data of observation, on the other hand, involves a more subtle process in which judgment plays a more important role. I believe that Stone's analysis is sounder and more perceptive than that elucidated in the *Benmax* decision for this reason as well, and not merely because Stone's analysis clearly recognizes that the evaluation of facts is not confined to questions such as "is this negligence?" or "is this good faith?", but can include the process of determining the specific or primary facts, even such "facts" as, "is it raining?" or "is this a chair?".133

It is interesting to note two further developments which further undermine the attempt to use logical concepts such as "inference" to justify the intrusions of appellate courts upon the fact-finding functions of trial courts. First, in March 1985, the United States Supreme Court decided *Anderson v. City of Bessemer City*,134 in which it held that, in applying the "clearly erroneous" standard of review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure to the findings of trial courts sitting without juries, a court of appeals may not substitute its judgment for that of the trial court "even when the district court's findings do not rest upon credibility determinations but are based instead on physical or documentary evidence or inferences from other facts."135 Even if the court of appeals disagrees, it must accept the district court's determination, provided it is a permissible (or plausible) view of the evidence. This is of course a very restrictive view and suggests a deference to trial court determinations that often is not borne out by experience.136 The Court went on to declare that credibility determinations by trial judges are entitled to even greater deference. In cases where the Court has not imposed any "independent judgment" requirement, it has thus come close to treating a trial judge's determinations as if they had been made by a jury. As is well known, when a case has been tried by a jury, the traditional view has been that its verdict must stand when it is supported by *any* plausible view of the evidence.137

133 Wittgenstein's discussion of Jastrow's drawing of what appears to be the head of a duck which, if rotated ninety degrees then looks like the head of a rabbit, is well known. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 194-95 (1963).
135 Id. at 574. Only Justice Blackmun refused to join in this part of the Court's holding. Id. at 582, where he also describes the Court's statement as "dictum."
136 See, e.g., the cases cited supra in notes 42-44. The whole purpose of the constitutional fact doctrine is to make this process more open as well as more predictable and less quixotic.
137 It is generally considered that a reviewing court will be slightly more ready to re-examine the
The second development concerns the actual text of Rule 52(a). While the Anderson case was winding its way through the judicial system, the Advisory Committee on Rules, in July 1984, proposed an amendment to Rule 52(a) that specifically declared the clearly erroneous standard of review to be applicable regardless of whether the findings are based on "oral or documentary evidence," The Supreme Court approved this rule on April 29, 1985, and it became effective on August 1, 1985. Nothing is explicitly said about inferences, although the amendment clearly supports Anderson's ruling on this issue. It should be pointed out, however, that, if what is involved really is an inference, something that as a logical matter can be true or false as in one reading of Summers v. Tice, it will often be possible to demonstrate that conclusions based upon such inferences are clearly erroneous. Thus, subjecting such findings to the clearly erroneous standard will rarely impede appellate courts from second-guessing a trial judge's findings. The difficult problems arise with so-called inferences that are not really inferences, in the strict logical sense, but are more akin to what I have called evaluations.

For historical and other reasons, the conclusions of juries, and of trial courts trying cases without juries, are supposed to have a privileged status. This means that, when trial judges overturn the conclusions of juries or appellate judges overturn the conclusions of trial courts, they feel obliged to explain their actions in ways that recognize the privileged position of juries or of trial judges trying cases without juries. Unfortunately, as we have seen, the explanations offered are unsatisfactory and, if taken seriously, would end up overturning the primacy of juries and of trial courts trying cases without juries. Is, therefore, the independent judgment requirement with regard to certain questions of facts a totally flawed notion? Or, can something still be salvaged from it? To answer these questions, it might be helpful to proceed by examining, in the light of the epistemological considerations, the possible implications of applying an independent judgment requirement in a concrete set of circumstances.

VII. THE EPISTEMOLOGICAL CONSIDERATIONS APPLIED

Assume that a case is one in which some court is supposed to exercise an independent judgment with regard to facts already determined by an initial trier of fact. What are the "facts" as to which this independent factual conclusions of a trial court sitting without a jury than it would a jury verdict or the factual findings of an administrative agency. See 4 Kenneth C. Davis, Administrative Law § 29.02 (1958). In Bose, however, Justice Stevens, writing for the Court, refused to draw such a distinction between jury trials and bench trials. See infra, note 143.

