Constitutional Fact Review: An Essential Exception to *Anderson v. Bessemer*

INTRODUCTION

In a fiercely contested bench trial, the federal judge rules the defendant did not violate plaintiff's constitutional rights. Plaintiff appeals, insisting that the trial judge erred in its findings of fact, and that this error resulted in an unjust denial of plaintiff's constitutional rights. The appellate court then faces a dilemma: under what standard of review should it examine the trial court fact findings?

This Note explores appellate review of bench trial fact findings for constitutional cases. The Note begins by discussing the most obvious standard of review. This standard is Federal Rule of Civil Procedure 52(a), which mandates, "[f]indings of fact . . . shall not be set aside unless clearly erroneous."[1] The Note traces the history of this rule through *Anderson v. City of Bessemer City,*[2] the Supreme Court's most recent statement about Rule 52(a). In *Anderson,* the Court explained that an appellate court must uphold the trial court fact findings unless these findings appear implausible in light of the evidence. Even if the appellate court prefers another interpretation of the facts, it must uphold any trial court fact finding which is not clear error.

The Note contends that Rule 52(a) review, as defined in *Anderson,* proves beneficial for most cases, but is inadequate for fact review in constitutional cases. Constitutional rights frequently hinge on fact findings in these cases. Thus, the trial court might make a factual error which would cause an improper denial of a constitutional rights claim. *Anderson,* for two reasons, does not adequately guard against such an error. First, under the narrow *Anderson* review, an appellate court could uphold any "plausible" fact finding, even if this finding failed to protect constitutional rights to the greatest extent possible. Second, several ambiguities exist within *Anderson.* The exact scope of appellate review under *Anderson* remains uncertain, and so does the distinction between a "finding of fact" subject to *Anderson* review and a "finding of law." The importance of fact findings in constitutional cases for the protection of constitutional rights demands an especially consistent, independent review of the facts.

This Note then examines a line of Supreme Court cases which suggest that appellate courts can independently review constitutional facts. The Note

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1. FED. R. CIV. P. 52(a).
2. 470 U.S. 564 (1985).

asserts, however, that these cases do not provide sufficiently clear and decisive guidelines for this independent review. For example, the Court has not clarified whether this independent review applies to all facts in all constitutional cases, or to a more limited range of facts or cases. The Court has also failed to define the scope of appellate review for these constitutional facts, as well as the circumstances in which this independent review is added to Rule 52(a). The appellate cases reviewing constitutional facts reflect these uncertainties; they fluctuate between review under the *Anderson*-Rule 52(a) standard, independent review, or various combinations of these standards.

This Note proposes a solution to the dilemma of constitutional fact review; the Supreme Court should, in a new case, formulate a definite standard of constitutional fact review. Under this standard appellate courts would independently examine the findings of fact in constitutional fact cases to insure that these findings do not result in an unjust denial of a party's constitutional rights. The appellate courts would, of course, continue to use the *Anderson* review for most cases. The independent review of constitutional facts, however, would provide an added check against improper denial of constitutional rights.

I. HISTORICAL BACKGROUND: BEFORE LAW AND EQUITY MERGED

A. Appellate Review in the Colonies

Throughout American history, controversy and confusion have surrounded appellate review of trial judges' fact findings.[3] The structure of courts in colonial America invited this difficulty. As a general rule, the American colonies copied the English two-prong court structure with courts of law and courts of equity.[4] A trial jury heard most cases in the courts

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3. The Constitution and subsequent cases firmly establish the standard of appellate fact review for jury decisions:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and 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.

U.S. CONST. amend. VII.

In cases like Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891), the Court has consistently affirmed that an appellate court cannot overturn facts found by a jury unless no substantial evidence supports the findings. Appellate review of trial judges' fact findings in bench trials, however, not guarded by such a provision, continually floundered between competing standards. *See infra* notes 4-34 and accompanying text.

4. The colonies copied this dual court system from the division between Courts of King's Bench and Courts of Chancery in England. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 107-08 (1941). In the early American colonies, the two systems of review, the law writ of error and the equity appeal, had vied for power, but by the beginning of the eighteenth century, the

of law,[5] and the appellate court could review the evidence by "writ of error" only to judge the jury's legal conclusions, not the findings of fact.[6] A trial judge heard equity cases, but in equity the appellate court could review the evidence by "appeal" and freely judge and alter the trial court's findings of law and findings of fact.[7] In actuality, however, striking inconsistencies appeared between the colonies' court systems. Some colonies used only law courts, others held both law and equity courts, and within each type of court the procedure for appellate review varied between the colonies.[8]

B. Judiciary Act of 1789: Uniform Appellate Review

Due to the uncertain nature of fact review, conflict erupted in the United States legislature when Congress convened in 1789 to enact a statute establishing federal courts and their review procedure.[9] Federalists, attempting to place power in the central government, advocated the broad fact review associated with equity, which would increase the scope of appellate and Supreme Court review and place added power and discretion in the central courts.[10] Anti-Federalists, who preferred government power to be dispersed among the states, supported narrow fact review, leaving discretion over fact finding in the trial courts.[11] The Judiciary Act of 1789[12] represented a com-

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writ of error had started to gain prominence. *Id.* at 88. By the time of the American Revolution, writ of error became the normal type of review in the colonies. *Id.* For a description of the development of the writ in various colonies, see *id.* at 86-94.

5. In a few kinds of cases at law, no right to a jury trial existed. Here, the trial judge's findings of fact would have the same finality as would a jury's findings. 3 J. MOORE & J. FRIEDMAN, MOORE'S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE § 52.01 (1st ed. 1938).

6. *See* R. POUND, *supra* note 4, at 109-10. *See generally* Clark & Stone, *Review of Findings of Fact,* 4 U. CHI. L. REV. 190 (1937).

7. *See* 3 J. MOORE & J. FRIEDMAN, *supra* note 5, at § 52.01; *see also* Clark & Stone, *supra* note 6, at 190.

8. Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923), provides examples of these different court systems:

> There were Courts of Chancery [equity], in 1787, in New York, South Carolina, Maryland, Virginia, and to some extent in New Jersey; in Pennsylvania, Delaware and North Carolina, there were no such courts, though the common law courts had certain equity powers; in Connecticut and Rhode Island, the Legislature exercised some powers of a Court of Chancery; in Massachusetts and New Hampshire, there were common law courts only, having a few very limited equity powers. Georgia had only common law courts.

Id. at 96. *See also* R. POUND, *supra* note 4, at 80-94.

9. For a detailed and lively description of the progression of the Judiciary Act through Congress, see generally Warren, *supra* note 8.

10. Clark & Stone, *supra* note 6, at 192-93; Warren, *supra* note 8, at 131.

11. Clark & Stone, *supra* note 6, at 192-93; Warren, *supra* note 8, at 131.

12. First Judiciary Act of 1789, ch. 20, 1 Stat. 73. The Act created the Federal Courts, including thirteen districts with a district court in each, and three circuits with a circuit court in each. The Act also established procedures for these courts.

promise between the Federalist and Anti-Federalist factions,[13] but in significant ways the Act favored the Anti-Federalist position of narrow fact review.[14] For example, the Act provided the limited writ of error appeal for both law and equity cases,[15] and prohibited equity cases except when no adequate remedy at law existed.[16] The Act also abolished proof by deposition and substituted proof by oral argument which made effective appellate review more difficult.[17]

C. *Acts of 1800: Divided Appellate Review*

In the years following the Judiciary Act, the Federalists and Anti-Federalists eagerly attempted to amend[18] and to interpret the Act to conform to their beliefs.[19] The Anti-Federalists gained power in 1800 and immediately passed new Acts to alter appellate review by making it broader.[20] As a result of these Acts, Congress established two standards of review for trial court fact findings: de novo review for equity actions, and a more restricted review for law actions.[21]

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13. Warren, *supra* note 8, at 131, describes the tremendous division between the Federalist and Anti-Federalist positions, and shows the delicate balance the Act struck in attempting to please both sides:

> As has been stated, the Judiciary Act was a measure in the nature of a compromise between the extreme federalist view that the full extent of judicial power granted by the Constitution should be vested by Congress in the Federal Courts, and the view of those who feared the new Government as a destroyer of the rights of the States, who wished all suits to be decided first in the State Courts, and only on appeal by the Federal Supreme Court.

Id.

14. *Id.* at 53.

15. "[F]inal decrees and judgments in civil actions in a district court . . . may be reexamined, and reversed or affirmed in a circuit court . . . upon writ of error . . . ." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

16. The Act permitted equity jurisdiction where there was no "plain, adequate and complete remedy" at law. First Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.

17. "[T]he mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law." First Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88-90. At common law, attorneys examined witnesses by oral testimony rather than by depositions as used in equity. Clark & Stone, *supra* note 6, at 194. *See also* Warren, *supra* note 8, at 100.

18. Clark & Stone, *supra* note 6, at 194; Warren, *supra* note 8, at 54. These attempts to amend the Act proved that the Act did not truly resolve the earlier conflict. Blume, *Review of Facts in Non-Jury Cases,* 20 J. AM. JUDICATURE SOC'Y 68, 68 (1936).

19. *See* Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 328-29 (1796).

20. Clark & Stone, *supra* note 6, at 196. The Act of April 29, 1802, ch. 31, § 25, 2 Stat. 156, 166, states that either party can request witness testimony to be taken by deposition. This would make appellate fact review easier. The ensuing Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244, took the major step of allowing review by appeal in equity and providing that a transcript of the record and the evidence should be sent to the Supreme Court for its review. The Court in *In re* The San Pedro, 15 U.S. (2 Wheat.) 132, 137-42 (1817), stated that these acts abolished the writ of error in equity cases. Thus, broader review was reinstated.

21. Clark & Stone, *supra* note 6, at 196.

These two standards remained constant throughout the nineteenth and early twentieth centuries, but subtle yet substantial changes in law and equity foretold a merger of these procedures of appellate fact review.[22] By the 1930's, the gap between law and equity and the type of review accompanying each procedure diminished.[23] Nevertheless, some distinction in appellate review for law and equity remained. For example, an Act[24] intending to abolish writ of error and to establish appeal review for law cases evoked the anger of lawyers and judges.[25] Congress quickly amended the Act so that review

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22. The Act of March 3, 1865, ch. 86, § 4, 13 Stat. 500, 501 (codified as amended at 28 U.S.C. § 773 (1928)), took the first major step toward this result by allowing parties to waive a jury trial for actions at law, so that both law and equity cases could now be tried before a judge. 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, 231 (1985). In a law action before a judge, however, the appellate court would examine the fact findings with the deference it formerly gave jury fact findings. *Id.* at 232.

Legislation in the states also contributed to the growing similarity between law and equity. In the nineteenth century, states adopted field codes which combined law and equity actions. Clark & Stone, *supra* note 6, at 200-01. In 1872, Congress passed the Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872) (codified as amended at 28 U.S.C. § 724 (1928)), which mandated that federal law procedure conform as much as possible to state law procedure in the state in which the federal court was located. Therefore, some of the federal courts began to combine law and equity actions. Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure,* 22 A.B.A. J. 533 (1936). In addition, the scope of federal appellate review became more important with the creation of the circuit courts of appeals in the Evarts Act of 1891. Act of March 3, 1891, ch. 517, § 2, 26 Stat. 826. *See* Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts,* 32 CATH. U.L. REV. 787, 788-90 (1983).

The twentieth century showed a continuation of this movement toward merging law and equity. In the twentieth century, as in the nineteenth, the jurisdiction for federal review expanded, making the review more significant. The Act of February 13, 1925, ch. 229, 43 Stat. 936, attempted to combat a new Supreme Court overload by rendering its jurisdiction primarily discretionary, and giving much of its former appellate jurisdiction to the federal appellate courts. R. FORRESTER, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE 832 (Dobie & Ladd, 2d ed. 1950).

23. Appellate courts at this time varied on how much deference they gave to the trial court fact findings in equity cases as they reviewed these findings. R. POUND, *supra* note 4, at 301; Clark & Stone, *supra* note 6, at 208-09. As Clark and Stone explained, the type of evidence used at trial often influenced the scope of equitable appellate review. For instance, the appellate courts tended to hold fact findings based on oral witness testimony presumptively correct, since the trial court had a superior opportunity to observe the evidence. The appellate courts more freely reviewed fact findings based on documentary evidence, since they could observe the evidence as well as the trial court. If documents conflicted with each other, the appellate court viewed the trial court fact findings as presumptively correct, but the presumption was rebuttable. Clark & Stone, *supra* note 6, at 207-08.

24. 28 U.S.C. § 861(a) (1936) (obsolete).

