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n2 See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

n3 See generally 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW @@ 4.01, .21, 7.06 (2d ed. 1992); Robert C. Post, The Management of Speech: Discretion and Rights, 1984 SUP. CT. REV. 169, 215; Henry J. Friendly, Indiscretion About Discretion, 31 EMORY L.J. 747, 756-58 (1982). The leading Supreme Court decision is Pierce v. Underwood, 487 U.S. 552 (1988).

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Scholars must sort out the proper review applied in order to understand both the process and substance of review. That cannot be [*1232] done unless the "division of labor" is taken beyond the literal labels law, fact, and discretion, into a political inquiry about institutional competence, position, and power. n4 This is because appellate courts are political decisionmakers, a fact having functional and theoretical consequences when devices like "the law-fact distinction" are fully analyzed in light of the allocation of decisional resources that they ultimately represent.

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n4 See infra notes 87-99, 185-190, 400-403 and accompanying text.

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In turn, the division of labor is informed by the underlying roles and goals of appellate courts. n5 These are often said to include the declaration of legal rules and principles, correction of decisional error, and promotion of justice. n6 The functions of appellate courts are also recognized (infrequently and less candidly) to include the less hortatory political roles of centralization, bureaucratic regularity, and administrative oversight. n7 Such appellate purposes are properly used as benchmarks and tools of criticism in examining the assignment of limited decisional resources.

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n5 See infra notes 292-295, 368-373, 375-378, 413 and accompanying text.

n6 PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2-3 (1976).

n7 Two political scientists have examined in detail these broader functions of intermediate appeals courts. See generally Burton Atkins, Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States, 24 LAW & SOC. REV. 71, 76 (1990) ("Appeals serve a variety of functions for the judicial hierarchy specifically and for the political regime generally."); Martin Shapiro, Appeal, 14 LAW & SOC. REV. 629, 644 (1980) (noting that appeal may "be considered as a means of command and a source of information within a hierarchical system of multiple internal controls"). To the list, one should add the redirection and even diffusion of blame and judicial controversy. See generally DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 5 (1994) ("Appellate courts provide a means for the institutional sharing of judicial responsibility for decisions.").

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Courts allocate their resources and functions by way of standards of review. n8 The standards must be broadly seen, then, as devices of jurisdiction and power-assignment, and are no less so just because they [*1233] are imperfectly provided by precedent and operate through words. This is particularly true for judicial factfinding, in which scholars and courts often inadequately account for the political consequences of the intermediate appellate court's role, especially in light of the source materials forming the record in U.S. courts. n9

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n8 Edward H. Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 NOTRE DAME L. REV. 645, 649-57 (1988); Martha S. Davis & Steven A. Childress, Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis, 60 TUL. L. REV. 461, 464 (1986); Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. Rev. 993, 997-98 (1986).

Standards of review, the catch phrases used within judicial hierarchies to set the level of deference and scrutiny given to prior decisionmaking actors, are defined more fully in 1 CHILDRESS & DAVIS, supra note 3, @ 1.01, and surveyed in Steven A. Childress, A 1995 Primer on Standards of Review in Federal Civil Appeals, 161 F.R.D. 123 (1995).

n9 See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 37-49 (1981) (examining the political import of judicial factfinding and review, and comparing civil systems using different records on appeal).

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Nowhere is the proper allocation of decisionmaking resources and authority more important than in the process of constitutional adjudication. Thus, it is generally recognized that the division of law from fact has special implications, both theoretical and pragmatic, in constitutional cases. n10 So does the error-correction function on appeal. n11

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n10 Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); 1 CHILDRESS & DAVIS, supra note 3, @ 2.21.

n11 See infra notes 380-393 and accompanying text.

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That reviewing courts retain a vital error-correction power, however, is much less recognized. Scholars insist on channeling all such constitutional analyses through a weary law-fact regime, gazing too steadily upon the law-declaration function that appellate courts champion. n12 And intermediate courts of appeals increasingly believe themselves to be (or pretend to be) Supreme Courts--forums where law-declaration overwhelms the traditional power to fix decisional mistakes in individual cases.

-Footnotes-

n12 See infra notes 380-416 and accompanying text.

-End Footnotes-

The result is a missed opportunity by the courts of appeals to clarify and enforce their legitimate political role in preventing the suppression of speech protected by the First Amendment to the U.S. Constitution. That role--a duty in fact--gets lost either in the law-fact shuffle or in a neglected power of erasing mistakes and furthering justice. The U.S. Supreme Court has traditionally empowered appellate courts to apply independent review in cases involving important First Amendment interests and, occasionally, in cases in other areas of constitutional law. n13 In turn, the so-called "constitutional fact" doctrine requires the appellate reviewer to give no deference to findings made below that fall within the doctrine. n14 Although many [*1234] other sources then recognize that "constitutional facts"--those underlying factual findings and inferences that ultimately control constitutional adjudication--receive a different kind and intensity of review, the usual justifications ultimately fall back (and then falter) upon the appellate law-declaring function and its traditional law-fact distinction. n15

-Footnotes-

n13 See infra Part II (detailing the development of this First Amendment tradition, and its difficulties and confusion).

n14 1 CHILDRESS & DAVIS, supra note 3, @ 2.19; Henry P. Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229, 229-35 (1985).

n15 See sources cited infra notes 401-403 & 406-407.

-End Footnotes-

This Article openly redirects the judicial allocative inquiry, in the important context of constitutional processes, away from the law-fact premise that observers almost uniformly adopt. The focus should move toward an original and more satisfying account of the appellate court's appropriate institutional function in such processes. Clarification may be found within the particulars of constitutional adjudication and the appellate court's protectionist role, not in the usual definitions of appellate deference and procedure such as the nebulous law-fact border. Indeed, a newer focus on the appellate function in speech cases generates a model justifying review over censorial authority. n16 The model, in turn, raises important implications for lower court decisions in a variety of constitutional contexts. n17

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n16 See discussion infra Parts I.B & III (introducing, developing, and justifying a model of censorial discretion, requiring expanded appellate review).

n17 See discussion infra Part IV (presenting the implications and applications of the censorial model).

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Ultimately, perhaps, that rare three-sided coin is the Rosetta stone, and a translation may be made. And the ringmaster's role is seen clearly if observers focus less on the bright overlap than on the less glaring crescents of unshared light. If successful, the result is to clarify the actors' proper functions in situations involving important constitutional interests.

B. Toward a Model of Censorial Discretion

Scholars and many lower courts read the constitutional fact doctrine as merely confirming an appellate court's authority to decide legal issues or "mixed law-fact" questions. n18 In other words, to these observers, an independent review doctrine rests not so much on free speech law as on a more routine version of civil procedure: Legal [*1235] conclusions are not subject to lower court deference. This confuses and undervalues a unique First Amendment tradition.

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n18 See 1 CHILDRESS & DAVIS, supra note 3, @ 2.19; Monaghan, supra note 14, at 229-34.

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This would not be the case if courts and courtwatchers would perceive--arguably within accepted precedent, theory, and history authorizing independent review--that a heightened appellate role is the necessary and proper product of an under-articulated model of censorial discretion. n19 Appellate scrutiny must be rooted in the dangers to the First Amendment values present in specific adjudications. The model posits that exercises of factfinding discretion at trial are themselves potential acts of censorship, quite apart from the substantive line drawing of traditional First Amendment theory that usually defines what is censorship. In turn, the model asserts, other judicial actors on review must be imbued with their own factfinding discretion to prevent manipulation, abuse, and error below.

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n19 See infra notes 368-415 and accompanying text. It might have been called an anti-censorship theory instead, but the term is avoided because the argument is meant to augment many existing theories of First Amendment substance rather than replace them. See infra note 272 and accompanying text.

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Reviewing courts retain an anti-censorial discretion. Greater appellate review of constitutional facts finds its source not in lawdeclaration but rather in a separate protectionist role placed on the courts under a heightened due process standard. This Article thus proposes an alternative and explicitly political basis for the de novo review that scattered cases have suggested as to constitutional facts. Once lower courts are properly perceived as political bodies having the potential to censor much like other state actors, n20 then appellate courts may be legitimately empowered, with meaningful and limiting

justification, to do what they have in fact done in many free speech contexts--check the censorial discretion of the actor reviewed.

-Footnotes-

n20 See infra notes 368-393 and accompanying text.

-End Footnotes-

To this end, First Amendment theory should not exclusively be concerned with line drawing (what is protected, what is not), though that inquiry understandably has the lion's share of apologists and examinations. n21 Instead, drawing from observations made by social scientists in other contexts--including policing, criminal plea bargaining, and administrative law--this Article argues that in many ways the judicial process is as important as the substantive right. n22

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n21 See review and criticism infra notes 252-273 and accompanying text.

n22 Social scientists demonstrate the importance of checking discretion in many settings, especially as to police and bureaucrats. The point is presently extended to the factfinding discretion exercised by trial actors. The potential defect is in the unrestricted delegation of discretion, and not necessarily or exclusively in the substantive definition of the right. A license to censor, without a powerful checking function within the courts themselves, imposes substantial costs and risks on speakers. See infra notes 363-367 & 390-392 and accompanying text.

-End Footnotes-

[*1236] Precedent and historical evidence support the synthesis of a particularized First Amendment due process in appellate adjudication. An important example is the 1735 acquittal of colonial printer John Peter Zenger, a case often described as the philosophical and political precursor to the First Amendment itself. n23 Yet what the case actually did was not about the substantive definition of seditious libel or the creation of a defense of truth. Those issues waited decades before being addressed. Instead, the actual result was one of allocating decisionmaking authority between actors in the judicial process. n24 The enforcement of substance and liberty by way of process should influence us today in considering the appellate court's own role.

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n23 See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 16-61, 119-43 (1985).

n24 See infra notes 353-359 and accompanying text.

-End Footnotes-

Such a view finds support in recent theoretical writings on the First Amendment, urging a pathological perspective on interpreting the right, or a focus on the "back side" of the Amendment. n25 They may be extended to support a heightened process when governmental risks to expression are themselves

heightened. This Article argues that the minimum content of any First Amendment theory or right must be procedural, whatever important substantive line drawing is also advanced, and it attempts to find further support in procedural cases the Supreme Court has decided in many contexts. Traditional speech law, in both its substantive and procedural components, is officially skeptical of government regulators' authority to balance the right at stake, particularly when they themselves are involved. The concern should be seen as no less valid for actions within courts; this is especially so since First Amendment interests are increasingly balanced and thus factual, requiring specific findings which may well control the outcome. Judges, like any another political actors, are therefore potential censors. Indeed, the power to censor by manipulation of or inattention to the factual basis for a constitutional [*1237] decision can be even more dangerous, subtly so, than the direct actions of the archetypical board of censors. n26

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n25 See infra notes 274-295 and accompanying text (building from First Amendment theories of Vincent Blasi, Frederick Schauer, Ronald Cass, and others).

n26 Although one may refute the accepted concepts of self-censorship because they distinguish among prices and sanctions in a manner that is meaningless in this context, see infra note 362, ultimately the point is that censorship in whatever guise can occur through court processes. Trial judges potentially censor by exercising factfinding discretion, and it is entirely appropriate that they be checked through the political process, presently the judicial process. If the consistent threat to speech values is unfettered discretion, then the model of censorial authority, in particular, requires that appellate courts deny vesting final decisional power, even as to fact, within the trial court.

-End Footnotes-

Protection of the right through judicial review exists in part within the appellate body, and not simply in the courts as a whole. This may even be true (in contrast to accepted justifications) in situations in which the trial actor is in a superior position or has superior capacity to find facts. The model does not depend on an allocation based on capacity as that term is usually used. Rather, what is feared and deflected is indeed the superior capacity of the trial actor to censor. n27 A baseline process extended to First Amendment adjudication thus requires a model of appellate review that reflects this concern. If, in other contexts, the kind of process that is "due" must be informed by the substantive rights at stake in order to express the political allocation of decisional authority that is appropriate to the claims raised, that consideration is no less valid for constitutional claims. In turn, the decision must be measured by a process that reflects an appropriate role for the judicial actor involved--presently, as an overseer of constitutional integrity in light of the negative potential for censorship. The basis for such a rights-sensitive process will not be found in law-declaration, but more clearly and legitimately in unfettered error-correction in appropriate cases. The product is the proposed model of censorial discretion used to justify heightened appellate authority. n28

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n27 See infra notes 381-392 and accompanying text.

n28 The model's justification for heightened review is discussed infra notes 394-415 and accompanying text.

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Such a model of judicial decisionmaking has important implications, not only to clarify the general law-fact dilemma which it avoids, but even more importantly, in providing a constitutional basis to criticize and ultimately rectify many lower court decisions in a wide variety of procedural and substantive contexts. These include nonjury findings on several specific issues of constitutional law, especially free [*1238] speech law. The model has direct and vital effects on the review of factfindings made by lower court judges. n29

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n29 The model also has important implications for the review of jury findings, where the legacy of the jurors which acquitted Zenger may be used to haunt speakers as ghosts rather than as guardian angels. See generally infra notes 351-359 and accompanying text. It will be developed further as to the review of verdicts, in a forthcoming article applying the model to the majoritarian and communitarian roles of juries, Review of Juries in Speech Cases: Legacy of Protection and Tyranny of the Community.

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In this setting, many appellate courts during the past decade have declined an invitation to provide meaningful scrutiny because of their perceived lower capacity to find facts. n30 Many recent opinions which refuse to apply free review, despite the free speech interests at stake, may be criticized for eschewing their proper protectionist role and missing the broader import of the Court's tradition. n31 In fact, a closer examination of the cases that make up this tradition reveals that the free review rule may well apply even to foundational factfindings, historical facts, credibility calls, and other issues far short of the ultimate "legal" conclusion in these cases. n32

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n30 E.g., Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1228-29 (7th Cir. 1985); Levine v. CMP Publications, Inc., 738 F.2d 660 (5th Cir. 1984).

n31 E.g., FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41 n.3 (D.C. Cir. 1985); Planned Parenthood, 767 F.2d at 1229.

n32 See infra notes 458-477 and accompanying text.

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Other courts have, paradoxically, over-extended their independent review into areas where it actually encourages censorship. For example, a majority of courts apply de novo review to scrutinize findings which actually favored the speaker below--in cases where the speaker had won below--rather than affirming under

normal deference. n33 Such cases ironically cite the First Amendment tradition to support an action which effectively reverses a pro-speech finding, when that finding would have been routinely accepted had the litigation arisen in a nonconstitutional context. n34 This virulently symmetrical application of the review doctrine makes sense only if the tradition was not about free speech as such, but rather enforced the usual law-fact distinction or a mixed law-fact analysis which has [*1239] expanded in recent years. Yet, it fundamentally betrays its First Amendment origins. n35

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n33 Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988); Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894, 897-98 (5th Cir.), cert. denied, 475 U.S. 1119 (1985); Hardin v. Santa Fe Reporter, 745 F.2d 1323, 1325-26 (10th Cir. 1984).

n34 Don's Porta Signs, 829 F.2d at 1053; Bartimo, 771 F.2d at 897-98; Hardin, 745 F.2d at 1325-26.

n35 See infra notes 417-438 and accompanying text.

-End Footnotes-

Such an approach also reveals once again that the dominant view of the independent review doctrine is to locate it within an unyielding law-fact package that implies that the label mixed law-fact is an immutable concept, a quality that every type of finding carries with it regardless of procedural or substantive context. This is error, not only because many of the Supreme Court cases within the constitutional fact tradition do not limit their created review power to such conclusions, or do not involve questions that can fairly be described as "legal" or "mixed." More broadly, the tradition actually draws on an accepted and heightened procedural component of First Amendment protection, as well as a pre-constitutional history of locating decisionmaking power within a skeptical judicial body when important speech interests are challenged. The appellate review aspect of this right cannot be explained away as mere rhetoric or normal procedure.