138 See Kevin P. Robbins, Note, Review of Findings of Fact Based on Documentary Evidence: Is the Proposed Amendment to Rule 52(a) the Correct Solution?, 30 Vill. L. Rev. 227, 228 n.5 (1985).

139 Fed. R. Civ. P. 52(a) (amended 1985). For the prior history of the rule, see supra, note 8.
judgment should be exercised? In the modern trial, juries and other triers of fact both receive the reports of witnesses and are, at the same time, themselves witnesses to what transpires in the courtroom. They experience with their own senses the physical evidence that has been introduced and they observe the verbal and nonverbal behavior of the other participants in the trial. The verbal reports presented by the witnesses are now generally reported verbatim in the record, although, even until comparatively recently, it was common to preserve only general summaries of the evidence except on matters to which counsel had lodged exceptions in the course of trial. Of course the nonverbal aspects of the witnesses’ presentations are still not preserved in the record. Video-taping opens up the possibility of preserving some of these nonverbal aspects, but neither the possible adoption nor the implications of such a fundamental innovation is worth speculating about in this Article. Of the verbal behavior of the witnesses much will consist of reports of their own direct observations, but this is not invariably the case. Even laymen on occasion are permitted to express an opinion, such as whether the defendant was drunk or was speeding, or whether he enjoys a good reputation in the community, and the direct observations underlying these conclusions are not always described in the transcript.

A set of questions therefore arises: On what “facts” should the independent judgment requirement be applied? Should the exercise of independent judgment by a reviewing court be extended to matters that are determined by direct observation? And, if so, should this exercise of independent judgment by a reviewing court allow it to reject the reports of witnesses of their own direct observations? Take a defamation case in which the defendant who has made a false and defamatory statement about the plaintiff, is also alleged to have said “I’ll fix . . . [the plaintiff] even if I have to tell a lie about him.” The issue, as in Bose, is whether the defendant was guilty of actual (or constitutional) malice; that is, did he make a false statement about the plaintiff with knowledge of its falsity or with reckless disregard for truth or falsity? Several witnesses testify that they heard the defendant make that remark on a particular occasion; the defendant and another witness deny that any such remark was made on that occasion. If the defendant actually had made the statement, it would certainly be strong evidence of constitutional malice. Is a reviewing court obliged by Bose to exercise an independent judgment with regard to this fact? Should it do so despite the circumstance that the

140 The point has been well made by Jerome Frank. See Jerome Frank, Law and the Modern Mind 109-10 (1930). The statement was made in a context in which Frank was discussing trials by a judge sitting without a jury. The same point of course could be made with regard to a jury sitting as the trier of fact. It should be noted, of course, that at least at this period of his life, Frank believed that “[t]he jury . . . are hopelessly incompetent as fact finders.” Id. at 180. Frank felt that a competent fact finder required specialized training. Id. at 170-85.

141 See Graham C. Lilly, An Introduction to the Law of Evidence 107-10 (2d ed. 1987); McCormick on Evidence, supra note 119 at 26-29.
determination of whether the defendant actually made the statement boils down to a question of the credibility of witnesses reporting their direct observations?

One might respond that, yes, the reviewing court should exercise an independent judgment because, while determinations of credibility usually are treated as quintessentially within the province of the trier of fact, in Bose itself the Court actually disagreed with the credibility determinations of the trial court. It will be recalled that, in Bose, the trial judge, who directly observed the proceedings at the trial level, found actual malice because he could not believe that an “intelligent person whose knowledge of the English language cannot be questioned” could believe that “about the room” means “along the wall.” In addition to being concerned with credibility, the inquiry also looks very much like a what, where, or when question—was the witness being disingenuous?—the sort of question that observers like Jaffe and Monaghan accept as being part of the process of fact identification and which can be made “by a person who is ignorant of the law.” But the fact about which the Court was exercising an independent judgment in Bose was: could an intelligent English-speaker believe that “about the room” means “along the wall?” This is a fact that must be determined on reflection. It is not a fact that can be resolved by direct observation, such as whether the defendant uttered certain words on a particular occasion, as in the hypothetical case discussed in the previous paragraph.