25. Clark & Stone, *supra* note 6, at 204-05:

> But so great was the outcry from bench and bar alike, which interpreted the reform to be a substitution of the equity review for that at law, that the further Act of April 26, 1928, was immediately passed, which emasculated the proposed reform into a mere change of words by providing that the statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking that relief, should

at law, while now labelled an "appeal," retained its traditional characteristics.[26]

D. *Federal Rule of Civil Procedure 52(a): Uniform Appellate Review Reinstated*

Congress, responding to the confusion surrounding the law and equity distinction, authorized the Supreme Court, in 1934, to formulate procedural rules for the merger of law and equity.[27] The new procedural rules needed a provision for uniform appellate review of trial court fact findings, a major change from the former system.[28] A proposed Rule 68 presented the first solution: "The findings of court in such cases shall have the same effect as that heretofore given to findings in suits of equity."[29] The Advisory Committee seemed to view this as a type of de novo review, which would permit an appellate court to examine and judge the evidence freely, possibly arriving at new fact conclusions and disregarding those of the trial court,[30] although at the time, equity review actually encompassed a variety of standards the courts had developed.[31] Some Committee members and commentators supported this Rule[32] and others opposed it.[33] A heated conflict developed.

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be applicable to the appeal substituted for the old writ of error. Thus the old writ of error now became known as an appeal, but its characteristics remained unchanged otherwise.

(footnotes omitted).

26. 28 U.S.C. § 861(b) (1936) (obsolete).

27. Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064.

28. The Advisory Committee for the Rules had a choice between three standards of review. The Committee rejected one option, retaining the law and equity dual standards, because it would frustrate the goal of the rules to abolish the law and equity distinction. The Committee, without an explanation, rejected the second option, retaining the "writ of error" review for all cases. The Committee accepted as a starting point the broader review formerly applied in equity, and began attempting to formulate a new standard from this one. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF COLUMBIA 120-21 (1936).

29. *Id.* at 118.

30. This is apparent by the fact that the commentators' praise and criticism of this Rule focus primarily on the benefits and dangers of a broad review.

31. *See supra* note 22.

32. Professor William Blume, in Blume, *supra* note 18, at 71-72, expresses the position of committee members and commentators who approved of Rule 68. Blume advocates that a broad "equity" review would provide an extra safeguard against incorrect decisions, encourage trial judges to exercise greater care in making fact findings and enhance public confidence in the courts. Blume emphatically stated: "A sure way to arouse distrust and suspicion in the public mind is to give the district judge final power over life, liberty or property." *Id.* at 71.

33. Other commentators and Committee members advocated a narrower review. Dean Charles Clark, reporter for the Committee, and Professor William Stone, Committee member, insisted that a broad equity review would increase the number of appeals and reversals,

Confronted by controversy, the Committee retreated and spent three years examining the procedures for appellate review in various states and soliciting the advice of lawyers, judges and commentators.[34] In 1937, the Committee submitted to the Supreme Court Rule 52(a). The Court accepted the Rule, the Attorney General submitted it to Congress, and it became effective in 1938.[35] The new rule stated then, as now: "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[36]

II. Early Interpretations of a New Rule

A. Rule 52(a) Proves Ambiguous

At first glance, Rule 52(a) appeared to quell the uncertainty of appellate review by silencing the dispute between law and equity. Later, court decisions revealed troubling ambiguities within the Rule. The term "clearly erroneous" appeared to be a vague modification of the former law and equity review standards. Basically, a "clearly erroneous" standard implied considerable appellate court deference to trial court fact findings; the appellate court would reverse these findings only when the evidence did not reasonably support the trial court's fact decisions. Judge Learned Hand, in *United States v. Aluminum Co. of America,*[37] offered a general guideline for application of the "clearly erroneous" review standard:

> It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an adminis-

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frustrating the goal of simplicity. Clark & Stone, *supra* note 6, at 217.

Judge Chesnut urged that broad review would "tend to derogate from the importance of . . . [the trial judge's] judicial function." Chesnut emphasized that the trial judge's chance to observe the trial provided an added opportunity for the trial judge to make a better decision. Chesnut, *supra* note 22, at 540.

Judge Wright feared that a reversal by judges who had not observed the witnesses and the trial would threaten, not protect, just results. Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn. L. Rev. 751, 762-63 (1957).

34. R. Forrester, *supra* note 22, at 548:

> After almost three years of incessant toil, in the course of which a thorough and painstaking study was made of the best features of the legal procedure in the various states and in England and an opportunity was extended to all bar associations and to individual lawyers to offer criticisms and suggestions, the Committee, in the autumn of 1937, submitted to the Supreme Court a draft of the proposed Federal Rules of Civil Procedure.

35. *Id.* at 548-49.

36. Fed. R. Civ. P. 52(a).

37. 148 F.2d 416 (2d Cir. 1945).

> trative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.[38]

Many courts accepted this basic standard, but appeared uncertain about the type of fact finding to which this standard should apply. Courts experimented with different approaches until, over time, three strikingly different patterns of appellate fact review appeared. Under one approach, the courts applied the "clearly erroneous" standard to all types of evidence.[39] Under another, the "gloss" approach, courts applied the pure "clearly erroneous" standard to facts based on oral evidence. For facts based on documentary evidence, they applied a "watered-down" version of the clearly erroneous standard, and, while they did not use de novo review of facts based on documentary evidence, they did review these facts more freely than they would under the strict clearly erroneous standard.[40] Under a third approach, the *Orvis* approach, courts applied the "clearly erroneous" standard only to findings based on oral evidence, and reviewed documentary evidence de novo.[41]

B. Two New Approaches to Rule 52(a) Review

1. The Gloss Approach

The gloss approach, an early interpretation of Rule 52(a), arose from the following confusing passage within the Advisory Committee's Notes to Rule 52(a): "The rule stated in the third section of Subdivision (a) accords with the decisions on the scope of review in modern federal equity practice."[42] This statement evoked confusion since equity courts in the past had applied a diversity of standards, including de novo review, free review of facts based on documentary or undisputed evidence, and a "clearly erroneous" standard for all evidence.[43] The words of the rule dispelled the possibility of complete de novo review,[44] and another passage in the Advisory Committee's Notes dismissed the possibility of different types of review for disputed and un-

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38. *Id.* at 433.

39. *See* Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee,* 7 VAND. L. REV. 521, 535 (1954).

40. Judge Clark and Judge Wright coined the term "gloss approach." For a description of this approach, see Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules,* 3 VAND. L. REV. 493, 505-06 (1950); Wright, *supra* note 39, at 533-34.

41. For a description of the *Orvis* approach, see generally Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950).

42. *See* FED. R. CIV. P. 52(a) advisory committee's note.

43. *See supra* notes 22-26 and accompanying text.

44. "Findings of fact shall not be set aside *unless clearly erroneous* . . . ." FED. R. CIV. P. 52(a) (emphasis added).

disputed evidence.[45] Two basic standards of review remained plausible: a "clearly erroneous" standard for all evidence, or a standard with broader review for documentary evidence.

a. Supreme Court Cases Use the Gloss Approach

Supreme Court interpretations of Rule 52(a) heightened the uncertainty surrounding the rule. In *Baumgartner v. United States,*[46] the Court hinted that the oral and documentary distinction might wield significant control over the scope of appellate fact review: "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based."[47] A subsequent case, *United States v. United States Gypsum,*[48] arguably supported the oral and documentary distinction. In *Gypsum,* the defendant industries appealed a charge that they had violated the Sherman Act through a plan involving patent licensing in a conspiracy to restrain the gypsum trade.[49] In court, the defendants denied the conspiracy. Documents, however, including the licensing agreement and bulletins from defendants' meetings contradicted the oral testimony.[50] The trial court granted the defendants' motion to dismiss. On review, the Supreme Court struck down the trial court's holding. The Court discredited the witness testimony. Justice Reed, speaking for the majority, explained: "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."[51] This holding could support a different standard of review for oral and documentary evidence. Or, as one commentator pointed out, it could also

45. This passage explained that the clearly erroneous standard "is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony." FED. R. CIV. P. 52(a) advisory committee's note.

46. 322 U.S. 665 (1944). In this case, the appellate court had sustained the district court's holding that deprived Baumgartner of his American citizenship under the claim that, at his naturalization oath ten years earlier, he had not fully renounced his loyalty to Germany and transferred his loyalty to America. The lower courts based their decisions on the defendant's subsequent declarations about his loyalty to the Nazi party and the superiority of the German people. The Supreme Court stated that the first amendment protected the speech of naturalized and natural born citizens equally, so that the defendant's declarations alone could not cause Baumgartner to forfeit his citizenship. The Court held that the plaintiff (the defendant here) presented no sufficient evidence of Baumgartner's disloyalty or fraud at the time he took the naturalization oath.

47. *Id.* at 670-71. This quote may be dicta since the Supreme Court did not appear to use the oral and documentary evidence distinction to attempt to justify using independent review, and instead seemed to base its independent review on the character of the evidence, its broad social value, and its implication of important first amendment principles.

48. 333 U.S. 364 (1948).

49. *Id.* at 364-65.

50. *Id.* at 393-96.

51. *Id.* at 395-96.

support the narrower interpretation that a court could ignore self-serving oral testimony when that testimony contradicted documents prepared by the same witnesses.[52] Appellate courts predictably interpreted the holding both ways, widening the rift between the standards of review.

b. Commentators Discuss the Gloss Approach

Commentators' opinions reflected the appellate courts' divisions between the "clearly erroneous" approach and the gloss approach. Some commentators supported the gloss approach,[53] while others preferred general application of the "clearly erroneous" rule.[54] No irreparable chasm had yet developed, however, between the two views. Even commentators who advocated the "clearly erroneous" standard accepted, reluctantly, the gloss approach. As one explained, "This was perhaps not harmful, though to add an additional measure of discretion to a rule calling for the exercise of discretion was, if not confusing, at least gilding the lily."[55]

2. The *Orvis* Approach

a. Judge Frank Develops the *Orvis* Approach

The gloss approach was expanded dramatically by one judge's interpretation of *Gypsum*. Judge Frank, in *Orvis v. Higgins,*[56] used *Gypsum* to develop a two-part formula to govern the scope of appellate review of trial court fact findings. First, if the trial court based the fact finding on purely documentary evidence, or on a mixture of documentary and oral evidence with the balance toward documentary, the appellate judge could make a new finding of fact and disregard the trial court's findings, since both courts

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52. Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence,* 49 VA. L. REV. 506, 523 (1963).

53. *See* 3 J. MOORE & J. FRIEDMAN, *supra* note 5, at § 52.01. For Moore's more recent analysis and support of a different scope of review for oral and documentary evidence, see 5A J. MOORE, FEDERAL PRACTICE § 52.04 (2d ed. 1982).

54. Clark, *supra* note 40, at 505; Wright, *supra* note 39, at 533-35.

55. Clark, *supra* note 40, at 505.

56. 180 F.2d 537. In this case, the appellate court reversed the trial court's holding that a husband and wife had not intended to create reciprocal trusts, and hence these trust funds were not includable in the husband's gross estate.

had equal opportunity to examine the evidence.[57] If the fact finding rested on purely oral evidence or a mixture of oral and documentary evidence with the balance toward the oral testimony, the appellate court, having a limited ability to examine witnesses' demeanor, could reverse the trial court's fact findings "only in the most unusual circumstances."[58]

b. Commentators Discuss the *Orvis* Approach

Judge Frank's novel approach further divided the commentators. Some approved Judge Frank's derivations. They believed that a broader appellate review would increase correct decisions, encourage trial court care in fact findings, and elevate public confidence in the fairness of court decisions.[59] Others, including some who tolerated the gloss approach, vehemently opposed this new interpretation. They insisted that the freer review would multiply the number of appeals, decrease public confidence in lower courts' decisions, lower the morale of trial judges, restrict trial courts to a role of merely determining witness credibility, and lead to a lack of uniformity and finality of decisions.[60]

C. *Rule 52(a) Review: Three Standards Evoke Confusion in the Courts*

Supreme Court cases coming after the *Gypsum* and *Orvis* cases appeared to fluctuate between the three standards: the *Orvis* approach, the gloss approach, and the "clearly erroneous" review. In *United States v. General Motors,*[61] the Court appeared to shift toward the gloss approach and the *Orvis* approach by implying that appellate courts could review documentary

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57. Judge Frank explained:

> Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) if he decides a fact issue on written evidence alone, we [the Court of Appeals] are as able as he [the trial court] to determine credibility, and so we may disregard his finding. (b) Where evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.