This Article thus argues that constitutional fact doctrine properly embraces and reflects its true First Amendment origins, and today properly enforces recognized First Amendment policy. Ultimately, the review tradition must rest on the unique constitutional interests at stake rather than on a circular mixed law-fact rationale. The focus should not be on the undoubted institutional capacity of lower courts to find facts (the analysis increasingly used to decide whether issues are "legal"), but rather on the dangers of placing unbridled factfinding discretion within a judicial actor who, under normal review rules, would not be reversed, despite the reviewer's belief that censorship has occurred and been validated in court. Appellate courts must be recognized as retaining not only an institutional purpose of explicating law, but also in correcting error--even decidedly factual error in appropriate cases. More is at stake than simple appellate procedure. Courts and scholars should understand the appellate process in speech cases as special, protectionist, and appropriately skeptical of judicial discretion.

[*1240] II. FACTFINDING IN CONSTITUTIONAL CASES: PRECEDENT AND CONFUSION

Over the years, many lower courts have indicated with little explanation or clarification that appellate review in constitutional cases deserves special treatment. They indicate, for example, that a district judge's final conclusion which is constitutionally decisive will be freely reviewed on appeal, unbound by the usual rule of deference. n36 To the extent that these cases merely restate the oft-cited rule that legal conclusions or mixed law-fact questions fall outside complete factfinding protections, such as the clearly erroneous standard of Federal Rule 52(a), n37 they are not revolutionary or particularly necessary as a separate exception.

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n36 E.g., *Glasson v. City of Louisville*, 518 F.2d 899, 903-04 (6th Cir.), cert. denied, 423 U.S. 930 (1975); *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 348-49 (1st Cir. 1975); *Guzick v. Drebus*, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971); see also *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.6 (4th Cir. 1983) (stating that the review process is perhaps different for "'constitutional' fact-finding"), cert. denied, 470 U.S. 1083 (1985); *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984); *id.* at 1209-10 (*Boochever, J.*, concurring).

n37 Rule 52(a) has provided, since 1938, that a district judge's findings of fact in a nonjury trial receive deference; they are affirmed "unless clearly erroneous," even if the appellate court disagrees. FED. R. CIV. P. 52(a); see Steven A. Childress, "Clearly Erroneous": Judicial Review Over District Courts in the Eighth Circuit and Beyond, 51 MO. L. REV. 93, 97-98 (1986).

-End Footnotes-

Certainly the determination of whether given conduct is constitutionally protected or permissible is a legal question, n38 as is a court's decision on a particular legislation's constitutionality. The decision of course will be reviewed de novo on appeal. By this analysis, the trial court's application of constitutionality review under *Marbury v. Madison* n39 is performed anew by the appeals court; that de novo standard of appellate review must be distinguished from the purely substantive and sometimes tougher scrutiny review which all levels of courts use to determine whether the legislature acted permissibly. n40 In any event, the appeals court does not defer to the trial [*1241] court's own assessment of the constitutionality of the legislation, or any other broad question of constitutional law as such.

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n38 *Brantley v. Surles*, 718 F.2d 1354, 1359 n.6 (5th Cir. 1983); *Burris v. Willis Indep. Sch. Dist., Inc.*, 713 F.2d 1087, 1093-95 (5th Cir. 1983); see *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972).

n39 5 U.S. (1 Cranch) 137 (1803).

n40 Constitutional scrutiny and standards are distinguished from the internal judicial review of concern here. 1 CHILDRESS & DAVIS, *supra* note 3, @ 1.03. The difference is illustrated *infra* notes 232-237 and accompanying text.

-End Footnotes-

De novo review in this sense means little more than a specific application of existing appellate doctrine rather than a special rule with constitutional dimensions. Many of the courts that have traditionally recited a freer review in constitutional cases apparently are applying, in practice, their normal review posture as to legal or mixed questions and need no basis in the U.S. Constitution to do so.

Most strikingly juxtaposed to this benign tradition, and its apparent over-labeling of "constitutional fact" review, is the Supreme Court's 1984 decision in *Bose Corp. v. Consumers Union of United States, Inc.*, n41 in which the Court overtly applied a constitutional review rule. It held that appellate courts maintain independent record review over the district judge's determination of actual malice in defamation cases involving assertions of First Amendment privilege. n42 This exception to Rule 52's clear error deference was presented as the inevitable and open consequence of the more subtle application of appellate authority over the jury verdict twenty years earlier in the landmark (for other reasons, though no more controversially) case of *New York Times Co. v. Sullivan*. n43

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n41 466 U.S. 485 (1984); see infra notes 157-190 and accompanying text.

n42 *Bose*, 466 U.S. at 501-02, 510-11.

n43 376 U.S. 254 (1964) (requiring actual malice in defamation suits brought by public officials); see infra notes 117-145 and accompanying text.

-End Footnotes-

Eventually, this Article will argue that the exception is justified under First Amendment theory, having important implications in various procedural and substantive contexts. The exception must also be distinguished from traditional mixed law-fact doctrine as well as from other and older review rules operating under similar labels. Before *Bose* and its analytical basis in *New York Times* are discussed, it is helpful to examine in detail the checkered pedigree, or at least a history of mixed applications, of a specialized constitutional fact doctrine in the federal courts.

A. Halting Early Steps Toward Constitutional Fact

Even before modern courts began applying the systematic rules of trial procedure and appellate deference adopted in 1938 in the Federal Rules of Civil Procedure, there were notable first steps toward [*1242] an independent doctrine of de novo review over constitutional facts. n44 Most of this direction came from the Supreme Court. This early Supreme Court doctrine, which I will argue later has little connection to the recent rule, developed during the pre-New Deal 1920s and early 1930s, prior to the fully ensconced FDR Court. n45 Scholars routinely describe that Court as acting in an era of economic judicial activism and of judicial skepticism of administrative delegation, n46 and it is not much of an extension to see its creeping constitutional fact doctrine as part of that trend, especially in its empowering of appellate courts to the detriment of administrative agencies. n47 The doctrine actually originated in

two forms, focusing on constitutional issues and jurisdictional-foundation facts.

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n44 A fuller account is found in 2 CHILDRESS & DAVIS, supra note 3, @ 15.02, and was suggested to the author by Martha Davis.

n45 Cf. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-55 (1936) (applying even in the era of Court transition).

n46 See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 79-82 (1991); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 31-62, 253-68 (1992); WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS 111-60 (1988); Barry Cushman, Rethinking the New Deal Court, 80 VA. L. REV. 201, 203 (1994).

n47 I would add that the Court could be criticized for, in effect, "Lochnerizing" the internal judicial review issues, by reference to the notorious case of constitutional review, Lochner v. New York, 198 U.S. 45 (1905); nevertheless, my point that the appellate review rule is consistent with other historical trends is not essential to my larger thesis that this trend can be separated from a more modern model of constitutional adjudication.

-End Footnotes-

The first version of this factual de novo review is a small set of cases that deal with narrow issues assuming constitutional or near-constitutional dimensions. In 1920, in Ohio Valley Water Co. v. Ben Avon Borough, n48 the water company asserted that the Public Service Commission's rate-fixing at seven percent was so low as to be confiscatory. The state court applied the substantial evidence standard and upheld the rates. The United States Supreme Court reversed:

If the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. n49

[*1243] The Court thus held that agencies are not allowed to finally determine "constitutional facts," but without stating a reason why that should be so or what makes a fact a constitutional one. n50

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n48 253 U.S. 287 (1920).

n49 Id. at 289 (citing Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); Missouri v. Chicago, Burlington & Quincy R.R., 241 U.S. 533, 538 (1916); Wadley S. Ry. v. Georgia, 235 U.S. 651, 660-61 (1915); Missouri Pac. Ry. v. Tucker, 230 U.S. 340-47 (1913)).

n50 Id. at 290-91.

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In 1936, the Court attempted to provide such a basis in *St. Joseph Stock Yards Co. v. United States*, n51 by analogizing agency ratemaking to legislative ratemaking. The analogy was not particularly apt, since the courts give considerable deference to much legislative action, certainly more than is implicated in de novo review. n52 Also, agency ratemaking reaches the courts with a well-developed record while legislative action usually requires an initial court trial. n53 In any event, the Ben Avon doctrine has all but disappeared, though the case has never been overruled. n54 The Court has since stated that "it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." n55

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n51 298 U.S. 38 (1936).

n52 2 CHILDRESS & DAVIS, supra note 3, @ 14.17.

n53 BERNARD SCHWARTZ, ADMINISTRATIVE LAW @ 10.22, at 667 (3d ed. 1991).

n54 Id.

n55 *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 348 (1951) (citing *New York v. United States*, 331 U.S. 284, 334-36 (1947); *Railroad Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 576 (1941)).

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The second set of cases involved the jurisdictional-fact issue. In *Ng Fung Ho v. White*, n56 the constitutional claim was the fundamental issue of citizenship. The jurisdiction of the executive in deportation matters does not extend to U.S. citizens, so a claim of citizenship amounts to a denial of jurisdiction. n57 Because the right of a citizen to the protections of citizenship is so fundamental, the Court ordered the entire case to be retried rather than limiting de novo review to only the constitutional fact issue, as in *Ben Avon*. n58 Justice Louis Brandeis, later concurring in *St. Joseph Stock Yards*, distinguished *Ng Fung Ho* as a difference between "the right to liberty of person and other constitutional rights." n59 To the extent that *Ng Fung Ho* raised an issue [*1244] of de novo review of constitutional claims regarding personal rights (the protections of citizenship), it and its source *Ben Avon* may remain good law, although as to questions dealing with property or economic rights only, the trend has been away from *Ben Avon*.

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n56 259 U.S. 276 (1922).

n57 Id. at 284.

n58 Id. at 284-85. The right to de novo review of the question of citizenship has now been codified, and is read as entitling one to de novo judicial determination of citizenship without her being required initially to present substantial evidence of citizenship. See *Agosto v. INS*, 436 U.S. 748, 752-57 (1978).

n59 298 U.S. 38, 77 (1936) (Brandeis, J., concurring).

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The jurisdictional-fact interest in Ng Fung Ho was expanded in Crowell v. Benson, n60 a case brought under the Longshore and Harbor Workers' Compensation Act (LHWCA). n61 In an action to enjoin enforcement of the agency award, the plaintiff asserted that he was not the worker's employer and that the agency was therefore without jurisdiction to make the award. n62 The agency had found that there was an employment relationship. n63 The majority determined that the jurisdiction of the agency to make the award rested on two facts: (1) that the injury occurred upon the navigable waters of the United States, and (2) that a master-servant relationship existed. n64 These facts are fundamental, Chief Justice Charles Evans Hughes said for the majority, "in the sense that their existence is a condition precedent to the operation of the statutory scheme." n65 They "are indispensable to the application of the statute, not only because the Congress has so provided explicitly ... but also because the power of the Congress to enact the legislation turns upon the existence of these conditions." n66 Further, the question is not simply one of due process; rather, it is "whether the Congress may substitute for constitutional courts ... an administrative agency ... for the final determination of the existence of even the facts upon which the enforcement of the constitutional rights of the citizen depend." n67 The majority held that it could not, and even that the court must make such determinations on its own record--a trial de novo. n68

- - - - -Footnotes- - - - -

- n60 285 U.S. 22 (1932).
- n61 33 U.S.C. @@ 901-950 (1994).
- n62 Crowell, 285 U.S. at 36-37.
- n63 Id.
- n64 Id. at 37-38.
- n65 Id. at 54.
- n66 Id. at 55.
- n67 Id. at 56 (footnote omitted).
- n68 Id. at 65.

- - - - -End Footnotes- - - - -

In dissent, Justice Brandeis pointed out that, in the final analysis, there is no difference for jurisdictional purposes between the fact that there was a master-servant relationship, the fact that the worker was not drunk when the injury occurred, or the fact that the worker was [*1245] engaged in maritime employment. n69 All such facts must be found under the statute to bring the injury and the work within the statute to trigger the jurisdiction of the agency, as is any issue of asserted nonliability. n70 Furthermore, even if courts somehow could separate fundamental jurisdictional facts from other

facts, there is simply "nothing in the Constitution ... [that] lends support to the doctrine that a judicial finding of any fact ... may not be made upon evidence introduced before a properly constituted administrative tribunal." n71

-Footnotes-

n69 Id. at 73-74 (Brandeis, J., dissenting).

n70 Id. at 73 (Brandeis, J., dissenting).

n71 Id. at 85 (Brandeis, J., dissenting).

-End Footnotes-

The decision in Crowell v. Benson, like Ben Avon, has never been overruled; "it lingers in the limbo of apparently discredited but not wholly deceased decisions," n72 and even continues to be cited in some workers' compensation cases. n73 The case, if still viable, is limited to its facts. As early as 1940, South Chicago Coal & Dock Co. v. Bassett came before the Court, challenging jurisdiction under the LHWCA on the basis of whether the employee was engaged in maritime employment, n74 one of the jurisdictional facts set out by Justice Brandeis in his dissent in Crowell v. Benson. n75 Yet the Court, in an opinion by Chief Justice Hughes, held that such a fact was an ordinary finding entitled to no special treatment, without mentioning Crowell. n76 Further, the Supreme Court soon held that the theory of Crowell had no application in National Labor Relations Act cases. n77

-Footnotes-

n72 SCHWARTZ, supra note 53, @ 10.27.

n73 See, e.g., Director of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297, 307 (1983); Lukman v. Director of Workers' Compensation Programs, 896 F.2d 1248, 1252 (10th Cir. 1990). Crowell is also widely cited for other issues.

n74 309 U.S. 251 (1940).

n75 Crowell, 285 U.S. at 74 (Brandeis, J., dissenting).

n76 South Chicago Coal & Dock, 309 U.S. at 257-58.

n77 NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944). Likewise, even if the navigable-waters and employer-status issues arguably still receive de novo review, it appears that whether to conduct a new hearing is in the court's discretion and is not a matter of right. See Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619 n.17 (1966); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-87 (1982).

-End Footnotes-

Today, section 10(e) of the Administrative Procedure Act specifically authorizes the reviewing court to "decide all relevant questions of law" and "interpret constitutional and statutory provisions." n78 Except for the harmless-error provision in the last [*1246] sentence, the implication of

the review powers thus granted is that courts are expected to perform de novo review over questions of law, whether jurisdictional, constitutional, statutory, or procedural. n79 The last decade has seen much dispute and Supreme Court ink spent on the extent to which some or all agency determinations of law should nonetheless receive deference. n80 Yet there appears to be no serious dispute that questions of fact, whether or not relevant initially to agency jurisdiction, receive appropriate deference.

-Footnotes-

n78 5 U.S.C. @ 706 (1994).

n79 See id.

n80 The impetus for greater agency deference in statutory interpretation was provided by Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and its progeny.

-End Footnotes-

Even to the extent these forms of the constitutional fact doctrine have survived, it is primarily cast as an administrative law conception of constitutional fact review, and an old one at that. Even so, it is rarely cited today and is in these forms described by scholars, nearly universally and for some time now, as a dead doctrine. n81

-Footnotes-

n81 E.g., 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE @@ 2:10, 7:2 (2d ed. 1979); MARTIN H. REDISH, FEDERAL COURTS 193 (1983) (collecting sources); SCHWARTZ, supra note 53, @ 10.27; see infra notes 591-601 (demonstrating that jurisdictional fact has not been picked up by federal civil courts as a separate review doctrine).

-End Footnotes-

B. The Constitutional Fact Tradition: Obscenity to Incitement

After the 1940s and early 1950s, a period which can be described as one of deafening silence regarding the de novo review doctrine, the activist Warren Court began to hint at breathing new life into it. More accurately, the Court began developing a fully new doctrine, ignoring the earlier administrative law cases in its suggestion of freer appellate review within certain constitutional contexts.