Furthermore, while the question of whether the defendant uttered certain words on a certain occasion can in theory be resolved by the reports of direct observation, the question whether the witnesses, who testified on the issue of whether the defendant uttered the statement, were telling the truth would, of course, usually be a question that could only be resolved upon reflection. I say usually because the conclusion that one of the witnesses is lying or mistaken could in some circumstances be considered by many people as a determination involving hardly any reflection at all. Take, for example, a trial court’s determining that a witness was lying when he said he could see clearly because it was daylight—and there is uncontradicted astronomical evidence in the record that at the time of day in question the sun had long set at that time of year. Putting aside such unusual cases, my point is this: regardless of how some particular determination of credibility is classified—that is, even if it is classified as a question that can only be resolved by reflection and the exercise of judgment—if there is no statement in the record as to why the trier of fact decided one of the witnesses was lying or mistaken, there is normally no basis upon which a reviewing court could exercise an independent judgment. The trier of fact’s conclusions, from the point of view of an appellate court, are the equivalent of a witness's reports of his direct observations.

It is hard to reject the uncontradicted reports of direct observers,
whether they are witnesses reporting their experiences or triers of fact reporting their own observations of the physical evidence introduced and the process of the trial itself. Such reports can only be rejected if one doubts the veracity of the observer. But suppose the record is barren of any evidence that the observer is unstable or that the observer’s faculties were impaired? The trier of fact might decide that the observer is either mistaken or simply not telling the truth, but the trier of fact is itself an observer of what transpires at trial. A reviewing court does not enjoy such a privileged position. Suppose, in an action for battery, a witness reports, and the trier of fact accepts, that a defendant turned into a vampire bat and flew off and bit the plaintiff? The most an appellate court can do is find that the report is so implausible that it is not sufficient to establish that the event in fact happened. Yet the appellate court, even in this extreme situation, is in no position to decide itself what in fact happened. Even the conclusion that the evidence is insufficient to establish that the event occurred would be a difficult conclusion for a reviewing court to reach if a number of seemingly disinterested witnesses all told the same story about the defendant turning into a vampire bat and biting the plaintiff. Suppose, furthermore, in addition to this additional testimony the trial judge, as trier of fact, also reports, to buttress his decision in favor of the plaintiff, that the defendant turned into a vampire bat during the trial, and no one has attempted to introduce any contrary observations.

Sometimes, of course, and particularly when the trier of fact is a judge, the record does include some of the basis for conclusions about credibility. In Bose, for example, the trial judge declared that he could not believe that an educated and intelligent person who was a (native?) speaker of English could believe that “about the room” means “along the wall.” On the basis of this finding, the trial court concluded that the defendant had exhibited the requisite “actual malice.” In rejecting this conclusion, what was the Court doing? Was it deciding that an educated and experienced native English-speaker would equate the two expressions? It certainly did not. Assuming then that a native English-speaker would not equate the two expressions, what are we to make of a person who persists, as did the author of the article in the Bose litigation, in maintaining that the two expressions are equivalent? The trial judge concluded that such a person is either lying or exhibiting a reckless disregard for truth or falsity. A majority of the Court disagreed, not seemingly because the conclusion was unreasonable, and such an assertion would have been disingenuous to say the least, but because the Court itself would not have reached that conclusion. For this reason, the Court held that there was not clear and convincing evidence in the record to support a finding of actual malice.142 Superficially that conclusion seems less rea-

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sonable than that of the trial court, particularly since the Court did not itself observe the demeanor of the witness. Labelling the question as one of "constitutional fact" does not make the Court's conclusion any more plausible. It is to Justice Stevens's credit that, while he recognized that he could have avoided the whole controversy by purporting to set aside the district court's finding under the clearly erroneous standard, he expressly refused to do so. 143