Id. at 539.

58. Judge Frank stated: "But where the evidence supporting his [the trial judge's] finding as to any fact issue is entirely oral testimony, we [the Court of Appeals] may disturb that finding only in the most unusual circumstances." *Id.* at 539-40.

59. 5A J. MOORE, *supra* note 53, at § 52.04.

60. Wright, *supra* note 39, at 534-35; Clark, *supra* note 40, at 506, observed: "Hence we have the rule so overturned that when the appellate court wishes to apply the policy of nonreviewability of the original rule, it finds it necessary to utter an apology for seeming to violate the rule of case law."

61. 384 U.S. 127 (1966).

evidence more freely than oral evidence. The Court reversed a trial court's decision, concluding that defendant automobile dealers conspired to restrain trade:

> Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) . . . plays only a restricted role here. This was essentially a 'paper case.' It did not unfold by the testimony of 'live' witnesses.[62]

Other cases were less certain. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[63] the Court made some statements that can be read to support the gloss and *Orvis* approaches,[64] and other statements that seem to support the "clearly erroneous" approach.[65]

1. The Supreme Court Begins to Accept the "Clearly Erroneous" Standard

In later cases, the Court moved toward application of the "clearly erroneous" review to all types of evidence. In *Inwood Laboratories v. Ives Laboratories*,[66] evidence of whether a generic drug manufacturer had intentionally induced manufacturers into mislabeling certain drugs consisted primarily of documentary evidence: advertisements, descriptions of the drug's appearance, and statistics about mislabeling. Both the appellate court and the trial court could examine the evidence equally well. Nonetheless, the Supreme Court denounced the appellate court's broad review of the fact findings, saying:

> By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the instances of mislabeling were not clearly erroneous, they should not have been disturbed.[67]

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62. *Id.* at 129 & n.16. Only three witnesses appeared in person, so the relevant evidence was almost wholly documentary.

63. 395 U.S. 100 (1969). In this case, the Supreme Court affirmed in part and reversed in part the appellate court's holding that plaintiff patentee had joined in a patent pool in a conspiracy to exclude defendant from the Canadian, English and Australian markets.

64. *Id.* at 122-23. The Court criticized the appellate court for giving less weight than the trial court gave to the witness testimony. This can be interpreted to suggest that appellate courts should give oral evidence special deference, as the gloss and *Orvis* approaches advocate.

65. *Id.* at 123. The Court warned, "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide cases *de novo*." *Id.* This warning could apply equally to oral and documentary evidence.

66. 456 U.S. 844 (1982).

67. *Id.* at 856.

In another recent case, *Pullman-Standard v. Swint*,[68] the Court specified that the "clearly erroneous" standard did not exclude certain categories of fact.[69] The Court, however, intended this statement to resolve another distinction, and did not specifically apply this statement to the oral and documentary distinction.[70]

2. Circuit Courts Fluctuate Between the Three Standards

Despite the fact that the Supreme Court was moving toward one standard of review, the "clearly erroneous" standard, the circuit courts remained divided between the three standards of review. As seen, some courts applied the "clearly erroneous" standard to all types of evidence. Other courts used a modified "clearly erroneous" standard, resembling the gloss approach, for all fact findings. Still other courts adopted a de novo review of documentary evidence under the *Orvis* approach. Some circuits fluctuated between different standards while others appeared more stable.[71] Even within the more settled circuits, however, a substantial number of decisions deviated from the prevailing standard.[72] There was no uniform application of Rule 52(a). A change to establish one uniform standard of review under Rule 52(a) was needed.

III. *Anderson v. City of Bessemer City* Offers a Solution

A. Anderson *Establishes "Clearly Erroneous" Review for All Fact Finding*

In March, 1985, the Supreme Court decided *Anderson v. City of Bessemer City*.[73] This case arose as a straightforward Title VII employment discrim-

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68. 456 U.S. 273 (1982). In this case, the Court found that the differential impact of defendant (plaintiff here) employer's promotion and seniority system did not contain discriminatory intent necessary for a Title VII violation. The Court did not rely on the oral and documentary evidence distinction for its decision.

69. *Id.* at 287. The Court stated: "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's finding unless clearly erroneous." *Id.*

70. The Court dealt with the ultimate and subsidiary fact distinction. *See infra* notes 143-50 and accompanying text.

71. Fed. R. Civ. P. 52(a) advisory committee's note (1985 amendment). This advisory note describes and provides examples of the different standards in order to explain an important reason for amending the rule. *See infra* note 111 and accompanying text.

72. For an example of this variation in the Sixth Circuit, see generally Solomon, *Appellate Fact Review Under Rule 52(a): An Analysis and Critique of Sixth Circuit Precedent*, 16 U. Tol. L. Rev. 667 (1985).

73. 470 U.S. 564 (1985).

ination case.[74] Plaintiff Anderson claimed the committee representing Bessemer City refused to hire her as a city recreational director solely because of her sex. The district court based its finding for the plaintiff on several factors examined at the trial.[75] First, the court found that at her interview for the position, committee members had asked her if she realized that the job involved night work and how her husband felt about her application for the job. Other applicants were not asked similar questions.[76] These findings evolved from conflicting testimony. Nichols, a committee member, reported that the committee had askcd all the job candidates about night work.[77] Boone, the only female committee member, said that the committee had not seriously questioned the other applicants about night work. She said that these questions to Anderson annoyed her. She claimed that, to express her irritation, she "facetiously" referred to night work and asked Kincaid, the successful applicant, "and your new bride won't mind?"[78] Butler, another member, remembered that the committee had asked Anderson these questions, and had also asked Kincaid "in a way."[79]

The court found Anderson better qualified than Kincaid for the responsibilities of a community recreation director. Anderson's qualifications included a diversity of activities in recreation, teaching, management and planning with various community groups, while Kincaid's qualifications centered around traditional team sports.[80] The trial judge looked at several committee members' out-of-court and in-court statements which implied that a woman should not hold the position.[81] The court dismissed defendants' contention that Kincaid offered a superior program; from the trial testimony of Anderson and Kincaid, the court found the programs to be substantially similar.[82] Based on all of these factors, the court held that the committee refused to hire Anderson, the better qualified candidate, solely because of her sex.[83]

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74. Anderson v. City of Bessemer City, 557 F. Supp. 412 (W.D.N.C.), *rev'd*, 717 F.2d 149 (4th Cir. 1983), *rev'd*, 470 U.S. 564 (1985).

75. *Id.* at 414-18.

76. *Id.* at 416.

77. *Id.* at 414.

78. *Id.* at 413-14.

79. Kincaid, the successful applicant, could not remember being asked about night work, but did remember commenting about it. *Id.* at 414.

80. The district court noted that Kincaid had a degree in recreation and Anderson did not, but felt Anderson's general qualifications better suited the needs of a recreation director's job. *Id.* at 414-16.

81. *Id.* at 417. Committee member Nichols testified at trial that "it would have been real hard" for a woman to hold the position. He also spoke of the night work required, and commented, "my wife should be at home at night." This statement could imply a general belief that women with husbands, like Anderson, should not hold a job involving extensive night work. *Id.* at 416.

82. *Id.* at 416.

83. The court also took into consideration the fact that the committee, while soliciting applications, had only invited men to apply for the job. *Id.* at 417.

The defendants then appealed, and the appellate court overturned the trial court's fact findings.[84] The appellate court examined both applicants' qualifications for the job, and found Kincaid's superior to Anderson's.[85] The court found the question of night work related to the job requirements and therefore acceptable.[86] The court said that nothing in the record supported Boone's contention of the "facetiousness" of her question to Kincaid about night work.[87] Finally, the court found that the committee members displayed no prejudice toward a woman as recreation director. The court supported that finding by pointing out that the male committee members had working wives, which, according to the court, dispelled the challenge of discriminatory motive.[88]

The Supreme Court could easily have overturned this case without touching the Rule 52(a) controversy. The case fit neatly into the traditional incorrect reversal: the trial court had used witness testimony substantially in forming its decision, and many of the key points of the testimony, such as the facetiousness of Boone's question, depended on witness demeanor for an accurate appraisal.[89] Even when documentary evidence supported a decision on an issue such as proof of the parties' qualifications, the Court's decision depended on a choice between two equally permissible views; neither upholding or rejecting Anderson's contention would have been a clearly erroneous trial court decision with these facts.[90]

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84. Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983), *rev'd,* 470 U.S. 564 (1985).

85. *Id.* at 155.

86. The appellate court emphasized Kincaid's college courses dealing with athleties, teaching sports and organizing physical education programs. The court also mentioned that Kincaid's experiences with athletics were all recent, while some of Anderson's work experience occurred at an earlier date. *Id.* at 151-52.

87. *Id.* at 155.

88. *Id.* at 155 n.5.

89. A portion of Boone's in-court interrogation, reprinted in *Anderson,* 470 U.S. at 578 n.3, shows the importance of demeanor toward ascertaining the nature of Boone's remark.

Before she was asked these questions, Boone stated that no committee member had asked the male candidates about night work "in the context that they [these questions] were asked of Phyllis." Boone added, "I don't know whether they were worried because Jim wasn't going to get his supper or what." The lawyer's questions then continued:

> A: [Boone]: You asked if there was any question asked about—I think Donnie [Kincaid] was just married, and I think I made a comment to him personally—and your new bride won't mind.
>
> Q: [attorney]: So, you asked him yourself about his own wife's reaction?
>
> A: No, no.

Id.

90. The Court aptly explained the situation; neither the district court nor the appellate court made a clearly erroneous fact finding, but "[t]he question we must answer . . . is not whether the Fourth Circuit's interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous." *Id.* at 577.

The Court, however, was worried about the current confusion surrounding Rule 52(a), and used this case to attempt to resolve it. After duly overturning the appellate court's reversal and reinstating the trial court's decision,[91] the Court tackled the documentary and oral evidence distinction. Recognizing the split among the circuits caused by the gloss and *Orvis* approaches, the Court expressly disapproved of *Orvis,* saying "it is impossible to trace the theory's lineage back to the text of Rule 52 . . . ."[92] The Court cited *Pullman* to assert that no type of facts evidence embodied an exception to Rule 52(a).[93] The Court then explained:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the current one; requiring them to persuade three more judges at the appellate level is requiring too much.[94]

Under *Anderson,* the gloss approach and the *Orvis* approach retreated, and the "clearly erroneous" standard for all evidence prevailed.[95]

B. *Benefits of* Anderson

Anderson affects Rule 52(a) in three significant ways. First, *Anderson* offers an immediate, significant benefit to the courts; as the overruled circuits change their standards to conform with the "clearly erroneous" rule for all evidence, uniformity between the circuits will increase. The Second Circuit illustrates the immediate impact of *Anderson.* In *Apex Oil Co. v. Vanguard*

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91. *Id.*

92. *Id.* at 574.

93. *Id.* (citing Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982)).

94. *Id.* at 574-75.

95. In a recent case, Icicle Seafoods, Inc. v. Worthington, 106 S. Ct. 1527 (1986), the Supreme Court reaffirmed the *Anderson* rule. In this case, the Supreme Court overturned an appellate court's finding, labeling a question about the content of barge workers' jobs, which determined their eligibility for protection under the Fair Labor Standards Act, a question of fact not open to independent appellate review. The Court then summarized the proper scope of appellate review:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Id. at 1530.

& Service Co.,[96] the concurring judge noted that *Anderson* prevented the Second Circuit from applying its former de novo review of documentary evidence. Instead, the Second Circuit applied the clearly erroneous review, as would every circuit after *Anderson*.[97]

Second, trial judges now know the degree of review with which appellate courts must scrutinize trial judges' fact findings. The trial judges will work with caution, knowing that the appellate courts will overturn incorrect, unreasonable decisions. They will also know that if they arrive at a "reasonable" decision, an appellate court cannot use the oral and documentary evidence distinction to overturn the decision simply because the appellate court disagrees with it. The trial judge's fact findings will gain a greater degree of finality than under the former system, where appellate courts too often switched standards of review to arrive at a desired result.[98] The change wrought by *Anderson* will undoubtedly elevate the trial judges' morale.[99]

Third, litigants now know that the appellate courts will always use the "clearly erroneous" standard for fact review despite the character of the evidence. They can more efficiently prepare their appeals. Formerly, the numerous standards and the uncertainty about how the courts would apply the standards encouraged litigants to appeal fact findings as a matter of course, hoping the appellate courts would choose a lenient standard of review.[100] A district judge, drawing from his own experiences, shrewdly commented:

> The credibility of the trial judges is being challenged and the attorneys have consistently told me in recent years that they automatically appeal because they "get two bites out of the apple." They not only get a ruling by the trial court but they get a good chance of getting a trial de novo in the appellate court as well because of the appellate court's failure to recognize the clearly erroneous rule and apply it.[101]

With *Anderson*, litigants will not appeal to obtain de novo fact review or review under the gloss approach. At an individual level, this will save time

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96. 760 F.2d 417 (2d Cir. 1985). *See also infra* notes 137-39 and accompanying text.