The newer trend most obviously debuted in a series of obscenity cases from the late 1950s to the mid-1970s, where the Supreme Court, especially in its actions and dispositions, appeared reluctant to defer to conclusions made below as to whether the material reviewed was indeed obscene. n82 For example, a whole series of so-called Redrup [*1247] reviews n83 from 1967-1973 essentially put the Court in the role of film critic, and the votes of individual Justices determined whether materials deserved First Amendment protection. n84 Even when the Court attempted to define the term to take themselves out of this chore, n85 the subsequent applications still maintained a broader reviewing role for the appeals court. n86

-Footnotes-

n82 See, e.g., DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY 12-20 (1989) (detailing appellate scrutiny); GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 135 (1988) (arguing that a case-by-case process renders "area a hotbed of judicial activism"). See generally Joan Hoff, Why is There No History of Pornography?, in FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 17 (Susan Gubar & Joan Hoff eds., 1989) (questioning the usual historical accounts as ignoring the more important focus on degradation of women).

n83 Redrup v. New York, 386 U.S. 767 (1967).

n84 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHERN: INSIDE THE SUPREME COURT 192-94 (1979) (noting reversal of two dozen convictions based on Justices' review under personal definitions).

n85 Id. at 194, 201-02.

n86 E.g., DOWNS, supra note 82, at 17-18.

-End Footnotes-

Even this version, though widely perceived as one of constitutional fact review, n87 might be explained as little more than the traditional law-fact inquiry as raised in a new substantive area of law. The Court in such cases appears to have defined obscenity as a legal matter n88 (or at least appears to have believed it is defining it n89), and of course in some cases it actually did change the definition. n90 It may simply be performing the recognized law-declaration process, using a common-law methodology, by working through the legal term in the context of record facts. If so, it appears to be the kind of freer mixed law-fact inquiry which is routinely developed in many mundane, nonconstitutional contexts. n91 Courts may certainly perform sheer law-declaration by way of record review of facts, and that process is then usually stated as an exception to an otherwise applicable rule of deference. In turn, the legal definition is developed by application and understood by later courts as stating a generalized legal norm in light [*1248] of the adjudicated facts. n92 The application of law to fact is bound up in the development of generalized substance, and therefore legal substance, and is freely reviewed.

-Footnotes-

n87 See GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 788 & n.1 (5th ed. 1992); FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 111-15, 150-51 (1976) (stating that the role of the appellate court is to restrict obscenity findings to Miller guidelines in both legal and factual determinations).

n88 See generally Jenkins v. Georgia, 418 U.S. 153 (1974) (finding that film is not obscene under Miller standards, and juries do not have "unbridled discretion" in determining what is "patently offensive"); Miller v. California, 413 U.S. 15 (1973) (finding that basic constitutional guidelines should guide the trier of fact's determination of obscenity); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (finding that the term "obscene" requires both factual and

constitutional analysis).

n89 See, e.g., DOWNS, supra note 82, at 17-18.

n90 See id. at 15 ("In 1966 [in Memoirs] the Court combined recent standards to form a new obscenity test."); accord LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 908-09 (2d ed. 1988) (stating that Memoirs for first time treated social value not as reason to exclude obscenity but as part of its definition).

n91 See 1, 2 CHILDRESS & DAVIS, supra note 3, @ 2.18, 13.05 (collecting many examples of de novo review of mixed questions in civil and habeas appeals).

n92 1 id. @ 2.18 (analyzing the development of rules via law-application that allows de novo review of mixed questions); Charles R. Calleros, Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases--Limiting the Reach of Pullman-Standard v. Swint, 58 TUL. L. REV. 403 (1983) (suggesting that mixed questions reviewed de novo if they develop general law); cf. WOODWARD & ARMSTRONG, supra note 84, at 194 (stating that Redrup review gave no written guidance to lower courts but they would essentially get the message over many films of what the Justices viewed as protected or not).

- - - - -End Footnotes- - - - -

Although this may be the most benign way of describing what the Court intended, ultimately more seems to be at issue than traditional common-law methodology and mixed law-fact review. This is because, whether courts concede the point or not, their true law-declaration function is only triggered--even as to the application of law to fact--whenever that application and the larger appellate process it reflects actually does alter the general norm, or define the meaning of that norm, for future courts. n93 Lawmaking simply does not occur in every factfinding review, at least if one understands lawmaking as requiring more than passing on the merits of a particular action under its contested record facts. At the least, it should be clear that review of facts itself and with no more generic development than that, by definition, cannot be cited as an exception to the usual rule of deference for review of factfinding (e.g., the federal clearly erroneous rule). The process, then, is simple error-correction, which is normally to be performed under the measure of error prescribed.

- - - - -Footnotes- - - - -

n93 See infra notes 185-190, 400-403 and accompanying text.

- - - - -End Footnotes- - - - -

In the Court's obscenity cases, it can be argued that more than law-declaration is occurring precisely because no real lawmaking usually is. Thus, the reversal under freer review must be a form of error-correction instead, in a substantive area where error-correction is performed de novo, rather than under a deferential review rule. Donald Downs's historical summary hints at the underlying First Amendment concern, even as he describes the review as one over law: "The determination of value [in Miller, 1973] ... was intended to be more a question of law for the judge than a question of fact for the jury, in order to maintain constitutional control over state action." n94 Later, and somewhat inconsistently, he describes the Court's actions as [*1249]

review over facts: "The [Jenkins] Court ruled that trial courts' findings of prurient appeal and patent offensiveness should be more closely scrutinized by appeals courts, even though these standards were meant to be questions of fact, which are normally left in the hands of juries at the trial level, rather than law." n95

-Footnotes-

n94 DOWNS, supra note 82, at 17 (citing SCHAUER, supra note 87, at 150-51).

n95 Id. at 18-19.

-End Footnotes-

The latter reading seems more accurate because any freer appellate review after 1973 would follow the Court's clear indication in Miller that community standards govern, which on its face seems to be a jury (and factual) inquiry under proper legal instruction. Thus, the freer review does not turn the issue into one of "law," but rather empowers appellate oversight of the conclusion despite its factual nature. n96 Moreover, appellate review regarding obscenity could not be cast as a substantive area of "judicial activism," as Hawkins and Zimring describe it, n97 if the Court has simply applied a form of law-fact analysis used in nonconstitutional contexts. And in most such cases, even if the Court purported to change the legal test, it decided the question of obscenity on its own, without remand under the new test, which is a general signal that a constitutional fact review is actually occurring rather than simple law-declaration. n98

-Footnotes-

n96 See Miller v. California, 413 U.S. 15, 25, 30 (1973) (holding that prurient interest and patently offensive questions are "essentially questions of fact," but Court earlier mentions "the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary"); cf. New York v. Ferber, 458 U.S. 747, 774 n.28 (1982) (engaging in independent examination in child pornography cases); Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (reviewing challenged film itself to decide "as a matter of constitutional law" not patently offensive); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) (stating that obscenity review boards undergo "judicial determination"); Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964) (stating openly that de novo review occurs in obscenity cases).

n97 HAWKINS & ZIMRING, supra note 82, at 135.

n98 See generally SHAPIRO, supra note 9, at 39-40 (stating that special doctrine allows rendering decision on appeal in constitutional cases rather than usual remand rule).

-End Footnotes-

This view is supported by contrasting other cases at this time that emphasized the trial court's factfinding role and the usual requirement of appellate deference, even as to issues that are arguably law-defining. n99 Because the Court in such cases did not strain to free up its own review, and yet did so in the obscenity context, it may be that rather than defining

obscene through application, the Court is actually re-finding the fact of obscenity on its own, on appeal. Thus, whether a [*1250] work is obscene is the ultimate conclusion that leaves the party under consideration vulnerable to an impingement of his constitutional rights, and the appellate court in turn is empowered to protect those rights as a separate exception to the usual process of deference, all without resort to a misplaced law-fact inquiry. The Court has shown in many contexts that it can place that inquiry where it wants to, by applying a law-fact exception or by requiring deference on facts; thus, in the abnormal situation of nondeference absent these tools, it must be refusing to defer on facts themselves.

-Footnotes-

n99 E.g., Commissioner v. Duberstein, 363 U.S. 278, 289-91 (1960) (holding that gift motive in tax law is treated as fact subject to clear-error deference).

-End Footnotes-

At any rate, several sources heard the latter message, and not the more usual law-fact one, so that even at their time this line of cases could be viewed as developing a reemerging constitutional fact principle, or better yet, a newly emerging one. n100 This Article will later argue that the better interpretation, seen through the backward lenses of New York Times and especially Bose, is indeed that these earlier cases foreshadowed a truly independent review rule. But at this point it should be recognized that without hindsight, this was not a pristinely obvious interpretation of what the Court actually did in such cases, and that they could reasonably be seen as barely special in light of the law-fact exception that did exist at the time.

-Footnotes-

n100 See, e.g., Daily Herald Co. v. Munro, 838 F.2d 380, 383-84 (9th Cir. 1988); Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1228-29 (7th Cir. 1985).

-End Footnotes-

The other group of early cases suggesting a new constitutional fact review involved determinations of clear and present danger, usually as a prerequisite to removing incitement or advocacy from First Amendment protection or to protecting the administration of justice. n101 For example, in 1946, the Court felt "compelled to examine for ourselves" the relevant statements "to see whether or not they do [*1251] carry a threat of clear and present danger," n102 a power reconfirmed in a 1963 peaceful assembly case finding a duty "to make an independent examination of the whole record." n103 Similarly, in its 1965 decision in Cox v. Louisiana, the Court reversed the demonstrators' convictions because its own review of the record revealed no conduct that the state could prohibit as a breach of peace. n104

-Footnotes-

n101 See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 97-160 (1970); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 29-50 (1965); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT

AND JUDICIAL REVIEW 46-75 (1966); TRIBE, supra note 90, at 841-61; Frank R. Strong, Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg--And Beyond, in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT 302 (Philip B. Kurland ed., 1975).

For a recent argument that such analysis must be applied to more subtle speakers, see David Crump, Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test, 29 GA. L. REV. 1, 6-11 (1994). For a poststructural and elite-critical analysis, see Mark Kessler, Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger, 27 LAW & SOC. REV. 559, 585-90 (1993).

n102 Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (emphasizing the danger to the integrity of the courts). Even very early cases had indicated that state-court decisions on unlawful advocacy which related to a federal right could be reviewed by the Supreme Court's, in effect, reading the propaganda itself. See Fiske v. Kansas, 274 U.S. 380, 385-87 (1927), noted in Anthony Lewis, Annals of Law: The Sullivan Case, THE NEW YORKER, Nov. 5, 1984, at 69-70.

n103 Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (citing Blackburn v. Alabama, 361 U.S. 199 (1960); Pennekamp, 328 U.S. at 335; Fiske, 274 U.S. at 385-86). Similar review principles were applied in such later incitement cases as Hess v. Indiana, 414 U.S. 105, 108-09 (1973), with Justice Rehnquist (joined by two Justices) complaining that despite the per curiam majority's subtle language, it effectively "interpreted the evidence differently from the courts below," exceeding the proper scope of review by substituting a different set of factual inferences. Id. at 111-12 (Rehnquist, J., dissenting).

n104 379 U.S. 536, 550-51 (1965). Similar "independent judgment" (as similarly vague) has been used in analogous questions of whether remarks were fighting words or likely to promote retaliation. See Street v. New York, 394 U.S. 576, 592 (1969).

- - - - -End Footnotes- - - - -

To be sure, the term clear and present danger itself may well be defined through the application on appeal of its legal standard to the record facts under adjudication. n105 Nevertheless, some of the cases empowering the Court to freely review that conclusion seem to build on a specialized constitutional fact doctrine, allowing de novo review of even the factual determination that a clear and present danger exists. Martin Shapiro wrote as early as 1966 that the clear-and-present-danger rule does not strain existing judicial competencies, and he suggested that it also had a unique twist on appellate court competencies:

What the clear-and-present-danger rule does do is allow the Supreme Court to undertake much of the responsibility for assessing the fact situation that would normally rest finally in the trial court. In the normal course of criminal law these findings of fact would be made primarily by the trial court and be reviewable by the Supreme Court only under the due process clause. n106

[*1252] "Independent review" followed, which would not strain the appellate courts' own institutional capacities. n107 Even so, what the Court may have done was to effectively turn the issue into one of law, so it was again not clear at that time exactly what the basis for this appellate authority was. Perhaps the

issue became mixed rather than factual:

When the First Amendment and the clear-and-present-danger rule are introduced, the same issues cease to be questions of fact falling under the no evidence rule and become mixed questions of fact and law, since they involve the application of a constitutional standard to the facts. n108

-Footnotes-

n105 Cf. Fiske, 274 U.S. at 385-86 (justifying its free review of application of law to facts by reference to the federal right and the facts being "so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," in essence a mixed law-fact approach).

n106 SHAPIRO, supra note 101, at 131.

n107 Id. at 131-32.

n108 Id. at 131.

-End Footnotes-

Nevertheless, even if the result was to treat the issues as mixed ones, the Court had provided no justification under its usual mixed law-fact precedent to support that application. It cannot be denied that the effective result in such constitutional inquiries was the freer review often associated with mixed questions--though again, interestingly, without remand. Shapiro continues, however, in a way that emphasizes the fundamentally factual nature of the appellate inquiry:

The Supreme Court, therefore, permits itself an independent review of the facts and will reverse the findings of the trial court if it feels that the weight of evidence considered as a whole falls differently than the trial court had thought it did, even though the trial court's findings are backed by substantial evidence. n109

From this description of the reweighing process, the independent review applies to the underlying facts as well, and, in fact, may be described as having "the fact finding" itself rest "more with the Supreme Court." n110

-Footnotes-

n109 Id.; see also id. at 131-32 (noting difference is weighing of evidence resting primarily with trial court and not overruled if some evidence, versus the appeals court taking an independent weighing of the facts reaching its own conclusions).

n110 Id. at 132.

-End Footnotes-

It is apparent from such analysis that in this context, the label mixed law-fact is meant as more of a shorthand description of the free review process applied, rather than a law-defining usage necessarily identified with the

label. The term is merely a conclusion of the procedural result (de novo review follows), not any modern sense of the concept of mixing law and fact.

[*1253] Thus, years later, Shapiro could accurately describe the "appellate fact-finding" that occurs under such review as "readjudicat[ing] precisely the same factual questions resolved by the trial court in determining guilt or innocence" n111 (i.e., clear and present danger). The essentially factual nature of the inquiry continues to be recognized, even as it has constitutional import because it then determines the constitutionality of an incitement statute as applied. n112 Indeed, it works out that "under the constitutional fact doctrine" in this context, the Court will "redetermine exactly the same factual question," n113 with the intended and political consequence of preventing remand to a lower court that might second-guess the reviewing body. n114

-Footnotes-

n111 Shapiro, supra note 7, at 649.

n112 See id.; see also SHAPIRO, supra note 9, at 40 (stating that the Court "empowers itself to do final fact-finding of certain facts essential to a determination of whether the state has acted constitutionally").

n113 SHAPIRO, supra note 9, at 41.

n114 See id. at 39-40.

-End Footnotes-

Similarly, as Laurence Tribe writes, "the Supreme Court has made plain that it will not blindly accept a lower court's determination that speech is punishable 'incitement' and not protected, albeit spirited, advocacy." n115 Elsewhere, he describes such Supreme Court review as "substituting its own factual judgments for those made by other courts," n116 in contrast to the usual deference.

-Footnotes-

n115 TRIBE, supra note 90, at 849 n.58 (analyzing a 1982 case, though not clarifying whether conclusion is legal or special substantive review rule is invoked).

n116 Id. at 834 (citing Cox v. Louisiana, 379 U.S. 536 (1965); Fiske v. Kansas, 274 U.S. 380 (1927)).

-End Footnotes-

Despite such results in obscenity and incitement cases, the basis for the freer review and its implications were, at best, provided after the fact by scholars. The conclusions of clear and present danger, as well as obscenity, could be readily cast into the role of a legal finding since each is a legal term of art or at least has decisive constitutional import. Even if the reapplication of law to fact on appeal created no new definition of the term at issue, it was not yet fully recognized that such was a trigger for an accurate label of mixed law-fact (so a vague or conclusory sense of mixed questions could describe what the Court seemed to be doing in many such cases). Thus, the

early jurisprudence yielded no clear, established, or general principle of specialized constitutional fact review.