It seems clear then that, with regard to findings that are directly based upon observation or upon the uncontradicted reports of observers and any other determinations, however classified, as to which there are no detailed explanations in the record, such as determinations of credibility, a reviewing court would be unable to—and, therefore, would be unlikely to—exercise an independent judgment regardless of a doctrinal requirement for such an independent judgment. It is ironic that the strongest criticism levied against Crowell v. Benson was its now moribund requirement, at least on the federal level, of a trial de novo on the constitutional facts involved. It seems, on the contrary, rather clear that, if an independent judgment is to be exercised with regard to the existence of certain facts, a trial de novo of these facts is the most sensible approach. How else can a reviewing court determine these facts and the crucial questions of credibility upon which they depend?

If an independent judgment requirement is to be exercised effectively, it will have to be limited to factual conclusions that are the subject of reflection once all the observational data are gathered. Excepted from this category are most determinations of credibility because, even though they are based upon reflection, it is usually impossible for an appellate court to marshal the relevant observational data before it. There is nothing upon which an appellate court can "reflect." Although it is a power that can be easily abused, there is some warrant in common sense for allowing a reviewing court some leeway in assessing the soundness of the trier of fact's conclusions that are derived by reflection from the observational evidence contained in the record. It does not follow, however, that the trier of fact's conclusions on these questions are entitled to no deference. After all, they do represent the exercise of an informed judgment. It is, I have argued, 144 one of the shortcomings of the Benmax case that the House of Lords conflated evaluation of the evidence, a process requiring judgment, with inference, a process suggesting logical processes and right answers, which carries with it the suggestion that any deference rendered to the conclusions of the trier of fact is merely out of politeness. Of course, as a practical matter, the trier of fact's conclusions, if reasonable, will be upheld in most cases merely because of the press of judicial

143 Id. at 514. Justice Stevens also refused to seek refuge in the possible distinction, as to the scope of appellate review, between jury trials and trials before a judge. See id. at 508 n.27. See also id. at 501.

144 See supra text accompanying notes 122-33.
business. If they are as reasonable as the conclusions of the reviewing court, however, they ought to be upheld in all cases. It is incongruous as well as irrational to entrust a complex fact determination to a body, to expend vast sums of money on a long trial, and then to accord the findings of the trier of fact not even the slightest presumption of correctness.\textsuperscript{145}

No record on appeal, however complete, can capture the richness of the trial situation. Moreover, even the most well-intentioned judge cannot always resist the temptation to take some trial court finding out of context. Take the two famous \textit{Wagon Mound} cases as an example. In the first case, the Privy Council accepted the trial court's determination that "the defendant did not know and could not reasonably be expected to have known that it [i.e. furnace oil] was capable of being set on fire when spread on water."\textsuperscript{146} In the second case, however, arising from the exact same accident, but decided some five years later, the Privy Council overturned the trial judge's finding that "the occurrence of damage to the plaintiff's property as a result of the spillage was not reasonably foreseeable by those for whose acts the defendants would be responsible."\textsuperscript{147} In overturning this finding, the Privy Council pointed out that there were subsidiary findings in the second \textit{Wagon Mound} case that were not present in the first case. These subsidiary findings were:

1. Reasonable people in the position of the officers of the \textit{Wagon Mound} would regard the furnace oil as very difficult to ignite upon water. 
2. Their personal experience would probably have been that this had very rarely

\textsuperscript{145} The question of why go through the trouble and expense of submitting a question to a trier of fact whose conclusion will not enjoy any presumption of correctness has arisen in several cases. In Jackson v. Denno, 378 U.S. 368 (1964), the Court held that, before the voluntariness of a confession could be submitted to the jury, it was not enough for the trial judge to determine that "the evidence presents a fair question as to its voluntariness." \textit{Id.} at 377. The trial judge must rather himself be convinced that the confession was voluntary. In his partial dissent, Justice Black raised the question whether, after the Court's decision, it made sense to consider the Constitution as any longer requiring that the jury be allowed to rule on the voluntariness of a confession. \textit{Id.} at 401, 404. Curiously, after having taken that position, Justice Black concurred in the Court's judgment because he felt that, regardless of who was the initial trier of fact, the Court was itself obliged to review the record to decide for itself whether the confession was voluntary. \textit{Id.} at 408-09. In Taggart v. Wadeley-Maurice, Ltd., 489 F.2d 434, 439 (3d Cir. 1973), \textit{cert. denied}, 417 U.S. 937 (1974), the majority held that labelling an issue one of "constitutional fact"—the issue being whether, in an invasion of privacy action, the plaintiff's inclusion in the "documentary" movie \textit{WOODSTOCK} had resulted in his being made an involuntary performer in the movie—did not change the criteria for when it would be appropriate for a trial court to grant summary judgment rather than allow the case to go to trial before a jury.