97. Other circuits have also noted the change. In Ginsu Prods. Inc. v. Dart Indus., Inc., 786 F.2d 260 (7th Cir. 1986), the appellate court, in referring to the *Anderson* rule, rejected Ginsu's claim that it should review the evidence independently because the evidence consisted of documents, not witness testimony. *See also In re* Allustiarte, 786 F.2d 910 (9th Cir. 1986).

98. *See supra* notes 71-72 and accompanying text.

99. Before the adoption of Rule 52(a), Judge Chesnut had feared that broad fact review would threaten the prestige and morale of the federal trial judge. Chesnut, *supra* note 22, at 538.

100. Nangle, *The Ever-Widening Scope of Fact Review in Federal Appellate Cases—Is the "Clearly Erroneous" Rule Being Avoided?*, 59 WASH. U.L.Q. 409, 417-21 (1981). Nangle, a district judge, points out that the uncertainty permitted appellate judges to alter the standards of appeal to "do justice," (to assure the result that the appellate judge felt was best). This gave trial judges little guidance or assurance about when they could reasonably believe they reached a final decision at the trial level.

101. *Id.* at 410 (Letter from Hon. Andrew Bogue, United States District Judge for the District of South Dakota, to Honorable Judge Nangle (April 19, 1979)).

and money for litigants, and will allow appellate judges to concentrate on matters of law and on clearly erroneous fact decisions.[102]

At a broader level, the change caused by *Anderson* could conceivably decrease the number of appeals, or at the least, the time spent in each appeal trying to persuade the appellate judge to review a reasonable fact decision de novo. In recent years the caseload in the appellate courts has expanded dramatically.[103] Commentators, judges, lawyers, and Supreme Court Justices have expressed alarm over the difficulties that this expansion foreseeably precipitates.[104] Appellate judges may find themselves unable to maintain high quality work under the increasing time pressure. This quality, in turn, will become more important as the Supreme Court caseload expands, preventing it from reviewing issues of national importance, placing these issues in the hands of the appellate courts.[105] Experts have debated various proposals for alleviating the caseload growth, including establishing a national court of appeals,[106] increasing the number of courts, increasing the number of judges and staff at the appellate level,[107] and instituting methods of certiorari case acceptance.[108] No proposal is ready for immediate enactment, however, as each one evokes fears of an increase in appellate court bureaucratization or a decrease in uniformity.[109] *Anderson,* having established a more uniform standard of review for fact decisions, should discourage automatic fact appeals. It will encourage appeals only on legal questions or for fact findings that could plausibly be "clearly erroneous." Through this, *Anderson* will play a role in confronting the urgent problem of the caseload explosion. *Anderson,* therefore, contains noteworthy benefits.

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102. Griswold, *supra* note 22, at 808.

103. *See* Meador, *The Federal Judiciary—Inflation, Malfunction and a Proposed Course of Action,* 1981 B.Y.U. L. REV. 617, 617-20; Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System,* 11 HASTINGS CONST. L.Q. 457, 459-60 (1984).

104. *See* Ginsburg, *Reflections on the Independence, Good Behavior and Workload of Federal Judges,* 55 U. COLO. L. REV. 1, 8-9 (1983); Mills, *Caseload Explosion: The Appellate Response,* 16 J. MARSHALL L. REV. 1, 1-3 (1982).

105. *See* Thompson, *supra* note 103, at 464-66. Thompson points out that signs of strain and overwork appear in modern Supreme Court opinions. These signs include the increasing length of the opinions and lists of cited cases, suggesting a greater reliance on court clerks to prepare opinions. Likewise, the number of concurring opinions suggests that the justices have less time to confer until they can compromise.

106. *Id.* at 474-503.

107. *See* Resnik, *Tiers,* 57 S. CAL. L. REV. 840, 1023-30 (1984). For a discussion of the benefits and difficulties of increasing the judges, courts and staff, see generally Auerbach, *The Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts,* 47 MO. L. REV. 47 (1982), and Wasby, *Appellate Delay: An Examination of Possible Remedies,* 6 JUST. SYS. J. 325 (1981).

108. Dalton, *Taking the Right to Appeal (More or Less) Seriously,* 95 YALE L.J. 62 (1985).

109. *See* Posner, *Will the Federal Court of Appeals Survive Until 1984? An Essay on Relegation of Specialization of the Judicial Function,* 56 S. CAL. L. REV. 761, 768-74 (1983); *see also* Overton, *A Prescription for the Appellate Caseload Explosion,* 12 FLA. ST. U.L. REV. 205, 220 (1984).

C. Anderson *is Codified: An Amendment to Rule 52(a)*

A recent amendment to Rule 52(a) codified part of the *Anderson* decision. This amendment reads: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[110] The Advisory Committee mentioned several benefits of this amendment, and these benefits mirrored the ones outlined in *Anderson:* greater uniformity in the circuits, less conflict between the circuits, and closer heed to the words of the rule by the courts. The Committee also mentioned stability, judicial economy, a lessening of appeals, and retention of fact finding power in its proper place, the trial courts. Therefore, *Anderson* and the amendment eliminate the oral and documentary distinction to the benefit of courts and litigants.[111]

IV. *ANDERSON V. CITY OF BESSEMER CITY* STOPS SHORT OF A COMPLETE SOLUTION

A. *The "Clearly Erroneous" Standard: Still Vague After* Anderson

1. The "Clearly Erroneous" Standard: Historically Vague

Anderson definitely improves the former Rule 52(a) review, yet the improvement is incomplete. Several significant problems remain. The most obvious problem in *Anderson* is that a "clearly erroneous" decision is difficult to define.[112] The Supreme Court attempted to provide guidance in early cases, but its definitions, while helpful, did not add specificity to this discretionary standard. In one earlier case, *United States v. Yellow Cab Co.,*[113] the Court pointed out that a trial court's rejection of one permissible view of the evidence in favor of another permissible view did not constitute a clearly erroneous fact finding. The appellate court's preference for a different view did not entitle that court to reverse the trial court's decision.[114] The Court also stated in *United States v. National Association of Real Estate Boards,*[115] "[I]t is not enough that we might give the facts another construc-

110. FED. R. CIV. P. 52(a) (as amended Aug. 1, 1985).
111. FED. R. CIV. P. 52(a) (1985) advisory committee's note.
112. *See supra* text accompanying notes 37-38.
113. 338 U.S. 338 (1949).
114. *Id.* at 341-42.
115. 339 U.S. 485 (1950).

tion, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."[116]

The Court offered another definition in *United States v. United States Gypsum Co.*[117] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[118] These definitions appear logical, but the difference between a "disagreement with a permissible interpretation" of evidence and a "definite and firm conviction that a mistake has been committed" proves elusive when appellate courts deal with specific fact situations. This standard in itself has proved workable, but its ambiguities show that any possible alteration of the standard needs to establish more clarity, not more confusion, in the scope of review.

2. *Anderson* Fails to Clarify the Standard Sufficiently

Anderson adds confusion to the issue of what constitutes a "clearly erroneous" fact finding. The *Anderson* Court reaffirmed earlier definitions of the "clearly erroneous" rule,[119] yet the Court also stated: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it . . . ."[120] In this context, an appellate court could interpret these words as a reaffirmation of the former "clearly erroneous" standard. An appellate court, however, could also interpret this phrase to allow only an extremely deferential review of trial court fact decisions rather than merely a cautious review. Since the trial courts invariably frame their facts in a fashion most supportive to their holdings, a trial court's fact findings seldom appear "implausible" in the light of all the evidence. Justice Powell, in his *Anderson* concurrence, aptly warned that this narrow interpretation could give a trial court almost complete discretion in fact finding, removing even minimal checks against the trial judge's power in fact finding.[121] *Anderson,* Powell feared, "may encourage overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases."[122] One commentator notes that such narrow appellate fact review appears to correlate with fact review in jury

116. *Id.* at 495.
117. 333 U.S. 364 (1948). *See supra* notes 48-52 and accompanying text.
118. 333 U.S. at 395.
119. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). For example, the Court mentioned the "definite and firm conviction" of a mistake test from *Gypsum*, 333 U.S. at 394-95.
120. *Anderson,* 470 U.S. at 573-74.
121. *Id.* at 581 (Powell, J., concurring).
122. *Id.*

cases, but actually increases the difference between the two types of cases. In jury cases, twelve jury members examine the facts, and the trial judge may then examine the result to assure that it does not contradict the evidence.[123] In bench trials, a narrow standard of fact review would render fact determinations completely within the discretion of one judge. This could leave an unjust result completely unchecked.

The extensive trial court discretion, described in the narrow interpretation of *Anderson,* is most striking in cases involving a fact decision which is "plausible" but questionable in terms of public policy or the effect on subsequent cases.[124] Under the narrow interpretation of *Anderson,* the appellate court could not overturn such a case. If the decision is upheld, however, this type of fact decision could become damaging precedent and have an unfavorable effect on future cases.

In addition, the *Anderson* Court also stated, "When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings . . . ."[125] This statement about review of facts based on witness testimony opens *Anderson* to several conflicting interpretations.[126] One commentator feels that this allows appellate courts to continue to use the gloss approach.[127] The Supreme Court's firm

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123. Blume, *supra* note 18, at 70-72. Blume spoke of this uneven review in the context of the Rule 68 controversy, but his words aptly suggest a problem with narrowing Rule 52(a) to allow trial judges overly extensive discretion in fact finding.

124. This issue arose in a recent case, County of Los Angeles v. Kling, 106 S. Ct. 300 (1985). Here, plaintiff Kling claimed she was denied admittance to nursing school because of a handicap. The district court denied her claim, but the appellate court found this decision clearly erroneous, noting that the nursing school physician had stated that if he had given plaintiff an individual examination rather than simply considering general facts about her illness, he would have been "strongly swayed" toward admitting her. Kling v. County of Los Angeles, 769 F.2d 532, 534 (9th Cir. 1985), *rev'd,* 106 S. Ct. 300 (1985).

The Supreme Court summarily overruled the appellate court, saying the district court decision was not clearly erroneous. Justice Stevens' dissent, however, said the Supreme Court should have examined the facts more carefully, and, in passing, quoted the appellate court: "It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid." *Kling,* 106 S. Ct. at 301 (Stevens, J., dissenting)(quoting *Kling,* 769 F.2d 532, 534, and referring to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794).

125. *Anderson,* 470 U.S. at 575.

126. The Court did provide limited guidance; the Court said that if documentary evidence contradicted the witness' testimony, or if it proved internally inconsistent or implausible, the appellate court could overturn the trial court's fact decision which relied on witness credibility. *Id.* If, however, the district court made a choice between two plausible interpretations, the finding "virtually never" can be error. *Id.* This provides some guidance, but still leaves *Anderson* open to several interpretations.

127. Note, *supra* note 22, at 261. The author stated: "While courts will no longer employ a *de novo* standard of review, courts may and should continue to employ both a modified clearly erroneous standard of review and the traditional clearly erroneous standard of review." *Id.* The author did not mention *Anderson,* which had not reached the Supreme Court at the time the Note was published. The author, however, analyzed the amendment to Rule 52(a), which contains basically the same directive as *Anderson. See supra* notes 110-11 and accompanying text.

affirmation that appellate courts must review oral and documentary evidence under the "clearly erroneous" standard[128] renders this claim unconvincing. Other interpretations suggest that this deference places appellate fact review based on witness credibility in the same category as appellate review of jury fact findings. The statement can also be interpreted to reinforce the Supreme Court's assertion that the "clearly erroneous" review must apply to all fact findings; fact findings based on witness testimony may simply require a slightly more careful application of the rule.

3. Appellate Courts Reflect This Vagueness

Appellate cases after *Anderson* are not uniform. Some cases apply *Anderson* properly.[129] Others exercise broad appellate review, despite *Anderson.*[130] For example, in *Bellissimo v. Westinghouse Electric Corp.,*[131] a Title VII discrimination case, the trial court found that defendant fired plaintiff because of her sex. This case involved contradictory testimony. Plaintiff claimed her conflict with her supervisor arose because of his discriminatory attitude. Defendant asserted that the supervisor's reasonable requests had evoked plaintiff's irrational refusal to cooperate.[132] The appellate court reversal, as shown by its holding, reasonably interpreted the facts. The trial court's interpretation, however, appears reasonable as well. The appellate court cited *Anderson,*[133] but then noted Justice Powell's concurring statement that some fact situations compel review of the entire record.[134] The appellate court said: "We find that the present case is one in which such review is

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128. *Anderson,* 470 U.S. at 573-75.