[*1254] C. The Disposition and Language in New York Times

Into this scene entered New York Times Co. v. Sullivan. n117 The 1964 case is rightly famous for the sea change in First Amendment analysis it wrought, both in terms of its specific effect in constitutionalizing state defamation law and on the dynamics of First Amendment theory and analysis. n118

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n117 376 U.S. 254 (1964).

n118 See, e.g., ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991) (discussing the impact on libel law, and exploring the broader and lasting effect on free speech theory); TRIBE, supra note 90, at 861-65 (detailing defamation issues after the case); Harry Kalven, Jr., The New York Times Case: A Note on the Central Meaning of the First Amendment, 1964 SUP. CT. REV. 191 (describing the narrow and broader analytic effects or possibilities of case); cf. SHAPIRO, supra note 101, at 175 n.73 (questioning Kalven's assertions about the broad reaches of the analysis, apparently as to the putative death of the clear-and-present-danger doctrine); Richard Epstein, Was New York Times v. Sullivan Wrong?, 53 U. CHI. L. REV. 782 (1986) (criticizing the Court for making sweeping changes, having effects beyond civil rights context).

-End Footnotes-

A more subtle aspect of the decision, particularly its disposition and mandate, has important consequences (less known) for the type of internal judicial review developed here. This occurs in the final portion of the majority opinion, in which Justice Brennan considered the specific application of its new constitutional privilege.

Remand would be the normal result, but "we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent." n119 This power was based not on the limited duty to declare constitutional principles; "we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." n120

-Footnotes-

n119 New York Times, 376 U.S. at 284-85.

n120 Id. at 285.

-End Footnotes-

Unsurprisingly, the Court found this to be "such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" n121 The line drawing in such cases requires the rule that the Court examines for itself the relevant statements and circumstances to see whether they are protected. More starkly: "We must 'make an independent examination of the

whole record' . . . so as [*1255] to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." n122

-Footnotes-

n121 Id. (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958), a case about government-required oaths against revolutionary advocacy).

n122 Id. (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

-End Footnotes-

In justifying this independent examination in the face of the historical protection given jury factfindings, such as that embodied for federal courts in the Seventh Amendment and the legacy of the Zenger libel jury, n123 Justice Brennan recalled the reasoning of an early incitement case, concluding that the Court maintains the role of "determining whether governing rules of federal law have been properly applied to the facts." n124 Indeed, the Court will review findings of fact "'so intermingled'" with the federal conclusion of law "'as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" n125

-Footnotes-

n123 See infra notes 351-359 and accompanying text.

n124 New York Times, 376 U.S. at 285 n.26.

n125 Id. (quoting Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)).

-End Footnotes-

Applying this broad principle to the case, Justice Brennan's opinion actually describes in detail the facts and allegations supporting a claim that actual malice existed, especially as to the newspaper, and also that the advertisement referred to the plaintiff-respondent. n126 The Court found, on its own, no actual malice and an insufficient connection to the plaintiff to permit any verdict against the defendants, concluding that the proof "would not constitutionally sustain the judgment for respondent under the proper rule of law." n127 Thus, on malice, "the judgment against them is . . . without constitutional support," n128 and further "the evidence was constitutionally insufficient to support a finding that the statements referred to respondent." n129

-Footnotes-

n126 See id. at 285-92.

n127 Id. at 286 (stating that the proof lacked the "convincing clarity" that "the constitutional standard demands").

n128 Id.

n129 Id. at 292.

-End Footnotes-

Despite the opinion's references to earlier cases of record reexamination, and its almost silky introduction of the authority by way of "efficient judicial administration," the actual use was blunt and powerful, and fully intended to avoid the prospect that Alabama could retry the defendants and find liability under the new constitutional privilege because it was a qualified one. n130 This procedural aspect, avoiding new trial on new evidence, was controversial among the [*1256] Justices before the opinion was handed down. n131 In fact, the Justices, rather than debating the new actual malice rule, largely "fretted about a part of the opinion that today seems far less important: the application of the new standard to the evidence in the case." n132 Ultimately, the Court applied pragmatic considerations to avoid a meaningless exercise of remand. n133

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n130 See LEWIS, supra note 118, at 172-82; Lewis, supra note 102, at 69; see also infra note 142 and accompanying text, for Harry Kalven's 1964 assessment.

n131 See BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 531-41 (1983).

n132 Elena Kagan, A Libel Story: Sullivan Then and Now, 18 LAW & SOC. INQ. 197, 202 (1993) (reviewing LEWIS, supra note 118). "All the notes from the Justices concerned the question whether the Court properly could apply the actual malice standard to the evidence below" Id. This is striking if the disposition is now to be treated as an afterthought.

n133 Id.

-End Footnotes-

Whatever the clarity or permanence of the earlier pieces of constitutional fact review, there can be little doubt that the New York Times version had clout and a true constitutional basis. In both language and effect, particularly the trial-like explicit review of pages of record evidence and the classic avoidance of remand for retrial under the new constitutional law, this exercise amounted to a virtual reexamination of the facts on appeal. It hardly appears to be mere second guessing of the legal conclusion, or especially the legal definition of libel law as applied, as would occur under a milder or traditional mixed law-fact analysis.

To be sure, two banal explanations could be offered. First, review may have been merely for evidentiary sufficiency, a review which courts routinely do. Laurence Tribe describes the result wholly in civil procedure terms:

Assessing the evidence in New York Times in light of its new rule, the Court determined that, on a retrial, the evidence as it stood on the record would be insufficient as a matter of law to submit the case to a jury; the Times would, on this record, be entitled to a directed verdict. n134

This mildest of interpretations cannot be correct, at least if sufficiency here is understood as the usual directed verdict test for reasonableness or substantial evidence (or likely, at that time, for any evidence) supporting the jury's verdict. n135 Nowhere in the opinion is there any [*1257] deference

shown to the jury's finding or possible inferences supporting a finding on malice or reference to the plaintiff, in contrast to the usual presumptive approach to such inferences. n136 Nor does the Court really frame the question as one of reasonableness of the jury, discretion of the jury, propriety of the directed verdict, or amount of evidence bolstering its view.

-Footnotes-

n134 TRIBE, supra note 90, at 864-65.

n135 Cf. 1 CHILDRESS & DAVIS, supra note 3, @@ 3.01-.04 (discussing normal sufficiency review in its highly deferential forms, including the strict complete absence test common at that time).

n136 Cf. 1 id. @ 3.05 (discussing the usual conclusive presumption given factual inferences and decisions on credibility).

-End Footnotes-

Indeed, the entire facts-review section is framed in terms of the Court's own inferences to be drawn from the record selections it wished to consider. That appears to be more like a trial court's traditional factual inquiry than appellate sufficiency review. For example, there are many mentions of the standard of proof in use here--clear and convincing evidence--but no standard of review other than "independent" record review, and yet it is clear that standards of proof are trial burdens for the initial trier of fact. n137 It then follows that the Supreme Court was acting as a trier of fact. Thus, it is impossible to ascribe simple procedural devices of appeal to the process this Court employed and discussed.

-Footnotes-

n137 See 1 id. @@ 1.03, 2.05, 3.06 (distinguishing trial burdens and standards of proof from appellate review tests, and noting the subsequent incorporation of such burdens within a review test). See generally Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) (discussing the basic distinction between trial burdens of proof and appellate standards of review).

-End Footnotes-

At the least, the Court can be seen as using a new version of sufficiency review that has no connection to the scope and substance of that procedure in nonconstitutional cases, such that it would then be a sufficiency review under an entirely different, de novo, standard of review. The references, then, to "constitutionally insufficient" or the "constitutionally defective" lack of support of the jury's finding n138 must reference a qualitatively different process than the label sufficiency traditionally invokes.

-Footnotes-

n138 See New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964).

-End Footnotes-

Second, and more difficult to assess, language in the opinion supports a more traditional mixed law-fact view of the case. The Court did cite an early incitement case which had emphasized the intertwining of law and fact and, like the early jurisprudence, called this process one of determining the proper application of governing rules of law to the facts. n139 Today, that would sound like the kind of [*1258] inquiry courts use in mixed law-fact analysis, via the routine application of law to fact. n140

-Footnotes-

n139 See id. at 285 n.26 (citing Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)).

n140 See infra notes 185-190, 400-403 and accompanying text.

-End Footnotes-

Even this interpretation, although not without some support, cannot survive a thorough scrutiny. Other language in the opinion, and its actual review of facts, makes clear that it is the record, the evidence, and the facts themselves that are under review. n141 The opinion, as quoted above, also bases this process on the constitutional rights at stake, and not simply the law-defining role of any appellate court in a dispute. There is no real discussion, during this review, of the meaning of the terms in question, even though they were given new definition throughout the earlier reasoning in the opinion. Rather, the record review actually undertaken appears to be the simple task of sorting through and weighing the various conclusions that could be drawn and choosing the correct one from the Court's viewpoint. The law had already been defined by this point in the opinion, and the application that followed in its Part III added nothing other than the final result in the case. In other words, the no-remand position was required by constitutional law, not by there being a conclusion of law.

-Footnotes-

n141 See New York Times, 376 U.S. at 285-86.

-End Footnotes-

That something more fundamental was occurring, even in the final procedural twist, was recognized soon after by Harry Kalven:

The Court then assured that its newly stated rule would not authorize another verdict in the same case on retrial by itself assessing the evidence and determining that it was not adequate to submit the case to the jury. The Court has hitherto rarely displayed such a taste for common sense in deciding a question not directly before it. n142

And the Court made "doubly sure" by ruling the evidence constitutionally inadequate to connect the plaintiff with the libel, a "powerful point." n143 Anthony Lewis's more recent observations confirm that Justice Brennan had taken "a most unusual step" of "apprais[ing] the evidence introduced at the trial to see whether it met the test. That was unusual because the principles of federalism require respect for findings of fact by a state court; ordinarily, the Supreme Court has no power at all to review them." n144 Neither

commentator [*1259] fleshed out what made these twists so dramatic, or whether they can be justified beyond the facts of the case.

-Footnotes-

n142 Kalven, supra note 118, at 204.

n143 Id.

n144 Lewis, supra note 102, at 69.

-End Footnotes-

Thomas Emerson apparently concurs in the factual nature of this independent inquiry. After describing the malice issue as one submitted to the jury, he argues that it provides insufficient protection as exemplified by the Court's tacit concession that the rule alone cannot control outcome: "The Court was unwilling merely to announce the rule and send the case back for retrial in accordance with the new principle. It carefully reviewed the evidence and itself drew the conclusions which the jury would be bound to reach." n145 Similarly, the Court did the same with the Butts and Walker cases which followed New York Times in 1967. n146

-Footnotes-

n145 EMERSON, supra note 101, at 536.

n146 Id. Emerson is noting that this procedure was used in Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) and in Associated Press v. Walker, 388 U.S. 130 (1967). See also Time, Inc. v. Pape, 401 U.S. 279 (1971) (illustrating an independent review of a directed verdict in a libel case); id. at 294 (Harlan, J., dissenting) (stating that though the Court is free to review the record, here the majority just refound facts).

-End Footnotes-

Perhaps the Court still had not quite made clear what was going on. Yet from the sweeping record review and the firm disposition, it was apparent then--and in retrospect even more certain--that the Court had applied a distinctly constitutional review doctrine to find for itself what can most naturally be described as actual facts under dispute.

D. Ultimate Fact and Constitutional Fact in the Lower Courts

This legacy may have made a difference in some lower court cases. Despite the observation in this section's introduction that many erstwhile constitutional fact cases over the years simply reduce to a more usual law-fact inquiry, it was nonetheless apparent that some of the lower federal cases allowed broad appellate review of pure historical or evidentiary facts if they had larger constitutional significance. n147

-Footnotes-

n147 See, e.g., Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971).

- - - - -End Footnotes- - - - -

To the extent that this claim was a manifestation of a broader independent review doctrine on questions of "ultimate fact," n148 it [*1260] appears to be foreclosed by Pullman-Standard v. Swint and its statement in 1982 that the federal clearly erroneous rule "does not divide facts into categories." n149 This is especially so if Swint is seen as involving constitutional interests, at least indirectly, since the statutory protection of Title VII is specifically at issue. The Court has, in fact, applied Swint to constitutionally related facts such as voting discrimination, n150 and held school board intent in desegregation cases to be a factual matter. n151 There is no indication in either context that a special ultimate fact doctrine in constitutional cases will permit the appellate court to ignore either the holding in Swint or the deferential clearly erroneous rule.

- - - - -Footnotes- - - - -

n148 See Childress, supra note 37, at 120-21. See generally 1 CHILDRESS & DAVIS, supra note 3, @ 2.17 (discussing the historical use and eventual abandonment of the doctrine that allowed any ultimate conclusion, even factual, to be reviewed de novo). For example, in Gay Lib v. University of Mo., 558 F.2d 848, 853-54 n.10 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978), Judge Lay noted important First Amendment considerations but then relied on a documentary case exception as the basis for broader review.

n149 456 U.S. 273, 287 (1982) (rejecting the Fifth Circuit's ultimate fact review and applying clear error test to finding of intent and discrimination in employment case).

n150 E.g., Rogers v. Lodge, 458 U.S. 613, 623 (1982); see also Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (concerning voting dilution).

n151 E.g., Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537-40 (1979).

- - - - -End Footnotes- - - - -

More commonly, lower courts have reviewed factual findings having constitutional significance but made no reference to the discredited ultimate fact doctrine or any potential constitutional fact exception. n152 Both before and after Swint, the language of a constitutional fact exception was traditionally invoked only sporadically and vaguely.

- - - - -Footnotes- - - - -

n152 See, e.g., Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983) (stating that "voluntary" residence in institution is fact, without mentioning constitutional intertwinings); Case v. Morrisette, 475 F.2d 1300, 1306-08 (D.C. Cir. 1973) (discussing thoroughly Rule 52 principles, but omitting a potential constitutional exception).

- - - - -End Footnotes- - - - -

Several courts flatly denied any such exception. n153 As one Tenth Circuit panel wrote in 1973, the Rule 52(a) question is whether the trial court made a

mistake, and "the same rule applies in cases involving constitutional rights." n154 Even a finding on clear and present danger--the conclusion itself, and not just the underlying factual basis--has been deemed a finding of fact subject to deference by the [*1261] Fifth Circuit, n155 despite that court's entrenched use of ultimate fact review in other contexts. n156

- - - - -Footnotes- - - - -

n153 E.g., Velasquez v. City of Abilene, 725 F.2d 1017, 1021 (5th Cir. 1984) (concerning voting dilution); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974) (applying Rule 52 to application of law to fact in constitutional analysis), cert. denied, 421 U.S. 963 (1975).

n154 Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir.) (citing Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972)), cert. denied, 414 U.S. 944 (1973).

n155 Molpus v. Fortune, 432 F.2d 916, 921 (5th Cir. 1970).

n156 See Pullman-Standard v. Swint, 456 U.S. 273, 285 & n.15 (1982) (collecting many Fifth Circuit cases applying de novo review on ultimate facts); 1 CHILDRESS & DAVIS, supra note 3, @ 2.17 (cataloging Fifth Circuit exception).

- - - - -End Footnotes- - - - -

In these forms, then, among the lower courts, any constitutional fact doctrine would appear to boil down to one of five relatively meaningless things: historically disapproved as an old isolated doctrine; rejected with its analogue, ultimate fact doctrine; superfluous as just another form of legal-conclusion or mixed-questions exceptions to Rule 52; inconsistently applied; or often simply ignored as a special possibility. The doctrine's historical record, especially among the federal circuits, was spotty at best--even in light of the early Supreme Court cases and the disposition in New York Times.

E. Bose, Mixed Law-Fact Analysis, and the First Amendment

Despite the mixed record, the Supreme Court has offered the opportunity to clarify and develop a more modern and independent analysis of constitutional fact review. In 1984, in Bose Corp. v. Consumers Union of United States, Inc., n157 the Court applied de novo review to the finding of actual malice which is now necessary to defeat the New York Times constitutional privilege in a public-figure defamation case. The clearly erroneous rule was found not to apply to a district judge's nonjury finding on such malice, n158 in this case whether a consumer magazine knew or had reckless disregard about the falsity of its report on loudspeakers. n159

- - - - -Footnotes- - - - -

n157 466 U.S. 485 (1984).

n158 Id. at 501-02, 510-11.

n159 Id. at 491.