\textsuperscript{146} Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (\textit{The Wagon Mound}), 1961 App. Cas. 388, 413 (P.C.) (appeal taken from N.S.W.) (hereinafter \textit{The Wagon Mound No.1}). The Privy Council ruled that, based upon this finding that "was reached after a wealth of evidence," \textit{Id.}, the defendant's negligent conduct in allowing bunkering oil to spill on to Sydney Harbor was not the legal cause of the burning of the plaintiffs' dockyard.

happened. (3) If they had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances. (4) They would have considered the chances of the required exceptional circumstances happening whilst the oil remained spread on the harbour waters as being remote.\footnote{Id.} The Privy Council laid great store on the fact that the trial judge did not find that the defendant’s engineers would regard furnace oil as “impossible” to ignite on water or that they “would never have heard of a case where it had happened.”\footnote{Id. at 641. The Privy Council also seized on the trial court’s determination that fire would have been viewed as a “‘possibility,’ . . . not, as in The Wagon Mound No.1, that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on water.” \textit{Id.}} Treating the trial court’s conclusion that the defendants could not reasonably foresee damage to the plaintiff’s property as an “inference” from the subsidiary or “primary” findings,\footnote{Id.} the Privy Council rejected it and instead concluded that the fire was reasonably foreseeable.

The Privy Council attempted to justify the difference in findings between the two cases on the ground that in the first case, which was brought by the dock owners, “if the plaintiffs . . . had set out to prove . . . that it was foreseeable by the engineers of the \textit{Wagon Mound} that this oil could be set alight, they [i.e. the plaintiffs] might have had difficulty in parrying the reply that this must also have been foreseeable by their manager” and thus, have been barred by the defense of contributory negligence.\footnote{Id. at 640. This point is stressed by Arthur L. Goodhart, \textit{The Brief Life Story of the Direct Consequences Rule in English Tort Law}, 53 Va. L. Rev. 857, 867 (1967). When \textit{Wagon Mound No.1} was brought, New South Wales had not yet moved to comparative negligence.} There is no question that the verbal form of the trial court’s findings of fact in the two \textit{Wagon Mound} cases is different, although the difference may be somewhat exaggerated. After all, in the first \textit{Wagon Mound} case, the trial judge did make a “subsidiary” finding that “I feel bound, on the evidence, to come to the conclusion that, prior to this fire, furnace oil in the open was generally regarded as safe, and that, in the light of knowledge at that time, the defendant’s servants and agents reasonably so regarded it.”\footnote{\textit{Mort’s Dock & Eng’s Co. v. Overseas Tankship (U.K.)} (\textit{The Wagon Mound No. 1}), [1958] 1 Lloyd’s List L. Rep. 575, 382 (Sup. Ct. N.S.W.) (emphasis added). This is a report of the trial court decision. Both \textit{Wagon Mound} cases were tried by a judge sitting without a jury.} He did not find that no one would have regarded the spilled furnace oil as presenting a fire hazard. It is also indisputable that the second judgment was much lengthier and detailed, and more evidence seems to have been introduced in the second case.\footnote{\textit{Miller Steamship Co. v. Overseas Tankship (U.K.) Ltd.} (\textit{The Wagon Mound No. 2}), [1963] 1 Lloyd’s List L. Rep. 402 (Sup. Ct. N.S.W.).} I submit, however, and this conclusion has been reached by other observ-
ers as well,\textsuperscript{154} that anyone who reads in their entirety the trial court judgments in both \textit{Wagon Mound} cases would have a difficult time concluding that the two trial judges involved took a different view of the facts on the foreseeability question. I do not doubt that the second \textit{Wagon Mound} decision is the more sensible one, but I do submit that it would be outrageous, as a general matter, if the occasions upon which an appellate court exercised an independent review of the facts were to depend upon the serendipitous way a particular trial judge chose to word his conclusions.