129. *See* Polaroid Corp. v. Eastman Kodak Co., 789 F.2d 1556 (Fed. Cir. 1986):

> It is commonplace that findings other than those of the trial judge might find *some* support in the record, or that the reviewing judges if sitting at trial *might* have reached such other findings. It is therefore ineffective on appeal merely to present a scenario in which the trial judge could have gone appellant's way. . . . The rules governing appellate review thus require affirmance of judgments based on findings made without . . . reversible error.

Id. at 1558 (emphasis in original) (citation omitted).

130. *See* Jorgensen v. Modern Woodmen of Am., 761 F.2d 502 (8th Cir. 1985). This case hinges on a choice between two equally plausible views about whether age discrimination was the reason for an older salesman's dismissal. The appellate court, by replacing one reasonable position with another, seems to have applied an overly broad interpretation of *Anderson.*

131. 764 F.2d 175 (3rd Cir. 1985), *cert denied,* 106 S. Ct. 1244 (1986). In another case, Avis Rent A Car Sys., Inc. v. Hertz Corp., 782 F.2d 381, 383 (2d Cir. 1986) the court broadly reviewed the facts. Hertz had advertised: "Hertz has more new cars than Avis has cars." Since Avis had more sale and rental cars than Hertz, the district court found this claim false. The appellate court reversed, saying Hertz had more rental cars than Avis, and asserting that the advertisement applied only to rental cars. Both interpretations appear equally plausible.

132. *Bellissimo,* 764 F.2d at 177-78. This proves to be a very "close" case, but in light of the ambiguous situation and conflicting evidence, it would be difficult to label the trial court's holding "clearly erroneous."

133. *Id.* at 178.

134. *Id.* at 178-79.

appropriate."[135] Without any explanation as to why the facts in this case differed from other fact situations, the court proceeded to review the entire record.

Other cases give stricter deference to the trial courts.[136] In many cases, strict deference is proper. In some, however, a trial court decision might be plausible, yet still questionable in terms of public policy. For example, using the "clearly erroneous" standard, an appellate court allowed a questionable holding in *Apex Oil Co. v. Vanguard Oil and Service Co.*[137] The trial court had held that a very tenuous contract was enforceable. The appellate court was unable to find the holding "clearly erroneous," and so it upheld the holding.[138] The court implied that this decision might have an adverse effect both on the parties' rights and on public policy:

> [W]e recognize that we are permitting a substantial transaction to be consummated on fragmentary conversation and documentation. However, it is the practice in many fields to transact business quickly and with a minimum of documentation, and the expert testimony indicates that purchasing oil wholesale is one such field. Parties doing business with each other in such circumstances take the risk that their conflicting versions of conversations will be resolved to their disfavor by a fact-finder whose findings, even if incorrect, are immune from appellate revision.[139]

Anderson therefore creates two problems. First, *Anderson* leaves the "clearly erroneous" standard open to several interpretations, thereby decreasing uniformity in an area that urgently needs a uniform scope of application. Second, a possible interpretation of Rule 52(a) suggests a review which is so narrow that it deprives trial court fact decisions of almost any review at the appellate level, Both of these problems threaten the clear, effective appellate fact review *Anderson* attempted to achieve.

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135. *Id.* at 179.

136. In Friends v. Coca-Cola Bottling Co., 759 F.2d 813,814 (10th Cir. 1985), the appellate court cited *Anderson* to sustain the trial court's holding in a discriminatory discharge case. The appellate court explained that it was "not at liberty to overturn those findings if they are supported, as we find they are, by the record." *Id.*

In cases like this, the deference to the trial court appears valid. In other cases, however, an extreme deference might sanction questionable decisions.

137. 760 F.2d 417 (2d Cir. 1985). This "contract" consisted of phone conversations, telex messages and a Product Purchase Agreement. The Purchase Agreement would normally permit a statutory "merchant's exemption" to the Statute of Frauds unwritten contract provision. The buyer had not returned the agreement, however, which raises questions about both parties' intent in this case. The decision did not appear "clearly erroneous." Sufficient evidence supported the claim that the parties had a contract; nevertheless, the contract was uncertain enough so it appeared to leave the appellate court slightly troubled about its decision.

138. *Id.* at 422.

139. *Id.* at 423.

B. *The Law and Fact Distinction Problem is Ignored in* Anderson

A second major difficulty with *Anderson* involves a formerly troublesome area which *Anderson* neglected to combat: the distinction between questions of law and questions of fact. At the most basic level, fact questions involve events connected to a specific case.[140] Questions of law involve general legal standards applicable to all cases.[141] However, questions about the application of a general legal standard to a specific set of facts, often called "fact application" questions, could fit in either the "law" or "fact" category.[142] Courts are therefore uncertain about the proper standard of review for "fact application" questions. Should they be reviewed as questions of law, or as questions of fact under Rule 52(a)?

1. History of the Fact Application Problem

The difficulty in determining whether fact application should be reviewed as law or fact arose in *Baumgartner v. United States*.[143] The *Baumgartner* Court reviewed a lower court's fact finding that defendant committed fraud when he took a naturalization oath.[144] The Court disagreed with the appellate court's use of Rule 52(a) to review this question of fact. The Court found that this question of fact deserved a broader and more exacting scope of review because it involved an "ultimate fact."[145] The Court noted that an "ultimate fact . . . implies the application of standards of law."[146] The Court defined "ultimate fact":

> Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court.[147]

A deluge of contrasting cases arose in the appellate courts as they attempted to work with the "ultimate fact" distinction, since the "ultimate fact" test

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140. Fact identification consists of "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." Monaghan, *Constitutional Fact Review,* 85 COLUM. L. REV. 229, 235 (1985).

141. "In a strict sense, then, law declaration yields only what we commonly think of as 'law'—conclusions about the existence and content of governing legal rules, standards, and principles. The important point about law is that it yields a proposition that is *general* in character." *Id.* at 235 (emphasis in original).

142. *Id.* at 236-39.

143. 322 U.S. 665 (1944).

144. *Id.* at 671-72.

145. *Id.* at 671.

146. *Id.*

147. *Id.* In the context of this case, this statement also remains open to a much broader interpretation. *See infra* note 210.

proved very difficulty for courts to use.[148] In *Pullman-Standard v. Swint,*[149] therefore, the Court abandoned the "ultimate fact" distinction, asserting that the "clearly erroneous" rule applied with equal vigor to ultimate facts.[150]

2. The Fact Application Problem Continues

The basic problem, the distinction between questions of law and questions of fact, still remained unsolved. The Court observed in *Pullman:*

> The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.[151]

As the *Pullman* Court explained, an appellate court can freely review findings of faet based on an erroneous view of the controlling legal principles. If the trial court used an incorrect legal standard, the appellate court can either remand the case with instructions to apply the correct legal standard or apply the standard and find the facts itself if only one factual inference results from the corrected legal standard.[152] This premise, while helpful, does not resolve the main question: how does Rule 52(a) fact review apply to mixed questions, "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated?"[153]

No current test for distinguishing law and fact proves wholly satisfactory. Courts sometimes label issues within the province of the jury as "fact," and issues decided by the judge as "law." The courts then use these labels to determine the scope of review for bench trials.[154] This reasoning provides

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148. Comment, *The Standard of Appellate Review in Title VII Disparate-Treatment Actions,* 50 U. CHI. L. REV. 1481, 1486-88 (1983). This Comment provides an example of the ultimate fact distinction in one area: discriminatory intent. The author states that at the time the Comment was written the First, Second, Third, Fourth, Ninth and Tenth Circuits treated discriminatory intent as a finding of fact reviewable under the Rule 52(a) "clearly erroneous" standard. The Fifth, Sixth, Seventh, Eighth and D.C. Circuits treated discriminatory intent as an ultimate fact which the appellate court could review independently.

149. 456 U.S. 273 (1982).

150. *Id.* at 287. The Court asserted: "Rule 52(a) does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."

151. *Id.* at 288 (citation omitted).

152. *Id.* at 287, 291-92.

153. *Id.* at 289-90, 289 n.19.

154. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction,* 55 CALIF. L. REV. 1020, 1022 (1967). Some appellate courts reviewing trial judge's decisions simply review questions normally allocated to the jury under the "clearly erroneous" fact review. These courts review questions normally allocated to the bench in a jury trial under the independent review used for questions of law.

a valid foundation for appellate review, but contains notable gaps in the area of fact application.[155] For example, a jury usually determines a question of whether certain actions constitute negligence. For a bench trial, however, the circuits conflict: some apply extensive appellate review, treating negligence as a question of law, while others use the narrower scope of review, treating negligence as a question of fact.[156]

A frequently cited test to distinguish law from fact appears in the Ninth Circuit case of *Lundgren v. Freeman*.[157] The Ninth Circuit stated that findings of fact are "based on the 'fact-finding tribunal's experience with the mainsprings of human conduct,'"[158] while law is based on the "application of a legal standard."[159] This provides a valid general definition, but docs not solve complicated questions of law application.[160] Negligence, for instance, involves a specific legal standard, but courts determine the contours of "negligence" by what "experience with the mainsprings of human conduct" defines as inexcusable carelessness.[161]

Commentators have also wrestled with the law and fact distinction. Some commentators urge that all cases of fact application fall within the scope of Rule 52(a).[162] Rule 52(a) review for cases of fact application may promote uniformity, but because of the difficulty of distinguishing between pure questions of law and fact application questions, it could result in "clearly erroneous" review for questions which should receive the full review of questions of law, thus depriving parties of their right to the broader review.[163]

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155. Weiner observes that constitutional protections prohibit appellate review of jury fact findings, but bench verdicts stand under no such protection. He advocates that questions involving law application should be treated as questions of fact for a jury trial and questions of law for a bench trial. He urges that this would result in more consistent law application between the circuits, and the benefit of many judges rather than one making the final fact decision. *Id.* at 1032-33.

156. Monaghan, *supra* note 140, at 232-33, 232 n.22. Often a jury decision on an issue like negligence involves a mixture of law and fact findings. Monaghan asserts that for this reason an issue of law application like negligence should not arbitrarily be characterized as fact.

At the present time, negligence is generally treated as fact in six jurisdictions, as a matter of law in one jurisdiction. The other jurisdictions do not have established standards. 5A J. MOORE, *supra* note 53, at § 52.05[1].

157. 307 F.2d 104 (9th Cir. 1962).

158. *Id.* at 115.

159. *Id.*

160. *E.g.*, Weiner, *supra* note 154, at 1054-56; Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) Findings of Fact in Federal Non-Jury Cases,* 53 MISS. L.J. 473, 481-83 (1983).

161. Monaghan, *supra* note 140, at 232-33, 232 n.22.

162. Solomon, *supra* note 72, at 699.

163. The mistake, mislabeling a question of law as a question of fact and thus depriving a party of a full review, occurs in several ways. First, trial courts may characterize the issue incorrectly, and the appellate court may fail to correct the mistake. Second, the appellate court might ignore the trial court's correct categorization and make its own incorrect determination. One author observes: "[I]t is the appellate court that determines whether a finding is one of fact or law and thereby establishes the scope of review for itself. . . . [T]he possibility exists

Other commentators advocate that mixed questions remain beyond the scope of Rule 52(a), leaving only basic historical fact questions for trial court determination.[164] This approach, however, would drastically curtail the function of the trial court, since the appellate court could independently review and alter a very large number of the trial court fact findings.[165]

3. *Anderson* Fails to Resolve the Fact Application Problem

In *Anderson,* the Supreme Court ignored the law and fact distinction. The Court altered the appellate court's final finding of discriminatory intent. The Supreme Court's decision did not resolve the dilemma of the law and fact distinction because, in the past, the Supreme Court has specifically characterized questions of intent as "pure fact." Therefore, no question arises in *Anderson* about whether discriminatory intent involves a question of law or a question of fact.