- - - - -End Footnotes- - - - -

The Court clearly removed this finding from the clear error rule's protected list, despite opinions which pointed out the pure fact or factual inference nature of any inquiry into a libel defendant's intent, knowledge, or state of mind. n160 Indeed, it cannot be disputed that state [*1262] of mind is usually a factual question. n161 This appears to be so, as well, on the facts of the case, which boiled down to the question of whether the magazine knew or had subjective doubts about the falsity of its statement that loudspeaker sound wanders "about the room" rather than "along the wall." n162

-Footnotes-

n160 See id. at 515 (White, J., dissenting) (stating that the actual knowledge component of malice is fact); id. at 515-16 (Rehnquist, J., dissenting) (stating that actual malice and falsity are both facts). Justice Rehnquist's opinion in particular distinguishes in detail the earlier constitutional fact cases--those cited by the majority--as not really hinging on a disputed state of mind. Id. at 515-20 (Rehnquist, J., dissenting).

n161 Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985); Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982).

n162 See Bose, 466 U.S. at 490 & n.5, 494. The difference was assumed to be both factual and false for purposes of the analysis, though to a reader it appears (like the "false facts" in New York Times) to be nit-picking by the plaintiff. Id. at 493-94.

-End Footnotes-

The Bose Court was less clear, however, in articulating why the clearly erroneous rule is inapplicable to actual malice findings in this context. n163 And so in some ways (especially in its sweeping language), the majority opinion no more clarified the analytical basis for its review rule than did the string of earlier federal constitutional law cases which it surveyed and quoted in myriad pieces. n164

-Footnotes-

n163 See generally id. at 504-10 (discussing and quoting multiple cases that apply some form of freer review over such constitutional issues as obscenity, child pornography, breach of peace, incitement, and actual malice).

n164 See id.

-End Footnotes-

To be sure, the Court discussed mixed-question doctrine generally, n165 and later specifically mentioned the "intermingling of law and fact in the actual-malice determination." n166 It noted that findings of fact often intertwine with both the substantive law and the materials being reviewed, thereby varying the conclusiveness of the finding. n167 It further reasoned that actual malice is not "literal text, but rather is given meaning through the evolutionary process of common-law adjudication." n168 And given the constitutional effect, the "Court's role in marking out the limits of the

standard through the process of case-by-case adjudication is of special importance." n169 That process, whether infused with constitutional import or not, sounds remarkably like the evolutionary law-application function associated with traditional mixed-question analysis. If the process were an accurate description of what the Court does, it would even seem to satisfy the thesis that reference to law-fact mixing should not be made without a [*1263] showing of that law-development through application that makes legitimate such assertions of appellate power. n170

-Footnotes-

n165 See id. at 500-02. The Court even quoted an old ultimate-fact case. Id. at 500 n.16 (quoting Baumgartner v. United States, 322 U.S. 665, 670-71 (1944)).

n166 Id. at 508-09 n.27.

n167 Id. at 500-01 nn.16 & 17.

n168 Id. at 502.

n169 Id. at 503.

n170 See discussion and application infra notes 187-190, 394-401 and accompanying text.

-End Footnotes-

Yet as helpful as these broad dicta are to understanding many of the dilemmas of appellate review of factfinding, including documentary cases, ultimate fact doctrine, and a more legitimate mixed law-fact analysis, n171 they ultimately seem out of place in the Court's actual disposition. The actual malice standard is not in any way changed or redefined through the application at hand, allowing Justice Rehnquist in dissent to parry that the judge below certainly understood what "actual malice" legally means; n172 presumably that did not change just because the appellate majority disagreed with the finding.

-Footnotes-

n171 See, e.g., 1 CHILDRESS & DAVIS, supra note 3, @@ 2.09, .16-.18 (applying the Bose dicta to explore these other difficult questions of Rule 52 application).

n172 Bose, 466 U.S. at 516 (Rehnquist, J., dissenting).

-End Footnotes-

Taking the mixed-question discourse too literally would not be an accurate account of what the Court in fact does. As in New York Times, the Court actually spent pages of text and footnotes detailing, with record cites, its own account of why there was no malice to be found in this record. n173 This must have gone beyond the usual Supreme Court summary, as even the dissent noted the "factual detail and rehearsal of testimony with which the majority's opinion is adorned." n174 Again, there is no remand under a corrected legal test.

-Footnotes-

n173 See id. at 487-98, 511-14.

n174 Id. at 516 (Rehnquist, J., dissenting).

-End Footnotes-

More fundamentally, Bose is based on constitutional law and a tradition--albeit cloudy--of appellate authority as to constitutional findings. From the start, Rule 52(a) deference is openly juxtaposed as "point[ing] in opposite directions" n175 as to a rule of the First Amendment and not just generic appellate law. Ultimately, the "requirement of independent appellate review . . . is a rule of federal constitutional law." n176

-Footnotes-

n175 Id. at 498.

n176 Id. at 510.

-End Footnotes-

Along the way, many passages make this point bluntly, despite the general introductions about fact review policies. "The simple fact is that First Amendment questions of 'constitutional fact' compel this [*1264] Court's de novo review." n177 Indeed, immediately after the preface on general factfinding, the Court apparently recognized that these other gradations of appellate deference, allowing for a weaker presumption of correctness but still applying Rule 52(a), were not at issue in this context:

The difference between the two rules, however, is much more than a mere matter of degree. For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge. n178

It is not a large step to recognize that the usual law-fact exception to deference is not really at issue either.

-Footnotes-

n177 Id. at 508 n.27 (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971) (Brennan, J., plurality opinion)).

n178 Id. at 501.

-End Footnotes-

Further, the precise issue of actual malice reviewed, as discussed above, belies any real mixed law-fact, or a revived ultimate fact, inquiry. It simply is one of subjective knowledge or doubt that in any other context would be regarded as fact, or treated as such even if it was considered a conclusion based on factual evidence. No evolutionary process has occurred. By contrast, the New York Times Court could be said to have invented a new substantive

rule, such that an application in the opinion arguably would give developmental guidance to the lower courts. In Bose, there was no new rule, and no law-declaration via law-application.

The other way in which the opinion can be read as supporting a mixed law-fact inquiry, if perhaps a special constitutional application of that process, is in the use of the earlier state-law libel cases which, outside the Rule 52(a) context, appear to treat malice as a legal question. n179 That history and its own unclear basis is noted above, and in Bose, some of the pieces sounding like legal conclusion or mixed law-fact definition are also picked up. n180 Yet in each case and use in the opinion, it appears to be a doctrine unique to constitutional interpretation.

-Footnotes-

n179 The relationship between such jury cases and this new nonjury rule is seen infra notes 213-217 and accompanying text, and detailed in the forthcoming article cited supra note 29.

n180 See, e.g., Bose, 466 U.S. at 505 (stating that the Court has not ended its task at generally describing protection, but instead makes sure that speech falls in unprotected category); id. at 508-09 n.27 (repeating the "intermingling" rationale of early cases).

-End Footnotes-

{*1265} Moreover, the statements and their use in Bose are not limited to sheer legal conclusions or even inferences drawn from other facts. Rather, many are presented as actual reexamination of the facts and weighing of the evidence in the record. n181 They are so endorsed by the Court in collecting them, as by its overt references to the dissenting opinions in this tradition which had accused the majority of refinding facts. n182 Like the general principles of factfinding, which the Court announced and then virtually abandoned, the references to law-fact in the introduction or in discussing the prior independent judgment cases do not really ground its de novo review rule as eventually stated and defined.

-Footnotes-

n181 See id. at 504-11.

n182 See, e.g., id. at 506, 510 n.28.

-End Footnotes-

The Court, then, did not firmly develop these general points into a rationale for its decision, but instead relied further on the constitutional nature of this erstwhile factfinding: "The constitutional values protected by the [actual malice] rule make it imperative that judges--and in some cases judges of this Court--make sure that it is correctly applied." n183 It follows, the Court concluded, that "judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" n184

-Footnotes-

n183 Id. at 502.

n184 Id. at 511 (meaning appellate judges in this instance).

-End Footnotes-

Although this final formulation could be read as the mundane rule that the constitutionality of a given conduct is a law question, in fact the First Amendment allusions throughout and the actual disposition belie such an interpretation. This is especially so in light of Justice Rehnquist's jab in dissent that, "in the interest of protecting the First Amendment," n185 the Court treats "what is here, and in other contexts always has been, a pure question of fact, as something more than a fact--a so-called 'constitutional fact.'" n186 Though he did not say so, it follows that the majority's exercise was one of sheer error-correction.

-Footnotes-

n185 Id. at 515 (Rehnquist, J., dissenting).

n186 Id. at 517 (Rehnquist, J., dissenting).

-End Footnotes-

[*1266] The import of this mechanism was not lost on the dissenting judges, and it should be understood that they are correct as a descriptive matter in regarding pure facts to be found on appeal, even if it is less clear as a normative matter whether such a new process is desirable. Further, Justice Rehnquist was correct to point out that the earliest constitutional fact precedent more easily lends itself to being described as involving "the kind of mixed questions of fact and law which call for de novo appellate review than do the New York Times 'actual malice' cases, which simply involve questions of pure historical fact." n187 Whereas obscenity, fighting words, and advocacy cases are infused with legal terms of art, Justice Rehnquist appears to argue, the malice issue is simply the "actual subjective state of mind of a particular person at a particular time." n188 Nevertheless, in that description lies the seeds to an original review rule, I would add, because it is so apparent that such particularized decisionmaking is the opposite of the broad norm-defining function caught up in the mixed-question inquiry.

-Footnotes-

n187 Id. at 517-18 n.1 (Rehnquist, J., dissenting).

n188 Id. (Rehnquist, J., dissenting); see also GUNTHER, supra note 87, at 735 n.3 (noting the "recurring and important issue in First Amendment law" of independent review "of the factual findings below," citing Bose).

-End Footnotes-

This is not to say that Bose unfairly uses the precedent; rather, its application must be seen as highlighting the constitutional rule rather than the related, but milder, law-fact inquiry. Nonetheless, the opinion collects and

advances these sources beyond what they clearly meant before. Bose's use of New York Times in particular must be understood as cementing that case's final disposition into a broader appellate review rule exclusively and powerfully for constitutional actions. Indeed, Part III of this Article turns to the further point that Bose, in its ultimate reasoning and application, is a significant step in appellate factfinding, and is justified by its (still relatively unstated) basis in First Amendment law and theory.

In sum, that the finding is "something more than a fact" n189 does not necessarily mean that it is the same process as the drawing of a legal conclusion from the facts, nor is it simply the development of a legal standard through application of law to facts. Bose can be read broadly to promote a modern doctrine of constitutional fact review, generalized so that factfindings on decisive constitutional questions [*1267] should be, for the protection of parties and constitutional integrity, given independent appellate scrutiny. Of course, what this free review is may be checked by the underlying facts found rather than appearing to state a true de novo trial, as the term is often understood in other systems; here, the term signifies an appellate court's power to make findings on its own, but it remains independent review from an existing record. n190 Yet it does have wide-ranging possibilities as a review process even if it is not a retrial on new evidence. Part IV turns to the implications of this model in a variety of substantive and procedural contexts, including the question of whether underlying credibility calls can be included in the de novo inquiry. First, the Court's later treatments of Bose and its review rule are recounted.

- - - - -Footnotes- - - - -

n189 Bose, 466 U.S. at 517 (Rehnquist, J., dissenting).

n190 See id. at 514 n.31 (clarifying that de novo review is independent review of the existing record, and not a retrial or a sweeping reexamination of the entire record where not germane to the finding at issue); 1 CHILDRESS & DAVIS, supra note 3, @ 2.14 (discussing specific meaning of de novo record review after bench trials and contrasting searching scrutiny or de novo hearings).

- - - - -End Footnotes- - - - -

F. The Aftermath of Bose in Supreme Court Discourse

Despite this broad reading, the Bose Court did not indicate that it was redefining the clearly erroneous rule, except perhaps for the peculiar and highly protected nature of First Amendment defamation law, with its own set of broad-review precedent. n191 Nor did it say where it would draw a line for "special facts . . . deemed to have constitutional significance." n192

- - - - -Footnotes- - - - -

n191 See Bose, 466 U.S. at 501-11.

n192 Id. at 505.

- - - - -End Footnotes- - - - -

We have seen that even before Bose, the Court was reluctant to override the usual deference to trial court factfinding in such contexts as desegregation, discrimination, and voting rights despite the constitutionally related issues at stake. And some rulings were reconfirmed after Bose, such as the statutory inquiry into discriminatory intent. n193

-Footnotes-

n193 See Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985). Swint gave no hint that statutory discrimination appeals allow for broader Rule 52 review. 456 U.S. 273, 286-88 (1982). Nor did it imply that a pure constitutional appeal would be different. In Anderson, 470 U.S. at 573-76, without citing Bose, the Court again applied Rule 52 strictly in a Title VII appeal, this time beyond Swint's @ 703(h) context.

-End Footnotes-

[*1268] For instance, issues in voting rights cases have become increasingly subject to review under Rule 52(a), n194 even though they seem to involve the application of law or affect constitutional rights. Lower courts find, further, that the Court's three preconditions to a Section 2 claim--large and compact minority, politically cohesive, and bloc-voting majority--are all findings of fact receiving deference. n195 Affirmance is usual, if the correct legal test is used. Moreover, the state of mind of a prosecutor has recently been deemed factual, even to the extent it drives a decision on the constitutional use of her peremptory challenges of jurors. n196

-Footnotes-

n194 See, e.g., Thornburg v. Gingles, 478 U.S. 30, 78-79 (1986) (finding that voting dilution is factfinding subject to Rule 52); Terry E. Allbritton, Voting Rights: Fifth Circuit Symposium, 21 TEX. TECH L. REV. 565, 567-68, 577-79 (1990).

n195 E.g., East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson, 926 F.2d 487, 491 (5th Cir. 1991); Brewer v. Ham, 876 F.2d 448, 450 (5th Cir. 1989). These preconditions are commonly known as the Gingles factors.

n196 Hernandez v. New York, 500 U.S. 352, 367 (1991) (distinguishing Bose as involving legal and factual elements; clear error rule thus applies to trial court's rejection of claim for discriminatory use).

-End Footnotes-

Likewise, the Court is unlikely to apply Bose broadly to habeas corpus issues of fact. n197 When it has found independent federal review (e.g., state habeas findings on counsel competency), the Court has rested on its legal rather than its constitutional nature. n198 Overall, then, it is unlikely given past practice and recent inaction in the area that the current Court meant to scuttle Swint's firm adherence to factfinding deference or to broaden review generally merely because an appeal might raise constitutional interests. The Court has not yet invoked Bose in this broad way. Though most instances involve no mention of that case, the Court in 1986 more openly found it inapplicable to a new situation, involving the Commerce Clause. n199

-Footnotes-

n197 See *Wainwright v. Witt*, 469 U.S. 412, 426-30 (1985); 2 CHILDRESS & DAVIS, supra note 3, @ 13.04.

n198 *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (finding that the effective counsel issue is a mixed law-fact); see *Miller v. Fenton*, 474 U.S. 104, 109-18 (1985) (finding voluntariness of a confession to be a legal conclusion).

n199 *Maine v. Taylor*, 477 U.S. 131, 145 (1986) (stating that the local discrimination issue is one of fact, while not asking whether legally a given set of facts violates Commerce Clause; "we note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case") (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)).

-End Footnotes-

More interesting is the way in which the Court has begun to characterize Bose itself. Although the Court has strongly reinforced [*1269] the Bose rule in the context of jury determinations on actual malice under the First Amendment, a few other cases take a different course from the potential for appellate factfinding analyzed above, even in the process of justifying free review another way.

In the immediate aftermath, the Court appeared to view Bose as ascribing legal significance to the actual malice finding. In 1985, in *Miller v. Fenton*, the Court seemed to characterize Bose relatively narrowly by making actual malice involve something akin to legal reasoning rather than pointing to its First Amendment and constitutional ramifications:

Where . . . 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 the law. [citing Bose] Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or some other factor. . . ." [citing Justice Rehnquist's dissent in Bose] n200

Justice O'Connor's opinion in *Miller* makes no mention of the actual factfinding that occurred in Bose, despite such a clear showing by Justice Rehnquist in a dissent which Justice O'Connor had joined.