\section*{VIII. Summation and Conclusion}

My argument thus far has proceeded along the lines that, from an epistemological point of view, the only rational way of constructing a plausible and workable theory of when reviewing courts should subject some findings of fact to a more searching review than others is one which distinguishes between those factual questions that, as a matter of common experience, represent the reports of direct observation and those factual questions that can only be determined by reflection upon the evidence that has been presented before the trier of fact and preserved in the record. I have suggested that, in these latter situations, reviewing courts could be given broader reviewing authority, but that there is no logical reason why, in the absence of a procedure for either a total or partial retrial to gather additional evidence, they should be permitted to dismiss completely the findings arrived at by the trier of fact who, after all, has personally heard all the witnesses and evaluated all the evidence.

These conclusions, of course, run afoul of two types of difficulties: those presented by the Seventh Amendment and the transference, by Rule 52(a) of the Federal Rules of Civil Procedure, of some of the attributes of the jury to trial courts sitting without juries, on the one hand, and the constitutional fact doctrine enunciated by the Court, on the other.\textsuperscript{155} As the evolving doctrine of constitutional fact demonstrates, the strictures of the Seventh Amendment have never been an insurmountable impediment to a federal court's reviewing a jury's findings.\textsuperscript{156} Moreover,

\textsuperscript{154} For example, Professor J. C. Smith, a Canadian, has concluded:

\textit{A comparison of . . . [the statements of the two trial judges relied upon by the Privy Council] would lead one to conclude that the courts came to different factual conclusions. An examination, however, of other statements of both judges, and the evidence upon which they principally relied, discloses no essential difference in the finding of fact.}


\textsuperscript{155} As previously noted, \textit{supra} note 1, similar problems arise under 28 U.S.C. 2254(d)(8) (governing the effect of state court determinations in federal habeas corpus proceedings brought by state prisoners). For the purpose of simplifying these concluding remarks, we will focus the discussion on Rule 52(a) and the constitutional fact doctrine.

\textsuperscript{156} As noted in the text following note 3, \textit{supra}, the Seventh Amendment provides for review of
the Seventh Amendment does not apply to the findings of a trial judge and, as a practical matter, the issue of appellate review of findings of fact is probably much more likely to arise in that context. The express findings that accompany a case tried to a judge provide a basis for second-guessing a determination at the trial level that is not present when a jury brings in a general verdict. Indeed, I myself would be prepared to accept a solution which never permitted a reviewing court to set aside the findings of a trial jury merely because it disagreed with those findings, but, by enunciating the doctrine of constitutional fact, the Court has indicated that it is not prepared to adopt that position, however much the difficulty of reviewing jury verdicts may, as a practical matter, lead to the same results as if it had. As a practical matter, the problem of trying to make sense of what the Court purports to be doing arises principally in cases tried by a judge without a jury. Under Rule 52(a), if some determination of a trial court trying a case without a jury is the determination of a question of fact, it cannot be overturned unless it is clearly erroneous. If it is not the determination of a question of fact, the trial court’s determination is totally open to re-examination by the reviewing court.