Appellate court cases subsequent to *Anderson* reflect this continuing problem. In *Zbosnik v. Badger Coal Co.,*[166] the appellate court reviewed the decision of the Benefits Review Board, which had overturned a decision of the administrative law judge. The administrative law judge stated that plaintiff coal miner had established a presumption of total disability from black lung disease which defendant coal company had failed to rebut. The Board overturned this, stating that as a matter of law defendant's evidence of medical tests rebutted the presumption. The appellate court, citing *Anderson,* said that as a matter of fact, substantial evidence supported the administrative law judge's finding that defendant had not rebutted the presumption.[167] Here, two "appellate courts," the court and the Board, interpreted the law and fact distinction to attain the holdings they desired.[168] The law and fact

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that the appellate court will allow its opinion of the justness of the lower court's ruling to shade its decision." Comment, *supra* note 160, at 481. Litigants might also incorrectly alter the standard in hopes of achieving a broader review, and the appellate court may uphold the incorrect change. Brennan, *Standards of Appellate Review,* 33 DEF. L.J. 377, 408 (1984).

164. Comment, *supra* note 148, at 1497-98. *See also* Calleras, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of Pullman-Standard v. Swint,* 58 TUL. L. REV. 403, 425-26 (1983).

165. One commentator points out that in the majority of cases appealed, the facts and law are often clear, and a disputed issue concerns whether the law applies to the facts. Brown, *Allocation of Cases in a Two-Tiered Structure: The Wisconsin Experience and Beyond,* 68 MARQ. L. REV. 189, 195-96 (1985). If the appellate courts could review all of these appeals independently, the trial court would have discretion over only the most basic historical facts.

166. 759 F.2d 1187 (4th Cir. 1985).

167. The medical tests gave contrary information and doctors could not agree about the cause of plaintiff's physical condition. Since plaintiff had worked in the coal mines for forty-four years, the possibility of black lung disease appeared high. *Id.* at 1188-89.

168. In this case, if the first tribunal had held for defendant, the appellate court might have been disturbed, feeling it unjust to deny plaintiff compensation under these facts. It might then have attempted to achieve a just result through manipulation of the law and fact distinction. For this reason, some commentators feel that the rules governing appellate review need some

dilemma has also arisen in other cases.[169]

C. *Benefits of* Anderson *Outweigh Detriments for Most Cases*

Despite these difficulties, *Anderson* provides significant benefits. As previously noted, *Anderson* eliminates the gloss and *Orvis* approaches to fact review which had long divided the circuits, taking a substantial step toward uniform appellate fact review. *Anderson* also emphasizes deference to trial judges as fact finders. It gives trial court fact findings greater finality, and emphasizes greater respect for trial courts' fact determinations.[170] *Anderson* will undoubtedly contribute to judicial economy by reducing the number and scope of appeals, and allow appellate judges to focus on matters of law and truly erroneous fact findings.

On balance, for most federal cases, *Anderson* provides valuable guidance to appellate review. Many of the difficulties can be lessened through Supreme Court action in future cases. For instance, if a circuit appears, over time, to apply Rule 52(a) with too much deference to trial courts, the Supreme Court or the Advisory Committee can correct the approach and reaffirm, perhaps more clearly, a more specific scope of Rule 52(a) review.

The appellate courts can also help resolve the *Anderson* difficulties. The appellate courts in each circuit should develop standards for the law and fact distinction. Then, if controversy arises between the circuits' standards, the Supreme Court or the Advisory Committee can study the problem, examine closely the diverse appellate approaches, and adopt the most effective approach. *Anderson* can thus prove suitable for most cases.[171]

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flexibility to allow appellate judges to alter the trial court decisions for a more just result even when the procedural rules would not sanction the alteration. *See* Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation,* 17 LOY. L.A.L. REV. 299 (1984). *See also* 5A J. MOORE, *supra* note 53, at § 52.05[1]:

> A scientific distinction between fact and law is not workable. Nor would such a distinction serve the purpose behind Rule 52, which is to aid the trial court in making a correct appraisal of the evidence and the law to the end that a sound decision is made, to show what has been adjudicated for future purposes of res judicata and estoppel by judgment, and to aid the appellate court where an appeal is taken.

169. *See In re* Pearson Bros. Co., 787 F.2d 1157 (7th Cir. 1986).

170. Some examples of conscientious application of the clearly erroneous review appear in cases following Rule 52(a). *See, e.g., Zbosnik,* 759 F.2d 1187. In this case the court did not claim to exercise a separate scope of review for cases involving witness testimony, but gave proper deference to the trial court's ability to observe the witness: "Moreover, in choosing to credit the testimony of the claimant, and Moyle and Albin Zbosnik, the A[dministrative] L[aw] J[udge]'s opportunity to observe the demeanor of the witness is an added plus." *Id.* at 1189-80.

171. The Supreme Court and the Advisory Committee can either adopt a general rule to cover all mixed law and fact questions, can develop a method to label some mixed questions law and others fact, or can, on a case by case basis, decide whether specific categories function better as "law" or "fact" for purposes of Rule 52(a) review. For an example of a decision about a specific category, findings about intent, see United States v. Yellow Cab Co., 338 U.S. 338.

V. *ANDERSON V. CITY OF BESSEMER CITY*: A DANGER TO CONSTITUTIONAL FACT REVIEW

In most cases, the benefits of *Anderson* outweigh its detriments. An examination of different types of cases in light of *Anderson,* however, reveals that in one type of case the detriments of *Anderson* threaten to outweigh its benefits. This type of case is the "constitutional fact" case, in which an appellant claims the lower court made an erroneous fact finding, and that this finding led to an incorrect decision about the appellant's constitutional rights. These "constitutional facts" include any facts significant to a court's decision about a constitutional question. Constitutional facts may include basic, "historical" facts concerning specific parties in specific cases. They frequently involve fact application issues, the application of a legal standard to a specific set of facts.

A. Protection of Constitutional Rights Relies on Historical Fact Decisions

Many constitutional rights cases rely heavily on fact decisions. For example, in *Kelleher v. Flawn,*[172] a plaintiff graduate assistant claimed that defendants on a university staff removed her from her teaching position to a non-teaching position partly because of the political opinions she expressed in the classroom. The plaintiff asserted that their actions violated her constitutionally protected right to free speech. The defendant contended that the plaintiff's dismissal occurred because of her insubordinate attitude and refusal to cooperate. Conflicting testimony surrounded these facts. For instance, at one meeting between the plaintiff and a member of the staff, the staff member claimed he behaved reasonably while the plaintiff responded by screaming and cursing. The plaintiff claimed she behaved calmly as he made angry remarks about her political lessons.[173] The reason behind the dismissal, therefore, remained purely a factual decision subject on its face to the *Anderson* review. In a case such as *Flawn,* however, an incorrect district court finding might not be clearly erroneous, but might violate plaintiff's constitutional rights.[174]

Flawn demonstrates that constitutional rights protection frequently rests on findings of "historical" facts. As pointed out previously, the "clearly erroneous" standard of fact review, under *Anderson,* remains open to con-

172. 761 F.2d 1079 (5th Cir. 1985).

173. *Id.* at 1082.

174. For a case in which the proper ruling for a constitutional right rested on a historical fact decision, see Wallace v. Jaffree, 472 U.S. 38 (1985) (decision about whether a moment of silence statute was meaut to encourage religion in school depended on fact finding about the legislature's motive in enacting the statute).

flicting interpretations. Some courts, as previously mentioned, claim that *Anderson* provides only a very narrow review of trial court fact findings. The importance of constitutional rights, however, necessitates that such fact findings are not left to the discretion of one individual,[175] but should receive a second judicial scrutiny to assure that a trial court's fact findings do not permit a constitutional rights violation. Under the narrow, or even the traditional "clearly erroneous" interpretation of *Anderson,* the appellate courts will not always scrutinize trial court fact findings with this added caution. A constitutional fact finding, therefore, could be upheld in an appellate court because it is not "clearly erroneous," even if it does not adequately protect a party's constitutional rights. *Anderson,* therefore, proves inadequate for constitutional fact review of historical fact questions.

B. Protection of Constitutional Rights Also Relies on Fact Application Decisions

Many crucial decisions in constitutional rights cases depend on the application of facts to a legal standard. The broad provisions in the constitution are defined and guarded as courts apply these provisions to specific fact situations. In other types of federal court cases, legislatures actively assist the courts in interpreting and formulating the laws these courts apply. For example, in diversity cases, state legislatures can amend or redraft state statutes to guide court application of these statutes. Congress can likewise alter federal statutes to assist court interpretation of federal law. In constitutional rights cases, however, courts serve as the primary protectors of the rights through application of constitutional provisions to specific facts. For example, the first amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[176] The courts' determinations of what constitutes protected exercise of religion stretches into controversial fact situations, such as cases where an individual's exercise of an allegedly religious practice clashes with other strong state interests.[177] Through their examination of such fact situations, courts attempt to guard freedom of religion to the highest degree possible without causing damage to society.

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175. Two obvious dangers appear from leaving constitutional facts to the discretion of one individual. First, the trial judge might occasionally make a mistake. Constitutional rights, often resting on constitutional fact decisions, remain too important to permit the mistake to stand unchecked. Second, constitutional cases often involve heated, emotional issues. *See infra* text accompanying note 195. This fact suggests a greater possibility of decisions unintentionally arising from personal bias. If several judges examine the decision, these mistakes have a smaller chance of escaping unnoticed.

176. U.S. CONST. amend. 1.

177. 177. *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984)(Student nondenominational religious club forbidden from meeting at a high school during activity time because these meetings violate constitutional separation of church and state).

The fourth amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[178] In *United States v. Jones,*[179] a court confronted a fourth amendment claim. In *Jones,* a chase occurred after police spotted defendant lurking in front of an apartment while a known burglar exited from the back. Defendant, upon seeing police, covered his face and attempted to hide. The police then chased the defendant to his car, blocked the defendant's car with the police car, and pointed their guns at the defendant when he refused to identify himself or leave the car.[180] Questions about the reasonableness of the police's suspicions and subsequent search concern application of a constitutional provision to the facts of this case.

Under *Anderson,* a judge's application of fact to law can be reviewed either under the broad "law" review or the limited "fact" review set out in the Rule 52(a) standard. The appellate judge exercises wide discretion in selecting the scope of review, and the circuits differ in their categorization of certain areas as fact or law for purposes of appellate review. Obviously, therefore, the courts display a lack of uniformity in the type of review chosen. In addition, one possible standard of review, the "clearly erroneous" review, does not sufficiently guard against error in constitutional fact decisions. *Anderson,* consequently, proves inadequate for the constitutional fact review needed to protect constitutional rights in fact application questions.

C. Bose *Suggests a Solution to the* Anderson *Problem*

1. History of Independent Constitutional Fact Review

The *Anderson* review presents a problem; it does not allow a second scrutiny of constitutional facts which is broad enough to best protect constitutional rights. One possible solution to this problem lies in a constitutional fact exception found in some past cases. This exception provides for an added review of constitutional facts so that appellate courts will scrutinize these facts more independently than the clearly erroneous rule sanctions. This exception first emerged in cases where the Supreme Court independently reviewed the findings of an administrative agency.[181] Later, the Supreme Court asserted that it would exercise independent review of constitutional facts when these facts proved crucial to the outcome of the case. In *Fiske*

178. U.S. CONST. amend IV.
179. 759 F.2d 633 (8th Cir. 1985), *cert. denied,* 106 S. Ct. 113 (1985).
180. *Id.* at 635.
181. For an example of judicial review of an administrative agency decision concerning the constitutional issues in the agency decision, see Ng Fung Ho v. White, 259 U.S. 276 (1922).

v. Kansas,[182] the Court reviewed a judgment about the constitutionality of a state statute. The Court examined the facts independently to conclude that there was no evidence supporting the charge against the defendant.

In subsequent cases, the Court mentioned a doctrine giving special prerogative to constitutional fact review.[183] The Court described this doctrine in *Pennekamp v. Florida,*[184] a first amendment case:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.[185]

2. Constitutional Fact Review Today: The Standard Remains Uncertain

At times, as in *Pennekamp,* the Supreme Court has stated that it can freely review constitutional facts.[186] The Court, however, has not adequately clarified the doctrine of independent constitutional fact review. The Court sometimes speaks of independent fact review of first amendment cases and fails to mention that it applies to all constitutional fact cases.[187] In some

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182. 274 U.S. 380 (1927). In this early case, the Court said independent fact review was proper when needed to reach a proper outcome for a federal right. Later decisions narrowed this to include only constitutional rights.

183. *See* Edwards v. South Carolina, 372 U.S. 229 (1963). In this case the Court held unconstitutional defendant's conviction for breach of the peace for a nonviolent desegregation demonstration; the Court stated that it had a duty to make an independent examination of the entire record. *See also* Jacobellis v. Ohio, 378 U.S. 184 (1963). Justice Brennan, speaking for the majority, rejected a suggestion that the Court could treat questions about the obscenity of an individual book or movie as a pure fact question within the trial court's discretion:

> The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law.