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n200 474 U.S. 104, 114 (1985).

-End Footnotes-

Such a limited reading of Bose's full meaning would, at the extreme, bring the Court back to the position in which much of constitutional fact doctrine effectively existed before Bose: ignored as a special exception to the clearly

erroneous rule or masked by the more usual mixed law-fact problem. Of course, it can be said that Bose reaffirmed that appellate courts primarily function as law expositors even though the opinion touched on many other principles of nonjurytrial review. The actual holding, however, more accurately involved its essential function of error-correction in constitutional cases, the "some other factor."

More recently, a majority of the Court appears to read Bose as establishing something of a mixed law-fact analysis, n201 for example as [*1270] a justification for de novo review of findings on protected speech. In City of Houston v. Hill, n202 the Court considered an overbreadth challenge to an ordinance outlawing the interruption of police. To a charge that the lower court had engaged in factfinding, the Court said that "independent review of the record is appropriate where the activity in question is arguably protected by the Constitution," and here the "disagreement between the lower courts was . . . limited to a question of law--whether the ordinance on its face was substantially overbroad." n203

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n201 See Hernandez v. New York, 500 U.S. 352, 367 (1991) (distinguishing Bose and Miller as involving legal and factual elements); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 106-08 (1990) (reviewing conclusion on deception (over Justice O'Connor's dissent urging more deference to state courts) because determination of whether character of statement places it beyond First Amendment protection is a question of law, and thus reviewed de novo (citing Bose, 466 U.S. at 498-511)).

n202 482 U.S. 451 (1987).

n203 Id. at 458 n.6.

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Moreover, the Court has routinely indicated that independent review of the record is in order in lawsuits by public employees alleging that their discharge violated the First Amendment. n204 In reviewing the constitutionality of the firing of one employee who said that she wished Hinkley had killed Reagan, the Court in 1987 stated that it has a "constitutional obligation to assure that the record supports" a conclusion that certain speech relates to matters of public concern. n205 The Court must examine the statements themselves to determine whether they are protected, and the "ultimate issue--whether the speech is protected--is a question of law." n206 Lower courts repeat this de novo review. n207 Although this may be characterized as a form of constitutional fact review, it is apparent in many such cases that the actual review question merely deals with the legal question of whether certain conduct is protected by the First Amendment or certain firings violative of it. n208 Certainly, the decision [*1271] on whether the issue is of public concern is frequently cast as simply a conclusion of law. n209

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n204 See, e.g., Connick v. Myers, 461 U.S. 138, 150 n.10 (1983) (stating that the Court examines the record itself to see whether statements are of the type protected by the First Amendment).

n205 Rankin v. McPherson, 483 U.S. 378, 386 (1987) (finding that a public employee was improperly fired for her speech that was related to matters of public concern).

n206 Id. at 386 n.9 (citing Connick, 461 U.S. at 148 n.7).

n207 See, e.g., Price v. Brittain, 874 F.2d 252, 257-58 (5th Cir. 1989) (reviewing the record independently as to content, form, and context of speech; affirming judge's trial decision for defendants); Koch v. City of Hutchinson, 847 F.2d 1436, 1441 & n.12 (10th Cir.) (en banc) (discussing in jury review context), cert. denied, 488 U.S. 909 (1988); Page v. DeLaune, 837 F.2d 233, 237 (5th Cir. 1988) (stating that whether an issue relates to a matter of public concern is reviewed independently).

n208 See Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798 (5th Cir. 1989) (holding that the court reviews de novo whether reading list is protected, since inquiry into protected status of speech is one of law, not fact) (citing Connick, 461 U.S. at 148 n.7), cert. denied, 496 U.S. 926 (1990); Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1081-82 (4th Cir. 1987) (stating that independent review on public concern and on the balancing inquiry is involved in public employee free speech cases, calling even the balancing analysis a "question of law"), cert. denied, 487 U.S. 1206 (1988).

n209 See, e.g., Dodds v. Childers, 933 F.2d 271, 273 (5th Cir. 1991); Page, 837 F.2d at 237; Piver, 835 F.2d at 1081-82.

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As with the overbreadth challenge in Hill, arguably no real factfinding review has occurred in most of these cases, so there is no need to consider the limits of Bose's potential. Likewise, reference to Bose in modern incitement analysis n210 may mean only that the particular question of incitement is also the legal conclusion in the case. n211 In all such cases, the reach of Bose may be disputed by recharacterizing it as merely deciding that malice is a legal issue, although that strains the nature of the malice test. Yet most similar cases can be described as not really reaching the other, more powerful, aspect of Bose and factfindings, because, in most such applications, the actual issue up for review readily fit into traditional mixed-question analysis and received de novo review regardless of the label.

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n210 See, e.g., Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1021 (5th Cir. 1987) (demonstrating independent review of jury's finding of culpable incitement to hurt self), cert. denied, 485 U.S. 959 (1988).

n211 See Steven A. Childress, The First Amendment: Fifth Circuit Symposium, 19 TEX. TECH L. REV. 693, 697 n.27 (1988) (stating that a reference to constitutional fact doctrine is unclear in Herceg, but unnecessary since the real issue in the case was clearly one of law).

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The Court's 1989 decision in Harte-Hanks Communications, Inc. v. Connaughton n212 is a true progeny of Bose, considering that Bose's constitutional rule

was decisively in issue. After 1984, the circuit courts were uncertain of how and even whether Bose would apply on jury sufficiency review. n213 Yet, because the Court relied on its prior handling of jury cases to form its nonjury-trial review rule, n214 a straightforward application of Bose would allow independent review [*1272] of actual malice from the jury context as well. n215 Indeed, Bose had stated that independent review is the rule whether findings were made by judge or jury. n216

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n212 491 U.S. 657 (1989).

n213 For example, the D.C. Circuit judges had openly debated whether Bose applies to jury trials. See Tavoulareas v. Piro, 763 F.2d 1472, 1472 (D.C. Cir. 1985) (MacKinnon, J., on rehearing) (stating that prior opinion does not recognize that jury findings, even in libel cases, get deference; distinguishing Bose as a bench-trial case), aff'd on reh'g en banc, 817 F.2d 762 (D.C. Cir.) (en banc), cert. denied, 484 U.S. 870 (1987).

n214 See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499-500, 509 (1984).

n215 E.g., Levine v. CMP Publications, Inc., 738 F.2d 660, 674 (5th Cir. 1984) (stating that, under Bose, the court was "not bound" by court's "usual standards of extreme deference" to juries).

n216 Bose, 466 U.S. at 508-09 n.27; see id. at 501 ("For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.").

-End Footnotes-

This reasoning was reconfirmed in Harte-Hanks, in which the Court held that an independent review rule applies to courts reviewing jury verdicts as well: Although credibility determinations receive deference, the appellate court reviewing the factual record in full must examine for itself whether the statements and circumstances are of a character protected by the First Amendment and whether the constitutional standard has been satisfied. n217

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n217 491 U.S. 657, 688-89 (1989).

-End Footnotes-

The Court repeated the rule that the question of whether the evidence is sufficient to support a finding of actual malice is a question of law. n218 But, in fact, the question of the sufficiency of the evidence to support a jury verdict, under whatever measure of deference and in all substantive contexts, is always regarded as a "question of law." n219 Thus, the rule as stated is unremarkable except that the Court in Harte-Hanks then located it not only within common-law tradition, but also the unique First Amendment interests protected by the actual malice standard. n220 The rest of the opinion, discussing not general jury-review rules, but rather the First Amendment

precedent, indicates that this review as a matter of law is not the deferential kind given the usual civil verdict. n221

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n218 Id. at 685 (citing Bose, 466 U.S. at 510-11).

n219 1 CHILDRESS & DAVIS, supra note 3, @@ 3.01, .09, 5.02, .11; Childress, supra note 8, at 132-33, 135; see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986).

n220 Harte-Hanks, 491 U.S. at 685-86. Notably, the "common-law tradition" is actually the long string of constitutional cases applying some form of independent judgment in cases of obscenity, breach of peace, and defamation. See id. at 685 n.33.

n221 Id. at 687-93.

-End Footnotes-

Nevertheless, like Miller v. Fenton, in introducing the very different review tradition for actual malice, the Court falls back on terms evoking a law-fact inquiry: "The meaning of terms such as 'actual malice'--and, more particularly, 'reckless disregard'--however, [*1273] is not readily captured in 'one infallible definition.'" n222 "Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards." n223 Nothing that follows in the opinion, however, returns to this theme or otherwise appears to define actual malice through the particular application performed on appeal. Indeed, the vast majority of pages are spent detailing the actual, conflicting record facts, rather than merely drawing the Court's own conclusion from the facts such as would normally follow from a mixed law-fact view.

-Footnotes-

n222 Id. at 686 (citation omitted).

n223 Id. (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503 (1984)).

-End Footnotes-

In the process, the Court further clarified that Bose should not be read as flatly rejecting credibility calls because the appeals court should hesitate to disregard a jury's superior position on demeanor, thereby giving such calls some measure of deference apparently short of conclusiveness. n224 That is perhaps more deferential than a constitutional fact review might have implied, but is notably less constrained than the absolute prohibition against reviewing credibility in the normal jury case. n225 Thus, the reviewing court is to infer what credibility determinations the jury must have made--without speculation over what the record suggests it might have found, as the Sixth Circuit below had reasoned--and then determine what conclusion follows. n226

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n224 Id. at 688-89. Interestingly, the Court states that "credibility determinations are reviewed under the clearly-erroneous standard," id. at 688, but does not explain whether it said this because it was discussing Bose (where such Rule 52 language applies) or it was adopting that standard officially as the test in libel cases for jury decisions on credibility. Indisputably, clear error is not the usual jury test.

n225 See supra note 136. Elsewhere, the Court seems to allow the reviewer more leeway since it could draw inferences itself. Whether the specific standard is one of clear error, it is obvious that some deference is given on credibility yet it is not the conclusive deference given under the normal jury review test. Perhaps the clear error language, then, is meant to capture that mid-level deference: The reviewer is influenced greatly by demeanor calls but ultimately draws the inferences itself.

n226 See Harte-Hanks, 491 U.S. at 689-91.

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In this case, despite the Court's independent judgment, the jury's necessary findings within their purview, coupled with undisputed record evidence, "inexorably" led to a finding that actual malice existed. n227 The evidence, "when reviewed in its entirety, is [*1274] 'unmistakably' sufficient to support a finding of actual malice" as the jury found. n228

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n227 Id. at 691.

n228 Id. at 693 (citing language from Curtis Pub. Co. v. Butts, 388 U.S. 130, 172 (1967) (Brennan, J., concurring in part and dissenting in part)).

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Although it is settled that the Court independently reviews the jury verdict, it is less clear whether Harte-Hanks requires that the evidence be "unmistakably sufficient" in all such cases as a standard of review, or whether that was simply a case-specific conclusion in applying independent review. It is likely, however, that the Court is simply incorporating the higher clear and convincing standard of proof required in defamation trials into the application of the review standard. n229

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n229 See generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-56 (1986) (directing courts to apply a higher proof burden in sufficiency review, but emphasizing that this follows ordinary procedural rules, not a special First Amendment review); 1 CHILDRESS & DAVIS, supra note 3, @ 3.06 (noting the common incorporation of such trial burdens within jury review test).

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At bottom, the Harte-Hanks Court's mandate seems to be that review is independent of the conclusion as a whole, but may be controlled by necessary credibility findings of the jury--as long as the overall decision is supported

by sufficient evidence both to protect the constitutional interest at stake and in light of the higher burden of proof. This seems to be something less generally deferential than the normal jury standard, but more than a skeptical or global de novo review, especially because, in appropriate cases, the underlying jury determinations may lead to an obvious outcome which must be affirmed. Thus, it is settled that Bose applies to such cases, but the implications of the independent review rule, particularly as to credibility decisions, may need development in future applications. Moreover, the Court again appears to characterize its constitutional rule as requiring that actual malice determinations be identified as questions of law.

Finally, the Court may have quietly applied Bose's free review stance in a wholly different First Amendment context involving judicial discretion in issuing an injunction against anti-abortion activists, rather than judge or jury factfinding as such. This more recent case in which a de novo claim might have been fully considered was the June 1994 decision in *Madsen v. Women's Health Center, Inc.* n230 In *Madsen*, the Court, in an opinion by Chief Justice Rehnquist, [*1275] found that much of a state court's broad injunction against picketers at a clinic--which included a 36-foot buffer zone--did not violate the First Amendment. n231

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n230 114 S. Ct. 2516 (1994).

n231 Id. at 2526-30.

-End Footnotes-

The issue was primarily one of the constitutionality of the injunction in light of a counterargument that it was not content-neutral. On this point, the Court found that the injunction and ordinance authorizing it focused on conduct, not the content of the speech, and thus did not require strict judicial scrutiny, n232 in the broader sense of its constitutionality as judged by any court. When Justice Stevens dissented on the "enunciation of the applicable standard of review," n233 he principally targeted the same constitutional scrutiny that the majority applied to injunctions as to legislative acts, and urged a different substantive measure. n234 Justice Scalia's dissent criticized the denial of strict scrutiny, assuming that the order "would have been regarded as a candidate for summary reversal" had it not arisen in an abortion case. n235

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n232 See id. at 2523-24.

n233 Id. at 2531 (Stevens, J., concurring in part and dissenting in part).

n234 Id. (Stevens, J., concurring in part and dissenting in part).

n235 Id. at 2534 (Scalia, J., concurring in part and dissenting in part). He was joined by Justices Kennedy and Thomas.

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More may be gleaned, however, about the actual deference shown the trial court by the Supreme Court as an appellate reviewer. Justice Stevens dissented only from the majority's alleged micro-management of many details of the injunction. n236 Although he framed that in terms of the Court's constitutional scrutiny and its application of the legal test for less burdensome restrictions, n237 his complaint could also apply to the intertwined issue of the deference shown the lower courts as a factual or discretionary matter: "The injunction . . . should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts." n238

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n236 Id. at 2531-33 (Stevens, J., concurring in part and dissenting in part).

n237 See id. at 2531, 2533 (Stevens, J., concurring in part and dissenting in part) (stating that standards fashioned for laws differ from those for injunctions, and 300-foot buffer zone withstands First Amendment challenge).

n238 Id. at 2532 (Stevens, J., concurring in part and dissenting in part).

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[*1276] The Court did not address this narrower sense of standard of review or cite independent review cases. n239 It did affirm a rather broad injunctive remedy, and once even noted within its heightened constitutional scrutiny a certain deference to local assumptions. n240 This allowed Justice Scalia to argue in dissent that the Court acted far too deferentially, at least in the sense that it applied low substantive standards of constitutionality to test the injunction against. n241 He also viewed such alleged deference as inappropriate under "the usual practice in First Amendment cases" of employing "close examination of the factual basis for essential conclusions," n242 an accusation virtually ignored by the majority.

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n239 See id. at 2525 (noting Justice Stevens's dissent from the Court's refusal to apply a "more lenient standard" to injunctions, but then addressing only Justice Scalia's counterargument that even more scrutiny should have been applied).

n240 Id. at 2527 (stating that the need for complete zone "may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review"). Such deference, of course, may be more a matter of judicial comity in the Supreme Court than a standard applicable to second-level courts.

n241 E.g., id. at 2545 (Scalia, J., concurring in part and dissenting in part) (stating that as to the prior violations found, the "Court simply takes this on faith").

n242 Id. (citing, inter alia, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 517 (1984) (Rehnquist, J., dissenting); Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)).

-End Footnotes-

Nonetheless, the deference perhaps shown overall by the Court is muted by its actual reversal of some particular aspects of the injunction, modifying the approved buffer zone, which allowed Justice Stevens to dissent from "this sort of error correction in this Court." n243 The majority also spent pages describing the actual facts and "examin[ing] each portion of the buffer zone separately," n244 echoing to some extent the actual process of review used in the independent judgment cases. Once again, what the Court has done, pointed out as usual in dissent, appears to be nondeferential review of decisive exercises of decisionmaking authority below, presently in the context of an injunction.