This polarity, which recognizes only extremely constrained review, or completely open-ended review, is an intellectual straitjacket. As we have seen, there have of course been many attempts to allow courts to have a greater role in reviewing trial court determinations, but all of these attempts have begun by accepting this bipolar universe in which there is either very constrained review or open-ended review. The first of these attempts has focused upon what has traditionally been called the “so-called” mixed question of law and fact category. Modern commentators, such as Monaghan, prefer to call these questions of law application, and the Court itself has sometimes indicated that it may prefer this terminology.\(^\text{157}\) It is clear, however, that from an epistemological perspective there is nothing unique about questions of law application. The

resolution of what most people would accept as clearly factual questions—that is questions concerning what happened, etc., which are not thought to require any knowledge of the law—sometimes involves the same epistemological operations. Furthermore, despite proceeding on the basis that there is something to the mixed questions of law and fact, or law application, category, the Court has itself sometimes treated questions that it concedes fall into the category of law application as questions of fact that fall within the ambit of Rule 52(a).\textsuperscript{158} Indeed, the Court has, even on one moderately recent occasion, explicitly refused to rule on the question of whether Rule 52(a) does or does not apply to “mixed questions of law and fact.”\textsuperscript{159} Finally, when the Court definitively holds, as it did on that same occasion, that whether a seniority system has been adopted as “the result of an intention to discriminate on account of race”\textsuperscript{160} is a purely factual question, it is hard to look at an analysis based on the notion of questions of mixed law and fact or, if you will, questions of law application, as much of a panacea.

Another attempt to break out from the constraints imposed by Rule 52(a) upon the review of findings of fact by reviewing courts has been the attempt to distinguish ultimate facts from so-called primary or evidentiary facts. The distinction was made by Justice Frankfurter in \textit{Baumgartner v. United States},\textsuperscript{161} but in \textit{Pullman-Standard v. Swint},\textsuperscript{162} the Court seems to have refused to accept that this distinction was relevant for the purposes of Rule 52(a). Deciding what is an ultimate fact is a task which involves serious logical difficulties. In \textit{Pullman-Standard}, Justice White, writing for the Court, seems to have signaled his appreciation of these difficulties by always putting quotation marks around the term ultimate facts,\textsuperscript{163} and by suggesting that what Justice Frankfurter was really talking about in \textit{Baumgartner} were questions concerning the application of law.\textsuperscript{164}

The third method of breaking out from constraints of Rule 52(a), the doctrine of constitutional fact that we have been discussing at such

which the Court resorted to the mixed question of law and fact terminology. The question in both cases was who was a “member of [a ship’s] crew” and therefore a “seaman” under the Jones Act.\textsuperscript{158} See \textit{Thornburg v. Gingles}, 477 U.S. 30, 78 (1986), where the Court conceded that “a finding of vote dilution . . . requires the application of a rule of law to a particular set of facts” but nevertheless concluded that a trial court’s finding on this issue was subject to the clearly-erroneous standard of Rule 52(a).


\textsuperscript{160} \textit{Id}. at 287-88. See also \textit{Firefighters Local Union No. 1784 v. Stotts}, 467 U.S. 561, 577-78 (1984) (declaring that the district court’s finding that a seniority plan was not adopted with an intent to discriminate precluded the district court from ordering a departure from the seniority plan in order to protect black employees). This portion of \textit{Stotts} was cited with approval in \textit{Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC}, 478 U.S. 421, 471 (1986).

\textsuperscript{161} 322 U.S. 665, 671 (1944).\textsuperscript{162} 456 U.S. 273, 287 (1982).

\textsuperscript{163} \textit{Id}. at 286-87 & n.16.

\textsuperscript{164} \textit{Id}. at 287 n.16.
length, is in many ways the most radical, however much it may be a natural development of the Court's approach to constitutional theory. The doctrine asserts that regardless of the nature of the epistemological operations involved in the resolution of certain issues, Rule 52(a) simply does not apply because the issues involved are too important. Why the issue of intention to discriminate is the type of factual question subject to the clearly erroneous standard of Rule 52(a), but the issue of malice is not, is an interesting question. The difference in treatment is certainly not justified because the ascertainment of constitutional malice involves the application of law whereas the ascertainment of intention to discriminate does not, particularly when constitutional malice includes the intentional utterance of falsehoods. The Court's conclusions can only be described as quixotic, and they will continue to be so as long as the Court focuses merely upon the particular fact in issue and not on how that fact has been ascertained.