Id. at 187-88.

184. 328 U.S. 331 (1946).

185. *Id.* at 335.

186. *See supra* note 183. *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940)(Court held that defendant could play a religious record on the street as an examination of the facts revealed that this threatened no public danger, and was therefore protected by the first amendment freedom of religion mandate).

187. *See, e.g.,* Roth v. United States, 354 U.S. 476 (1957) (Harlan, J., concurring and dissenting in the result).

constitutional fact cases, including a recent case, the Court used the Rule 52(a) "clearly erroneous" review.[188] In still other constitutional cases, the Supreme Court stated that the fact application questions were questions of law, to be reviewed independently.[189]

3. Support for Independent Constitutional Fact Review

a. The First Amendment Cases

Two recent Supreme Court cases contain an in-depth discussion of the constitutional fact issue, and they illustrate why independent review of constitutional facts is necessary. In *New York Times v. Sullivan,*[190] the plaintiff claimed respondent's advertisement contained false statements about police activities in a civil rights demonstration. The trial court held that the statements' falseness made them per se libelous.[191] The Supreme Court, after a complete examination of the facts, reversed. The Court held that plaintiffs must prove defendant's actual malice, defined as knowledge or reckless disregard of a statement's lack of truth, before the court can hold defendant guilty of libel.[192] The Court struck down the Alabama law as unconstitutional, but independently examined the facts to determine that there was a lack of actual malice in the defendant's advertisement: "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that these principles have been constitutionally applied."[193]

Had the Court in *New York Times* applied the "clearly erroneous" rule, the trial court's decision would have prevailed. Respondent's advertisement would have been denied first amendment protection solely because it criticized a political figure and contained incorrect information. As the Court pointed out, this would have, as a practical matter, curtailed the right of the re-

188. One recent example of a Supreme Court failure to review a constitutional claim under independent review occurred in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). In this due process case, the Court stated that the appellate court should have reviewed the district court's decision under the *Anderson* clearly erroneous standard. The Court made no mention of an independent constitutional fact review.

189. One commentator observed, "the Court usually did not state that it would review a finding of 'pure fact.' Instead, it labeled the question for review a 'constitutional standard.' Arguably, this was analogous to calling the question one of application of law to fact." Comment, *The Expanding Scope of Appellate Review in Libel Cases—the Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice,* 36 MERCER L. REV. 711, 713-14 (1985).

190. 376 U.S. 254 (1964).

191. *Id.* at 262.

192. *Id.* at 271-79.

193. *Id.* at 285.

spondent to criticize the government, a right which is at the core of the constitutional free speech protection.[194] The Court also noted that the decision arose in a political climate hostile to desegregation. Political concerns might therefore have influenced the lower court's decision.[195] Had the Supreme Court, or an appellate court, felt bound by the "clearly erroneous" rule to uphold the trial court's decision, respondent would have suffered a constitutional rights violation.

These policy considerations appeared with greater magnitude in *Bose Corp. v. Consumers Union of United States,*[196] a case involving another actual malice question. In this case, the plaintiff charged the defendant with libel for printing false and malicious statements which injured the plaintiff's business. The defendant music reviewers had written that the sound emitting from the loudspeakers the plaintiff designed seemed to move "about the room." The district court found that the sound moved "along the wall" and since the statement "about the room" attributes "such grotesque qualities as instruments wandering about the room," the statement could inhibit sales of plaintiffs' loudspeakers.[197] The court said the defendant had actual knowledge or reckless disregard for the truth of the statement because a panel's examination of the circumstances revealed the statement's incorrectness.[198] After independently reviewing the facts of the case, the Supreme Court upheld the appellate court's reversal, stating that actual knowledge had to involve more than an imprecise statement.[199]

The Court seemed to base its ability to freely review the facts on different justifications. First, the Court spoke of the common law heritage of independent review in the actual malice case.[200] The Court did not focus on the common law heritage issue. Furthermore, confusion would arise if courts had to trace the history of each type of case to determine the scope of fact review for that case.[201] These facts strongly suggest that the Court's decision to review the facts independently did not arise from the "common law heritage" of independent review in actual malice cases.

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194. *Id.* at 271-79.

195. *Id.* at 294 (Black, J., concurring).

196. 466 U.S. 485 (1984).

197. 508 F. Supp. 1249 (D. Mass. 1981), *rev'd,* 692 F.2d 189 (1982), *aff'd,* 466 U.S. 485 (1984). Defendant published an evaluation of twenty-four loudspeakers in the magazine *Consumer Reports.* Defendant had reviewed plaintiff's loudspeakers harshly, and plaintiff sued, claiming that the review was harmful to sale of the equipment.

198. *Id.* at 1277.

199. 466 U.S. at 513. The Court said, "The choice of the language used, though reflecting a misconception, did not place the speech beyond the outer limits of the First Amendment's broad protective umbrella."

200. *Id.* at 502. The Court, without elaboration, stated that the common law heritage of the rule gave the judge and court adjudication an important place in its development.

201. Monaghan, *supra* note 140, at 243-44.

Second, the Court spoke of free appellate fact review of first amendment issues concerning libel, and at times, free appellate review of all first amendment issues.[202] This could suggest that the Court intended independent appellate fact review to apply only to first amendment cases, or, more narrowly, first amendment libel cases. For example, the Court stated, "We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan*."[203] Some commentators suggest that the *Bose* fact review could apply only to first amendment cases, although most commentators seem to dislike this interpretation.[204] Some appellate courts have specified that *Bose* applies to first amendment issues while avoiding any reference to general constitutional fact review.[205] One commentator narrowed the interpretation even further: "Apparently, the Court wanted to state clearly that independent appellate review is the sole standard of review for findings of actual malice in libel cases."[206]

A third rationale, however, proves most plausible: the Supreme Court intended the *Bose* review to apply to all cases using constitutional facts.[207] First amendment questions prove no more difficult than questions about other constitutional provisions, so the difficulty of first amendment interpretation does not justify a special review for first amendment issues. Fur-

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202. *Bose*, 466 U.S. at 503-11.

203. *Id.* at 514.

204. *See* Abrams, *The Supreme Court Turns a New Page in Libel*, 70 A.B.A. J. 89, 91 (August 1984).

205. *See* City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 932 n.3, 933 n.4 (1986) (Supreme Court observed that appellate court refusal to accept district court fact decision may have arisen in part from the appellate court's belief that it could review first amendment decisions independently under *Bose*. The Court declined to address this contention since it believed the appellate reversal was incorrect under any standard.). *See also* Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 897 (D.C. Cir. 1984) (court said the Supreme Court in *Bose* "set out the responsibility to an appellate court in cases raising first amendment issues."); Lerman v. Flynt Distrib. Co., 745 F.2d 123 (1984), *cert. denied*, 471 U.S. 1054 (1985) (court said *Bose* required independent review for evidence of actual knowledge in actual malice cases).

206. *See* Comment, *supra* note 189, at 729. This Comment described the many interpretations *Bose* could support, and apparently accepted the narrower interpretation. Earlier, the Comment discussed the history of iudependent constitutional fact review, stating that this review, while uever established by the Court with sufficient clarity, had generally applied to application of legal standards to historical facts which, the Comment stated, would fall outside of Rule 52(a). The Comment stated that the Court in *Bose* stated a historical fact, the writer's state of mind, and therefore moved into the realm of Rule 52(a) review. *See also* Note, *Defamation—A Standard of Review for Constitutional Facts*, 7 U. ARK. LITTLE ROCK L.J. 741 (1984).

207. Some commentators want to apply *Bose* in this way, but want to limit the case to questions of fact application in constitutional fact cases, and leave historical facts solely under Rule 52(a). Note, *Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases?*, 60 WASH. L. REV. 503, 521 (1985).

This Note, in contrast to the commentators mentioned above, states that *Bose* should apply to historical facts because of their importance in court decisions about constitutional rights.

thermore, other constitutional rights have an importance equal to that of first amendment rights and deserve an equivalent protection.[208]

Statements abound in *Bose* to support the contention that all constitutional provisions deserve equal review. The Court repeatedly speaks of the importance of all constitutional rights, and the need to guard these from possible improper interpretation by a judge or jury in the trial court.[209] As an example, the Court explained that its general definition of the types of protected and unprotected communication does not provide infallible guidance to the trial courts in determining first amendment cases. At times, the trial courts might err, and, because of the importance of constitutional rights, some check must guard against such error and its ensuing alteration of constitutional principles.[210] This explanation applies equally well to all constitutional rights.

b. The Desegregation Cases

This Note argues that the Supreme Court should advocate independent fact review for all cases involving constitutional rights. Further support for this contention appears in a line of school desegregation cases involving the fourteenth amendment's equal protection clause. These cases followed *Brown v. Board of Education of Topeka,*[211] in which the Court ordered school desegregation. Soon after the *Brown* decision, tumult arose in the school districts, and some school boards and cities attempted to evade the desegregation mandate. The Supreme court recognized this problem and ordered the school districts to implement desegregation plans under the supervision of the district courts.[212]

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208. Monaghan, *supra* note 140, at 270: "[I]t is not apparent that first amendment rules are less precise than other rules of constitutional privilege".

209. 466 U.S. 485. As an example, Justice Stevens stated: "The requirement of independent appellate review enunciated in *New York Times* . . . reflects a deeply held conviction that judges—particularly Members of this Court—must exercise such review in order to preserve precious [Constitutional] liberties." *Id.* at 510-11.

210. At this point, the Court cited Baumgartner v. United States, 322 U.S. 665, 670-71 (1944), to say that independent appellate review of fact decisions becomes especially important where the fact decision involves broad social judgments. *Bose,* 466 U.S. at 500 n.16. This appears to interpret *Baumgartner* more thoroughly and accurately than former cases that used *Baumgartner* to support an oral and documentary evidence distinction or an ultimate and subsidiary fact distinction. *See supra* notes 46-51 and accompanying text. In this context, *Baumgartner* strongly supports a constitutional fact review since it relied on questions of historical fact to establish the first amendment claim. The fact questions centered around whether Baumgartner's subsequent behavior sufficiently proved his disloyalty at the time he took the oath, which would justify a court's depriving him of citizenship. The Court in *Baumgartner* did not fully clarify its reason for examining the facts independently, but an examination of *Baumgartner* in the context of *Bose* strongly suggests that the *Baumgartner* Court was advocating independent appellate review of constitutional facts.

211. 347 U.S. 483 (1954).

212. Brown v. Board of Educ., 349 U.S. 294 (1955).

The district courts therefore exercised an important role, yet in the ensuing years the Supreme Court examined numerous desegregation cases to test the constitutionality of plans approved by the district and appellate courts. Since a desegregation remedy's appropriateness depended on the circumstances of each particular case, the Supreme Court consistently examined specific facts. The cases presented unique fact situations. In *Keyes v. School District No. 1, Denver,*[213] for example, the school district manipulated zoning laws to defeat desegregation in one part of the city and the plaintiffs contended that this evidenced intentional segregation in the entire city, requiring affirmative city wide desegregation. In *Wright v. Council of Emporia,*[214] a new municipality desired a separate school system, which would result in a segregated system for the county in which Emporia was located.

In some cases, the Supreme Court simply looked at the basic facts about the desegregation plan and declared a school system's plan unconstitutional.[215] An example of this situation appears in *Griffin v. County School Board.*[216] Here, the Court found a county's system of closing public schools and giving children funds to attend segregated private schools a violation of fourteenth amendment rights.[217] In other cases, the basic desegregation plan appeared valid, yet the Supreme Court, to protect the constitutional rights, delved beneath the surface of the plan to examine underlying facts such as the history of race discrimination in the area, the prior and current ratios of the number of black and white children in each school, and the number of minority faculty members in each school.[218] The Court did not speak of an independent appellate review of constitutional facts in these cases as it had in the first amendment cases.[219] Nevertheless, its willingness

213. 413 U.S. 189 (1973). The Court stated that "common sense dictates" that segregation in one area will affect the desegregation efforts of other areas. *Id.* at 203. The Court supported this contention with a thorough examination of the facts, including the racial composition of the schools, the assignment policies regarding minority teachers, and the policies of zoning and selection of school sites.

214. 407 U.S. 451 (1972).

215. *See* Goss v. Board of Educ., 373 U.S. 683 (1963); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972).

216. 377 U.S. 218 (1964).