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n243 Id. at 2534 n.6 (Stevens, J., concurring in part and dissenting in part). If indeed a deferential review also includes, within it or apart from it, an appellate power of error-correction, that is a remarkably candid assessment and an advancement away from the usual law-declaration basis for broader review.

n244 Id. at 2527.

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Further, the Court made clear that injunctions do raise particular First Amendment threats, more so than do well-considered and public [*1277] legislation. They "carry greater risks of censorship and discriminatory application than do general ordinances." n245 Thus, the majority "believe[s] that these differences require a somewhat more stringent application of general First Amendment principles in this context." n246 The application then followed with a modified substantive inquiry into such questions as the state's interest and the means-end fit (i.e., judicial constitutional scrutiny). n247

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n245 Id. at 2524.

n246 Id. Justice Scalia ridiculed this "intermediate-intermediate scrutiny." Id. at 2537 (Scalia, J., concurring in part and dissenting in part).

n247 Id. at 2524-25.

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All the Madsen Justices apparently agreed that the First Amendment interests, if sufficient, would override the mere exercise of discretion pursuant to a local ordinance. They did not defer to the judge on the question of the constitutionality of the injunction, even as applied, though Justice Stevens would have deferred on several aspects of the application. Apparently, to the extent the interests are protected, that is a legitimate concern of the trial court and also of its reviewing court, with no particular deference shown to the balancing of interests made below. As a matter of constitutional law, if not appellate review, all courts must weigh the relevant considerations under a substantive scrutiny analysis.

Still, the Court once again passed up the opportunity to strongly enforce and clarify an independent review norm premised overtly on the courts' appellate role as guardian of the First Amendment rather than on the more usual rules of appellate review. Ultimately, a more coherent basis for this role is to be found in a different body of precedent developing procedural rights in constitutional adjudications, and in free speech theory, history, and politics.

III. THE MODEL OF CENSORIAL DISCRETION

A. First Amendment Theory, Substance, and Process

The Court's 1984 decision in Bose stated more clearly the independent First Amendment review principle than did the relatively unconnected strands of freer-review precedent that Bose spun together. n248 In its action, it is apparent that a meaningful review of the factual basis itself is at issue, especially as to such issues as subjective [*1278] state of mind, which are in other situations inarguably factual. In its progeny, especially Harte-Hanks, it is clear that Bose's impact and basis in First Amendment tradition remains. It is certainly a more powerful and permanent direction than were the early constitutional fact cases, long forgotten or disparaged, from administrative law.

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n248 See supra notes 175-188 and accompanying text.

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Yet most later applications, like the series of public employee appeals, either are relatively innocuous uses of mixed-question analysis, or in dicta appear to reduce the First Amendment tradition to a special form of law-declaration. In the redefinition effort, the opportunity to explore the proper error-correction role of appellate courts is missed, as well as the model of First Amendment process that justifies expanding that role in specific contexts. It will be argued that this exploration provides a more satisfying and workable justification for a new constitutional fact process, with decisive implications as to particular First Amendment questions. This thesis requires a newer basis in free speech theory that looks beyond traditional arguments over the categories of protected speech into the procedural concept of what it means to protect speech.

To begin, it must be recognized that First Amendment analysis is not exclusively about what is traditionally described as "substantive law" and its categories of protected speech. In many ways, the judicial process is as important to the substantive right--in some contexts, nearly to the point where the process becomes the substance. In other areas of law, scholars have certainly shown that judicial, police, or other governmental process can be decisive of legal or constitutional claims and is a more telling academic exploration than is simply provided by debating the substantive law. n249 These extrajudicial processes can inform the substantive law itself. n250

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n249 See RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 181-82 (1987) (arguing that libel law's underlying assumptions bear

little relation to the real world of plaintiffs and media defendants). See generally MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (studying the effects of informal judicial process on criminal defendants, e.g., that only two of seven legal factors affected sentencing, as well as their interests outside of court such as lost wages); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966) (viewing law as an enterprise, one that is reflected in actual police practices, forming results not encompassed by law on the books); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975) (studying the uneasy overlap between corporate law and actual business practices); Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963) (studying business practices and differences from contracts law, and finding that law is often ignored in transactions).

n250 See, e.g., SKOLNICK, supra note 249, at 22, 231, 245 (stating that police are legal actors responding and contributing to the rule of law, whether they realize it or not).

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[*1279] To be sure, most theoretical exploration and debate of free speech rights is clearly focused on the substantive limits of First Amendment protections, that is, in deciding what it means for the government to be caught "abridging the freedom of speech." n251 Thus, the usual debate is whether the free speech right reflects a narrow political content alone, n252 or a broader political function harkening back to a paradigm of town hall decisionmaking, n253 or even whether that model is too narrow and mistaken, ignoring cultural heterogeneity and the illegitimacy of state control of discourse. n254 Perhaps in protecting the citizen from governmental intrusion, the Amendment performs an institutional checking function, for example, in empowering the press to scrutinize the secret functions of the government. n255 Others see the right as focusing on individual autonomy in human liberty, n256 personal self-realization, n257 the act of communication, n258 or a broader system of [*1280] free expression encompassing more than the citizen's role as political unit, yet providing a safety valve on human reaction to governmental acts. n259

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n251 Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 26-29 (1971).

n252 Id. at 20-35.

n253 MEIKLEJOHN, supra note 101, at 24-28, 75.

n254 Robert C. Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1117 (1993) (criticizing the "collectivist" theory, of which Meiklejohn is the most influential expositor, as violating "necessary indeterminacy of public discourse"). Owen Fiss is another strong voice favoring a collectivist approach. See Owen M. Fiss, Why the State?, 100 HARV. L. REV. 781, 785-86 (1987) (arguing that the Amendment's purpose is to foster rich public debate, and autonomy is instrumentally important only to further it).

n255 Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (exploring how free expression has value in part because of its check on the abuse of official power). For an argument that this model should be pushed further to evaluate the relationship between police and media oversight, to facilitate not just checking but citizen involvement, see Jerome H. Skolnick & Candace McCoy, *Police Accountability and the Media*, 1984 AM. B. FOUND. RES. J. 521, 530-34.

n256 C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989) (arguing that the First Amendment protects a sphere of individual liberty not as a collective good, but because of the value of free speech to the individual); cf. John Stick, *Book Review*, 8 CONST. COMMENTARY 164 (1991) (arguing that a focus on human liberty may allow Baker and others to gloss over pressing modern issues of First Amendment law, such as access to media and campaign reform).

n257 See generally Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that the constitutional guarantee of free speech has only one true value--"individual self-realization").

n258 Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206-08 (1972).

n259 EMERSON, *supra* note 101, at 46-53.

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In all such treatments, the mainstay is the substantive line drawing that defines the limit of the freedom and, as a corollary, the legitimate authority of the state to regulate speech. That is of course important, and these inquiries are fine as far as they go. Yet it should be recognized that whatever the substantive limits of free speech protections, the First Amendment provides, as its minimum content, a process-based limit on what the government can do in its formal efforts at abridging speech, just as the Court does not exist only to lay down broad First Amendment principles for exclusive implementation by other actors. n260 Free speech law may be argued to be the limits not only of speech regulation, but also of the regulatory process that legitimately defines, in turn, the substantive borders of the right itself.

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n260 See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

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The importance of judicial process in explaining First Amendment theory is at least indirectly supported by some theorists. For example, Alexander Meiklejohn's imagery of town hall dialogue can be seen, through modern eyes, as reflecting a desire that the substance of the First Amendment enforce a process of deliberation. n261 The theory that flows from such a democratic model is not limited to a narrow conception of politics as voting and legislating, n262 precisely because the model upon which it is based is about the citizens' dialogue in a procedural sense, requiring that all protected views be [*1281] placed on the agenda. n263 If that model is a mistake because it defines or overcontrols the legitimate agenda, n264 it is only because the process of citizen deliberation is unduly truncated.

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n261 Cf. Post, supra note 254, at 1116-18. Post criticizes the town hall model as overplaying process, authorizing censorship based on

assumptions about function and procedure. Meiklejohn cannot appeal to a neutral distinction between substance and procedure to justify this contraction of the scope of democratic self-government, for the procedural assumptions he wishes to enforce, no less than substantive ones, are ultimately grounded upon a distinctive and controversial conception of collective identity.

Id. at 1117.

For a similar argument that critics of radical feminist theory as to First Amendment substance cannot be shocked when the theory also encompasses a denial of the legitimacy of balanced democratic process or deliberative methodology, see Steven A. Childress, Reel "Rape Speech": Violent Pornography and the Politics of Harm, 25 LAW & SOC. REV. 177, 209-11 (1991).

n262 Compare Bork, supra note 251, at 26-29 (urging such a substantive definition) with JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 231 n.10 (1980) (denying such a narrow and exclusive political function).

n263 See MEIKLEJOHN, supra note 101, at 26-27 (stating that "the vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another").

n264 See Post, supra note 254, at 1116-19.

-End Footnotes-

So too is Justice Oliver Wendell Holmes arguing for deliberative process when he promotes the free exchange of ideas in the intellectual marketplace. n265 John Stuart Mill's 1859 thesis urged that half-truths and untruths require correction through free process: "It is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied." n266 Before Mill, in 1644, John Milton wrote what can also be described as a procedural invitation to a grappling between Truth and Falsehood. n267.

-Footnotes-

n265 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

n266 JOHN S. MILL, ON LIBERTY 50 (Elizabeth Rapaport ed., 1978).

n267 JOHN MILTON, AREOPAGITICA (1644). For criticism of the marketplace model of truth, see Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 DUKE L.J. 1, 4-5; Steven Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 NW. U. L. REV. 1212, 1281 (1983).

-End Footnotes-

Even so, it is clear that most such theorists and jurists mean as their primary task to draw the edge on the substance at stake (even Holmes and Brandeis would control clear and present dangers or false reports of fire, and the incitement cases are of course about defining unprotected speech). Not too much should be made of these writers as offering a truly procedurally based, if not concerned, model of free speech rights. The point here is one of a narrower conception of process, perhaps, than the rights thinkers evoke with such imagery as an ideas marketplace or democratic process.

For example, John Hart Ely presents the broader democratic process as the organizing principle for his larger constitutional theory, and includes First Amendment rights as an important means to that end. By his own account, his is a broad process-based theory of constitutional interpretation. n268 His goal is to promote fair constitutional substance by focusing on process and participation. n269 Yet Ely does not really develop a notion of the importance of First [*1282] Amendment procedure itself to effectuate the right and in turn to effectuate democratic government, except in the sense considered above that sees public discourse as part of political process. n270 He, too, means process in a larger and structural sense, n271 with little inquiry into specific procedural protection within the judiciary of the right at stake.

-Footnotes-

n268 See ELY, supra note 262, at 87-104 (doubting the traditional focus on occasional substantive delineations in Constitution, arguing rather that a more meaningful inquiry throughout is into "process writ large").

n269 Id.

n270 See also LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 62 (1988). For a broader philosophical analysis of the strain of "autonomous law" that views procedure as so important in producing substantive justice and legitimating power, and an argument to move beyond it to competence and realization of purpose, see PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 104-113 (1978). In part, this appears to be a response to the 1950s process school of thought, represented by HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958), and to Max Weber's focus on bureaucratic rationality. See also JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 88-97 (1983) (containing the justifications of process).

n271 See ELY, supra note 262, at 92. Even his occasional focus on "process writ small" as procedural fairness in individual disputes does not take on any special First Amendment quality elsewhere.

-End Footnotes-

That further and crucial protection--and indeed it is meant as no more or less than a supplement to the different substantive inquiry into the right n272--is more directly found in the tradition of First Amendment process which the Supreme Court has developed in this century, and which should be applied even in an increasingly conservative Supreme Court. n273 It is recognized in myriad places by free speech scholars as legitimate law, if not fully stated as theory. It offers the potential for a model of procedural minima which in turn

explains the constitutional fact tradition.

- - - - -Footnotes- - - - -

n272 Cf. id. at 100 ("Don't get me wrong: our Constitution has always been substantially concerned with preserving liberty The question that is relevant to our inquiry here, however, is how that concern has been pursued."). The answers are largely structural, participational, and "a quite extensive set of procedural protections." Id.

n273 Commentators have noted that even a conservative Court still acts somewhat liberally with basic free speech values. See, e.g., Martin H. Redish, The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine, 78 NW. U. L. REV. 1031, 1031 (1983). The same dichotomy should be seen today, as exemplified by the flag-burning and racial hate-speech cases decided over the past seven years. See Keith Werhan, The Liberalization of Freedom of Speech on a Conservative Court, 80 IOWA L. REV. 51, 52-53 (1994).

- - - - -End Footnotes- - - - -

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SYMPOSIUM: DEVELOPMENTS IN FREE SPEECH DOCTRINE: CHARTING THE NEXUS BETWEEN
SPEECH AND RELIGION, ABORTION, AND EQUALITY: ARTICLE: Strange Fruit*: Harassment
and the First Amendment

-Footnotes-

* The title, Strange Fruit, is the title of a song composed by Lewis Allan and sung by Billie Holiday and, more recently, Cassandra Wilson. The song describes painfully the sight of strange Southern fruit, lynched black bodies hanging from trees.

-End Footnotes-

Juan F. Perea**

-Footnotes-

** Professor of Law, University of Florida College of Law. I would like to thank Gil Canasco, Kenneth Nunn and Sharon Rush for helpful comments on these comments. Thanks also to John Marshall for excellent research assistance.

-End Footnotes-

SUMMARY:

... The Supreme Court has indicated clearly that, one way or another, it will continue to find harassing speech to violate Title VII. ... I find much cause for concern, however, in the Court's manner of resolving the issue of the regulation of hate speech, which may in the future bear on the Court's resolution of the issue of sexual and racial harassment, the hate speech of the workplace. ... As Professor Becker correctly notes, the speech that accomplishes either racial or sexual harassment (and I would add harassment on the basis of ethnicity to the list) has "the purpose and effect of putting a group . . . back in [its] (subordinate) place and outside the economic territory of the harassers." ... Harassing speech, the hate speech of the workplace, maintains established relationships of caste and subordination and undermines the core value of equality which lies at the heart of Title VII. ... It is not difficult, in balancing the harms resulting from sexual or racial harassment against their low value in any kind of reasoned discourse to reach the conclusion that harassing speech is of "such slight social value" that it should appropriately be regulated in the interests of promoting values of equality in the workplace. ...

TEXT:

[*875] There seems no cause for panic, though I find much cause for concern. The Supreme Court has indicated clearly that, one way or another, it will continue to find harassing speech to violate Title VII. Even in R.A.V. v. City of St. Paul, n1 Justice Scalia writes that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in the workplace." n2 Comments of the concurring Justices in R.A.V. suggest no erosion in the prohibition of harassing speech under Title VII. Most recently, in Wisconsin v. Mitchell, n3 Justice Rehnquist cited approvingly the Court's precedents upholding federal antidiscrimination laws against constitutional challenge, writing that the Court had "rejected the argument that Title VII infringed employers' First Amendment rights." n4 Describing R.A.V., the Chief Justice wrote that "we cited Title VII . . . as an example of a permissible content-neutral regulation of conduct." n5 Because of these statements, I will not panic.

-Footnotes-

n1 505 U.S. 377 (1992).

n2 Id. at 389.

n3 508 U.S. 476 (1993).

n4 Id. at 487.

n5 Id.

-End Footnotes-

I find much cause for concern, however, in the Court's manner of resolving the issue of the regulation of hate speech, which may in the future bear on the Court's resolution of the issue of sexual and racial harassment, the hate speech of the [*876] workplace. The abstruse majority opinion in R.A.V. casts the racist cross-burners as the victims of the overbearing, thought-controlling St. Paul City Council who, but for the Court, would impose an unbearable orthodoxy upon racist cross-burners. The majority opinion notably ignores the real victims of the episode, Russ and Laura Jones and their young son, the only black family on the block in a predominantly white neighborhood, who were awakened in the middle of the night by the American symbol of hatred of African Americans, a burning cross. Thus was the Jones's experience in St. Paul tied to centuries of violence and hatred inflicted upon African Americans, and over a century of crosses burning and midnight awakenings. n6

-Footnotes-

n6 See Charles R. Lawrence III, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 VILL. L. REV. 787, 787-88 (1992) (describing racial hatred directed towards African-American family living in Minnesota in 1990).