The most that can be said about the occasions in which the Court has imposed a requirement of the exercise of independent judgment with regard to certain facts is that the principal type of case, defamation, involves situations in which the Court has imposed a requirement of "clear and convincing proof" of the facts in question. In such situations it may be possible to avoid the necessity of creating a category of constitutional facts by a more carefully reasoned approach that recognizes that what may not be clearly erroneous when the requirement is proof by the preponderance of the evidence, may be clearly erroneous when the requirement is proof by clear and convincing evidence. If this approach does not meet the needs of the Court, and Bose may be a case where it does not,\textsuperscript{165} then all the problems discussed in this article are presented. Moreover, as pointed out, if reviewing courts are going to get involved in exercising independent judgment with regard to certain factual judgments there is a lot to be said for insisting upon trial de novo, particularly when credibility is involved; or if that is deemed impracticable, as undoubtedly it is, at least to allow supplementation of the record on appeal as is possible under contemporary English procedure,\textsuperscript{166} and in California\textsuperscript{167} in nonjury cases, and as used to be possible in appeals in admiralty.\textsuperscript{168}

As a practical matter, if the Court is unwilling to accept the limited

\textsuperscript{165} See supra text accompanying notes 142-43.
\textsuperscript{166} See supra note 28.
\textsuperscript{168} See Admiralty R. 45, 254 U.S. 671, 698 (1920). The substance of this rule was reflected in the Supreme Court Rules of 1928, Rule 15, ¶ 2, 275 U.S. 579, 607 (1928). In extraordinary cases, even today there are ways of bringing to the attention of the Court matters that are not contained in the record. See Giles v. Maryland, 386 U.S. 66, 74-82 (1967) (police report not in record; case remanded to state court for determination of whether report shown to defendant's trial counsel and, if shown, why not used in cross-examination). This, however, is not the same thing as supplementing the record at the appellate level.
scope of review provided by the actual language of Rule 52(a), the only
intellectually coherent solution is one that quite openly breaks the
shackles of Rule 52(a) rather than one that ostensibly accepts that rule,
but then carves out exceptions by utilizing notions like "constitutional
fact," "mixed questions of law and fact," or "questions of law applica-
tion." The latter solution is intellectually indefensible. An intellectually
plausible solution is one that proceeds as follows: If a determination
depends on the direct observation of facts and the uncontradicted testi-
mony of witnesses reporting their observation, the findings of the trial
court should be upheld, unless they are clearly erroneous, regardless of
what the fact in question is, and most especially regardless of whether the
fact is called a "constitutional" or "jurisdictional" fact. If the factual
determination involves reflection on the evidence and the record ade-
quately presents the evidence, then there is a basis for asserting that some
greater scope of review is warranted even if the fact is not determined to
be a "constitutional" or "jurisdictional" fact. Nevertheless, and again
regardless of what the fact is, the finding of the trier of fact is entitled to
some deference. Thus, it might be appropriate for a reviewing court to
reject the trier of fact's evaluation of the evidence, even if the trier of
fact's conclusions are reasonable, so long as the reviewing court felt that
its contrary evaluation was a more reasonable view of the evidence. On
the other hand, if the reviewing court cannot in good conscience main-
tain that its evaluation is a more reasonable evaluation than that of the
trier of fact, a trial court's determination that is reasonable in the light of
the whole record should be sustained. A trial court considering the eval-
uations of a jury might be allowed to take a slightly more assertive pos-
ture in substituting its conclusions for those of a jury; but after all, a trial
court, unlike an appellate court, is an observer at a trial.169 There would
be no point in having a trial, however, if the conclusions arrived at can be
overturned merely because a subsequent reviewer disagrees with them.
In the end, we would all agree with Monaghan that the primary job of
appellate courts is to establish law. It is only in performing this function
that they are entitled to have their views prevail.

169 The privileged position of a trial judge trying a case with a jury was, of course, recognized by
the common law in the authority afforded the trial judge to set aside a verdict and to grant a new
trial in the interest of "justice." This authority or power is recognized in Rule 59 of the Federal
Rules of Civil Procedure. See 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE
AND PROCEDURE §§ 2801-10 (1973). See especially id. at § 2806, which recognizes the right of
a trial judge to set aside a verdict even if there is "substantial evidence to support it." Id. at 43.