217. *Id.* This case proved unusually straightforward for a desegregation case, since the school district's statements revealed that it acted in open defiance of the law. Therefore, the Court did not need to examine extrinsic evidence as fully as in cases where districts employed more subtle means to avoid desegregation.

218. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the Court studied statistics concerning the racial composition of the school to conclude that the district plan was insufficient. In Green v. County School Bd., 391 U.S. 430 (1968), the district adopted a freedom of choice desegregation plan. The Court pointed out that the validity of this plan depended on the other circumstances; and on an independent examination of statistics and other evidence found that this plan did not sufficiently integrate the schools.

219. In one case the Court specifically mentioned an extensive examination of the evidence by a court of appeals: "On appeal, the Court of Appeals reviewed all aspects of desegregation in Mobile County. Additional information was requested regarding earlier desegregation plans

to examine each fact situation carefully to guard against a denial of fourteenth amendment rights strongly suggests that the Court intends independent constitutional fact review to extend beyond the boundaries of the first amendment.[220]

c. *Bose:* Independent Constitutional Fact Review in the Appellate Courts

Bose also provides strong support for giving the responsibility for independent constitutional fact review to appellate courts as well as to the Supreme Court. At one point, the Court explains that the constitutional fact review applies to review of federal as well as state litigation, thus placing it in the domain of the federal courts.[221] The Supreme Court also stated specifically that appellate courts hold this responsibility: "[I]n cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record [to ensure] that the judgment does not constitute a forbidden intrusion in the field of free expression.'"[222] As stated previously, appellate courts should interpret this statement to include all constitutional fact review questions, since the first amendment has neither extra complexity nor extra importance to justify a special first amendment review. Thus, *Bose* opened the door to a wider scope of constitutional fact review than that provided by Rule 52(a).[223]

B. Bose: *Too Uncertain to Provide Adequate Constitutional Fact Review*

Bose, in itself, does not provide sufficient protection for constitutional fact review. As is obvious from the commentators' assertions, *Bose* reason-

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for the rural parts of the county, and those plans were approved." Davis v. Board of School Comm'rs, 402 U.S. 33, 35 (1971).

220. In Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), the Supreme Court purported to review the facts under the clearly erroneous standard. However, the thorough report about the facts in the case, and the subsequent decision based on these facts suggest that the Court actually engaged in a more independent review of the constitutional facts.

221. 466 U.S. at 499.

222. *Id.* at 499 (quoting *Sullivan*, 376 U.S. at 284-86).

223. In Miller v. Fenton, 106 S. Ct. 445 (1985), the Court pointed out that courts may label a finding "law" or "fact" because they believe a certain tribunal is in a better position to make final decisions on those findings:

> Where, for example, 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 a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

Id. at 452. This logic applies with equal force to all constitutional fact cases. It would be clearer and easier simply to allow all trial court denials of constitutional claims to receive an added independent review rather than to try to achieve this result through manipulation of the law and fact labels.

ably supports a variety of interpretations. Courts can view *Bose* as sanctioning independent appellate review for only first amendment cases, or at the narrowest level, for first amendment libel cases. At the appellate level, many of the cases citing *Bose* involve one of these issues.[224] Appellate courts reviewing different types of constitutional fact issues frequently cite only *Anderson* and purport to use the *Anderson* review, ignoring *Bose*.[225]

Courts can also interpret *Bose* to support independent review for questions of law, but not for questions of fact. At one point the *Bose* Court stated, "We may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law" that the record did not prove defendant's knowledge or reckless disregard about the falseness of the statements.[226] *Bose* emphasizes broad review of constitutional fact findings, yet some statements in *Bose* might lead courts to interpret the case as advocating independent review only for questions of "law." *Anderson* can arguably support this contention, since the *Anderson* Court specified: "[R]ule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.' "[227] The Court in *Anderson* intended this statement to apply to the oral and documentary fact distinction.[228] An appellate court could, however, apply this statement, as Powell and Blackmun feared, to place all fact findings automatically within the clearly erroneous review standard regardless of compelling arguments that certain types of facts require a broader appellate review.[229]

Courts can also interpret constitutional fact review too broadly. The Court in *Bose* cautioned against this:

> Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual-malice determination.[230]

An appellate court, then, should not manipulate fact findings in a constitutional case simply to reach a different result than the trial court reached. Instead, the appellate court should use the independent scrutiny of consti-

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224. *See supra* note 205.

225. *See, e.g.*, Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986); United States v. Shears, 762 F.2d 397 (4th Cir. 1985); Collins v. City of Norfolk, Va., 768 F.2d 572 (4th Cir. 1985), *vacated*, 106 S. Ct. 3326 (1986); Gorham v. Franzen, 760 F.2d 786 (7th Cir. 1985), *cert denied*, 106 S. Ct. 255 (1986). In cases like these, the courts failed to use independent fact review for constitutional facts.

226. 446 U.S. at 513.

227. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) (quoting Pullman-Standard v. Swift, 456 U.S. 273, 287 (1982)).

228. *Id.* at 573-76.

229. *Id.* at 581 (Powell, J., concurring); *id.* at 581-82 (Blackmun, J., concurring).

230. 466 U.S. at 514 n.31.

tutional facts only to insure that the trial court fact findings did not result in a constitutional rights violation.

Several cases which purport to apply *Anderson* to constitutional facts actually apply this type of overly broad de novo review. In *United States v. Shears,*[231] the district court ordered the defendant's involuntary confession suppressed but the appellate court reversed the district court order. The defendant claimed he made this confession because the interrogators impliedly promised that the confession would procure him more lenient treatment. The decision rested on contrary and ambiguous evidence. At the trial, the defendant denied that the interrogators had made any promise to him,[232] yet he claimed the events surrounding the interrogation and the questioners' actions implied such a promise. For instance, the government agent told him that if he cooperated he would not need a bail bondsman, and that he should not let word of the arrest reach the street. A dissent argued that independent appellate review should apply on the issue of voluntariness, a due process concern, but that it should only apply when the lower court denied a constitutional rights claim, not when the lower court upheld such a claim.[233] As the dissent points out, this fact finding involved a question of demeanor, especially suited for trial court determination. The dissent did not cite *Bose,* but aptly captured the theory behind *Bose.* Constitutional fact issues require added scrutiny in order to prevent constitutional rights violations. Courts should use added scrutiny to prevent a constitutional rights violation, but not to overturn a trial court that has accepted a constitutional rights claim.[234]

Cases like *Shears* demonstrate that complete de novo review for constitutional fact cases places a party claiming a constitutional rights violation under a greater risk than a plaintiff or defendant in another type of case. If the trial court finds that the constitutional rights violation occurred, the appellate court could freely review and reverse the decision, unchecked by the clearly erroneous standard. Therefore, a party claiming a constitutional rights violation would run a double risk of having his claim improperly

231. 762 F.2d 397.

232. *Id.* at 403. When the prosecutor questioned defendant about the implied "promise" defendant responded: "He didn't promise me anything. All he said is he had some people that he had, wanted to talk to me, which meant one thing to me, you know, so somebody wanted to talk to me to do some business with me. Would that mean that to you?" This obviously remains open to several interpretations. The district court, looking at all the circumstances, held that the government agent made an implied promise. The appellate court reversed. The dissenting appellate justice criticized the majority, saying the circumstances and the above statement could reasonably be interpreted as the district court ruled.

233. *Id.* at 405 (Murnaghan, J., dissenting). The dissent said, "I simply sense injustice in denying to Shears the benefits of a district judge's findings when the 'not clearly erroneous rule' has worked so often in favor of the government against other defendants."

234. *Id.* at 403-05 (Murnaghan, J., dissenting).

denied. As noted earlier, constitutional cases often involve heated, controversial issues. If the appellate court feels free to disregard the trial court's fact findings, it can easily reinterpret the evidence and change the decision based on the appellate judges' opinions of the controverted issue. Complete de novo review of constitutional fact claims, therefore, would enhance the danger of an improper denial of a constitutional rights claim. *Bose* does not sanction this; instead, the *Bose* Court accepted the judges' findings on historical facts and gave credit to the judges' interpretation of conflicting evidence. The Court carefully examined the facts only to see if the trial court's interpretation of the facts permitted a violation of constitutional rights.[235]

Bose therefore suggests that courts should review constitutional facts independently. This suggestion provides a helpful "first step" toward solving the constitutional fact dilemma, but does not eliminate the confusion in this area. First, as evident from the interpretations of the commentators and the lower courts, *Bose* can be interpreted to apply solely to first amendment cases or first amendment libel cases. It should, however, be consistently applied to all cases involving constitutional facts, since all constitutional rights deserve equal protection. Second, *Bose* review should only apply when a trial court denies a constitutional rights claim. This would prevent unjust denials of constitutional rights. If *Bose* review applied when the lower court upheld a constitutional rights claim, litigants in constitutional rights cases would run the risk of an unjust denial of their constitutional rights twice. In other words, when a court denies a litigant's constitutional rights claim, the litigant should have the chance to have this claim examined independently at the appellate level to assure that the denial was just. As evident from lower court interpretations, however, *Bose* did not adequately clarify this point, either.

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235. 466 U.S. at 500. The *Bose* Court stated that Rule 52(a) and constitutional fact review could work together. First, the Court explained that Rule 52(a) does not prevent independent examination of facts, and the constitutional fact review does not prevent giving due deference for the trial court's opportunity to examine witnesses. Presumably this would include the trial judge's chance to observe documentary evidence as well. The Court stated:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.

Id. at 501 n.17. The Court stated that where the line was drawn depended on the case's substantive issues, and then spoke of "largely factual" issues which, because of their importance, warranted appellate review. It can be contended that these issues, from the context of *Bose*, are constitutional facts upon which the constitutional rights decision is based. *Id.* at 501.

VI. THE SOLUTION: A DECISIVE SUPREME COURT AFFIRMATION OF CONSTITUTIONAL FACT REVIEW

The Supreme Court should address the issue of independent constitutional fact review in a new case. Constitutional rights, guarded by constitutional fact adjudication, are too important to leave to varying, unpredictable and ineffective standards of review. A standard is needed to insure independent appellate review of lower court fact findings which result in a denial of a constitutional rights claim.[236] To achieve a standard for consistent review, the Supreme Court should mandate that the scope of constitutional fact review be one in which appellate courts give due deference to the trial court's fact interpretation.

The appellate courts, however, should also independently examine the trial court's constitutional fact findings in order to ensure that these findings do not violate a litigant's constitutional rights. In other words, the appellate courts must independently examine the facts in light of the relevant precedent cases concerning that constitutional issue and the policy considerations behind that constitutional issue. This examination should insure that the litigants' constitutional rights are protected to the highest degree possible. To ensure uniformity in the review, the Supreme Court should explicitly categorize constitutional fact review as an exception to the *Anderson* "clearly erroneous" standard. This exception, the Court should emphasize, must apply in every constitutional fact case; the appellate courts should not have discretion to choose not to exercise the review. The Court should include both historical and fact application cases within this exception. This would insure uniformity, and it would also avoid an overly broad review through which the appellate court might deny a constitutional rights claim sustained by the lower courts.

Some commentators will contend that federal rights should receive the same review as constitutional rights. However, federal rights obviously do not hold the special position of constitutional rights. Furthermore, at present, an amendment stretching fact review too broadly would defeat the purpose of *Anderson* and create more confusion. As seen, *Anderson* contains many significant benefits: a lessening of appeals, judicial economy, a more uniform standard of review, deference to the trial court fact findings, and finality. *Anderson* should have a chance to apply to a broad range of cases so that the Committee and courts might accurately test its validity, and discover and redeem its limitations in future cases and amendments. Furthermore, in federal statutory cases, the legislature could amend statutes if courts

236. Sometimes, the courts apply the careful, independent fact review needed for constitutional cases without citing *Bose*. A Supreme Court statement of the standards would insure that this is done consistently.

consistently apply them improperly. The constitutional fact cases do not have this safeguard but depend almost wholly on fact adjudication. This factor, as well as the recognized special importance of constitutional cases, shows that only the constitutional fact review needs a protection beyond *Anderson*.

At present, a federal appellate judge reviewing a constitutional fact issue is confronted by a bewildering array of standards of review. Some of the standards are too limited or too broad to provide a review of constitutional facts that will best protect constitutional rights. Under this Note's proposed solution, the appellate judge should independently review constitutional facts to ensure that the trial court findings do not permit a constitutional rights violation. This review should apply as an exception to the "clearly erroneous" standard enunciated in *Anderson*. This limited independent review will uphold the role of federal courts as the guardians of each individual's constitutional rights.

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