-End Footnotes-

The Court makes a cursory nod to the Joneses: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible." n7

This statement speaks volumes about how much the Court missed. Someone, in this case, was not anyone. The cross was burned in the front lawn of an African American family. It was an act calculated to terrorize by invoking the centuries of violence and hatred that, to some extent, remain our legacy.

-Footnotes-

n7 R.A.V., 505 U.S. at 396.

-End Footnotes-

The R.A.V. Court missed, or ignored, the story of those who were most injured by the cross-burning. The Court's analysis thus missed a crucial aspect of the injuries caused by the expression the St. Paul City Council was not permitted to regulate. I would characterize some part of the injuries to the Jones family as injuries to equality interests, society's compelling interest in eliminating our racial, ethnic, and sexual systems of caste. In effect, the Court ignored how free speech may injure equality values also of constitutional stature. Given the posture of the R.A.V. litigation, it seems that the Court could only have considered equality interests through some assessment of the injuries such as I described above. In the Title VII context, however, the conflict between the equality commanded by the statute and free speech seems clearly presented.

[*877] I. WHY HARASSING SPEECH IN THE WORKPLACE RAISES A LEGITIMATE FIRST AMENDMENT ISSUE

The Supreme Court has recognized that Title VII prohibits harassment because of sex in the workplace that results in a hostile or abusive environment. n8 The Court seems to have tacitly assumed that harassment because of a hostile or abusive environment presents no First Amendment problem. In the two leading cases on sexual harassment, no Justice has commented on the relevance or potential applicability of the First Amendment. n9 In its recent First Amendment cases, the Court appears to approve of the regulation of harassing conduct as incidental to general prohibitions on discrimination.

-Footnotes-

n8 See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (holding that Title VII prohibits harassment in workplace that results in hostile or abusive environment).

n9 See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Harris, 114 S. Ct. at 367.

-End Footnotes-

However, it is not clear to me why the First Amendment should not apply to harassing speech. Particularly in Harris v. Forklift Systems, Inc., n10 which involved a hostile work environment, the harassment occurred through verbal sexual comments, innuendos, and insults that Harris's male supervisor made to her. Her supervisor's speech, insulting and degrading, was the exclusive cause of the environment the Court found hostile.

-Footnotes-

n10 114 S. Ct. 367 (1993).

- - - - -End Footnotes- - - - -

Since extremely offensive speech alone was found to violate Title VII, I think a First Amendment problem, under the current construction of the Amendment, may be squarely posed. Just because the Court didn't discuss the possible application of the First Amendment nor resolve any conflict that might exist between the First Amendment and Title VII doesn't mean that no problem exists, as some commentators have recognized. n11 Ignoring any potential conflict has the obvious advantages of ease of resolution and facilitation of appropriate outcomes, as demonstrated in the Court's two leading precedents. The Court's failure, to date, to address this conflict directly, however, [*878] has supplied no satisfactory rationale for its resolution, nor a guarantee that the conflict will not be raised nor addressed in some future case.

- - - - -Footnotes- - - - -

n11 See, e.g., Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481, 481 (1991) (stating that few courts have acknowledged possibility of constitutional protection for sexually harassing statements); Calvin R. Massey, Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression, 40 UCLA L. REV. 103, 149 (1992) (stating that Court should examine how First Amendment related to sexually harassing statements).

- - - - -End Footnotes- - - - -

I cannot assume that the First Amendment does not apply. Let me state briefly the straightforward reasons why I think it does apply. Particularly in Harris, the hostile environment that violated Title VII was created entirely through repeated offensive verbal statements of Harris's male supervisor. While the supervisor's statements were offensive, sexual, and degrading, they fall within none of the currently recognized exceptions to First Amendment protection: they were not, for example, clearly obscene, nor fighting words, nor words of imminent incitement to unlawful conduct. Since the supervisor's words constituted illegal harassment because of their sexual, degrading, and abusive content, we have an example of governmental regulation precisely because of objectionable content. This kind of regulation presents a classic First Amendment problem: governmental regulation and prohibition of speech because of its content.

Hateful, degrading, and subordinating speech communicates a powerful idea: it is a hostile assertion of the inferiority of non-white peoples and women, an assertion of white, and usually male dominance in the workplace, and a denial of the rightful place of women and people of color in the workplace and in society.

The best response to the First Amendment problem posed by harassing speech, in my view, lies in recognizing the serious, degrading injuries caused by harassing speech and in asserting that values of equality and anti-subordination outweigh whatever little social value harassing speech may contain. I recognize that my argument departs from current First Amendment doctrine, but I believe the currently unsatisfactory weighing of the interests warrants such departure.

II. THE ANTI-SUBORDINATION RATIONALE FOR REGULATION OF HARASSMENT

I find the anti-subordination rationale to be the most compelling and the best reason for prohibiting harassing speech in the workplace and, indeed, in many forums. In some ideal world, and in this one, employees should share an environment of [*879] equal respect, dignity, and opportunity. As Professor Becker correctly notes, the speech that accomplishes either racial or sexual harassment (and I would add harassment on the basis of ethnicity to the list) has "the purpose and effect of putting a group . . . back in [its] (subordinate) place and outside the economic territory of the harassers." n12

-Footnotes-

n12 Mary Becker, How Free Is Speech at Work?, 29 U.C. DAVIS L. REV. 815, 832 (1996).

-End Footnotes-

Harassing speech, the hate speech of the workplace, maintains established relationships of caste and subordination and undermines the core value of equality which lies at the heart of Title VII. n13 Sexual harassment aims to keep women in their subordinated place in relation to men in the workplace. Harassment because of race and ethnicity aims to keep people of color in their subordinated place in relation to whites in the workplace. Harassment because of sexual orientation aims to keep gay and lesbian persons in their subordinated place in relation to heterosexuals. Equal treatment in the workplace, and in society, must mean equal dignity and respect for every individual's personhood. Equal treatment, should, therefore, mean freedom from harassing speech that impairs equality. n14

-Footnotes-

n13 Roberts v. United States Jaycees, 468 U.S. 609, 628-29 (1984) (segregation of women not allowed); Lawrence, supra note 6, at 792.

n14 See generally Sharon E. Rush, Feminist Judging: An Introductory Essay, 2 REV. L. & WOMEN'S STUD. 609, 627 (1993).

-End Footnotes-

III. THE HARMS OF HARASSING SPEECH

It is not hard to demonstrate the harms that flow from permitting harassment in the workplace. A study performed by the Working Women's Institute found that the following stress injuries were suffered by victims of sexual harassment: ninety-six per cent of victims experienced emotional distress; forty-five percent of victims experienced work performance stress, stress that interferes directly with work performance; and thirty-five per cent of victims suffered physical stress, bodily ailments induced by stress. n15 Similar stress injuries result from harassment because of race. n16 Harassment causes emotional distress and psychological [*880] trauma to the harassed employee, which can reach the extremes of post-traumatic stress syndrome. n17 The emotional distress that results from harassment is recognized as a specific diagnosable condition by the American Psychiatric Association. n18 This distress manifests itself in various ways, including anger, fear for one's safety, "anxiety, depression, guilt,

humiliation and embarrassment." n19

-Footnotes-

n15 Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1507 (M.D. Fla. 1991).

n16 Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L.L. REV. 133, 137, 143 (1982) (stating that racial stigmatization injures its victims' relationships with others); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2336 (1989) (stating that victims of hate propoganda experience physiological symptoms and emotional distress).

n17 Dorchen Leidholdt, Pornography in the Workplace: Sexual Harassment Litigation Under Title VII, in THE PRICE WE PAY 218 (Laura J. Lederer & Richard Delgado eds., 1995).

n18 Robinson, 760 F. Supp. at 1505 (noting expert testimony of K.C. Wagner).

n19 Id. at 1506-07.

-End Footnotes-

All of these forms of emotional distress are evident in the harassment cases. In Robinson v. Jacksonville Shipyards, Inc., n20 the plaintiff, Lois Robinson, and her very few female co-workers, testified about their feelings of humiliation and embarrassment when confronted with a daily barrage of pornography and crude, explicit sexual comments directed at them. Robinson testified that anxiety produced by her working environment caused her to request a thirty-day leave of absence, to miss additional work days, and to have difficulty sleeping. n21 In Wells v. Murphy Motor Freight Lines, n22 Ray Wells, the African-American plaintiff, sued his employer in response to a pattern of racial harassment the court described as "vicious" and "frequent." n23 Wells's rage in response to his daily abuse by his coworkers, who frequently called him "nigger," who refused to eat with him, and who sent him Ku Klux Klan crosses, is palpable and justified. n24 In Harris v. Forklift Systems, Inc., n25 the Supreme Court recognized that such humiliation, and harm to an employee's "psychological well-being," are among the relevant factors to be considered in deciding whether a hostile environment exists.

-Footnotes-

n20 Id. at 1486.

n21 Id. at 1519.

n22 488 F. Supp. 381 (D. Minn. 1980).

n23 Id. at 384.

n24 Id. at 384-85.

n25 114 S. Ct. 367, 370-71 (1993).

-End Footnotes-

Harassment at work also results in "work performance stress," which includes "distraction from tasks, dread of work, and an [*881] inability to work." n26 It should come as no surprise that harassment interferes with work performance. Who among us who have been targets of racial, ethnic, or sexual insults can remain impervious and act as if nothing happened? We may desperately want to persevere and act as if nothing happened, and we may be successful at maintaining outward appearances of professionalism, but something shattering and turbulent has happened. According to Dr. Susan Fiske, "when sex comes into the workplace, women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it." n27 And the effects of such work performance stress extend beyond just the immediate job: victims are deterred from seeking other jobs or promotions, quit their jobs, get transferred, or may be fired. n28 As just one illustration from the cases, Lois Robinson testified that "she missed several days each year because she could not face entering the hostile work environment." n29 Enlightened employers should see it in their self-interest to prohibit harassment, if only because it interferes with employee productivity, which ought to be their main concern.

-Footnotes-

n26 Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1506 (M.D. Fla. 1991).

n27 Id. at 1505.

n28 Id.

n29 Id. at 1519.

-End Footnotes-

IV. THE ASYMMETRICAL NATURE AND EFFECTS OF HARASSING SPEECH

It is important to note that these effects of harassing speech are essentially one-way: all the costs are paid by victims of harassing speech. In contrast to the profound effects of sexualization of the workplace upon women, the effects upon men have been described as "vanishingly small." n30 Interestingly, Robinson illustrates that men simply will not tolerate the kind of indignity that they are often willing to impose upon women. Despite the ubiquitous and persistent presence of pornography depicting women in the Jacksonville shipyard, the employer never distributed nor tolerated the distribution of calendars with pictures of nude or [*882] partially nude men which, according to the testimony, would have been thrown in the trash. n31

-Footnotes-

n30 Id. at 1505.

n31 Id. at 1494.

-End Footnotes-

If males are unwilling to accept centerfold pictures and nudie calendars of themselves in a workplace, this confirms the subordinating purposes of sexual harassment and pornography depicting women in the workplace. Men are able to create and maintain workplaces in which they do not become sexual objects. Sexual harassment of women and pornography sexualize the workplace in a way that allows all female workers to be seen as sexual objects, rather than as equal fellow employees. And as long as only women are sexualized in this way, men remain the dominant group whose worth is evaluated in terms of their job performance, rather than in terms of their bodies and genitalia.

V. HARASSMENT AND THE ESCALATION OF VIOLENCE

Hostile environments in which sexual and racial insults, pornography, and stereotyping are common tend to have a priming effect on the workforce which leads to encouragement of others to view harassment victims in a disparaging way. n32 In this way, harassment escalates into threats of violence and actual violence. In Robinson, one of Lois Robinson's male co-workers, George Leach, told an offensive joke about sodomous rape, "boola-boola," in her presence. n33 Leach later teased Robinson in a threatening way in the company parking lot by referring to the sodomous rape joke. In Wells, in addition to enduring racial insults and Ku Klux Klan crosses, Ray Wells had the tires of his car slashed. n34

- - - - -Footnotes- - - - -

n32 Id. at 1504-05.

n33 Id. at 1498-99.

n34 Wells v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384-85 (D. Minn. 1980).

- - - - -End Footnotes- - - - -

In Snell v. Suffolk County, n35 African-American and Latino police officers, including Officer Ramos, were abused regularly through demeaning comments and cartoons posted on official bulletin boards. n36 On one occasion, white officers dressed a Hispanic prisoner in a straw hat, a sheet, and a sign that read [*883] "Spic." n37 These white officers then referred to the prisoner as "Ramos's son." n38 When Officer Ramos complained to the appropriate officers and filed an incident report, he was accused of "making waves." n39 Officer Pritchard told Ramos to change the incident report. Pritchard then threatened Ramos, telling him "we know how to take care of fellows like you." n40 Soon after, Ramos's car was vandalized, and he began receiving harassing phone calls at his home at all hours, day and night. n41

- - - - -Footnotes- - - - -

n35 611 F. Supp. 521 (E.D.N.Y. 1985).

n36 Id. at 525.

n37 Id.

n38 Id.

n39 Id.

n40 Id.

n41 Id.

- - - - -End Footnotes- - - - -

Responding to Ramos's incident report, the Police Chief of Staff told Ramos that an investigation revealed that the incident never happened. Ramos then produced pictures of the Hispanic prisoner, at which point he was told to see internal affairs. Once a hearing on Ramos's complaint was set, the intensity of the harassment of Ramos apparently increased: he was called "Spic" and threatened with the words "we'll get you." n42

- - - - -Footnotes- - - - -

n42 Id. at 526.

- - - - -End Footnotes- - - - -

These stories from the cases demonstrate the correlation between harassment and violence. Violence and threats of harm seem often to be part of the harassing hostile environment. As stated by Twiss Butler, "all unequal power relationships must, in the end, rely on the threat or reality of violence to protect themselves. . . . Violence is necessary to enforce subordination of an individual or group." n43

- - - - -Footnotes- - - - -

n43 Twiss Butler, Why the First Amendment is Being Used to Protect Violence Against Women, in THE PRICE WE PAY, supra note 17, at 163.

- - - - -End Footnotes- - - - -

This section has discussed some of the ways that harassment contributes to the subordination of women and people of color in the workplace. Hate speech in the workplace intentionally injures people emotionally and physically. It often interferes significantly with an employee's job performance, which ought to be an employer's primary concern. And harassment breeds more harassment, which mushrooms into threats and violence. n44 All of these effects of harassment, taken together, undermine severely [*884] one of our society's most important interests and commitments: the core value of equality, protected statutorily by Title VII and protected by the Constitution in the Equal Protection Clause of the Fourteenth Amendment.

- - - - -Footnotes- - - - -

n44 See GORDON ALLPORT, THE NATURE OF PREJUDICE 390, 396, 436 (2d ed. 1958) (recognizing similar phenomenon in progressive escalation from racial harassment to discrimination to violence).

- - - - -End Footnotes- - - - -

VI. RECONCILING HARASSMENT WITH THE FIRST AMENDMENT

It is possible to reconcile the regulation of harassing speech with the First Amendment without departing dramatically from current First Amendment jurisprudence. Many forms of speech can be regulated or prohibited consistent with the First Amendment under current doctrines. n45 In each case, the Court has balanced the right to freedom of speech against some other right or interest implicated by the speech, such as public safety, freedom from crime or fraud, and freedom from injury to one's reputation. n46 And the Court has concluded that the competing social interest was more important, justifying regulation of the speech.

-Footnotes-

n45 A partial list includes:

Speech used to form a criminal conspiracy, speech that disseminates an official secret, speech that defames or libels someone, speech that creates a hostile working place, speech that violates a trademark or plagiarizes another's words, speech that creates a clear and present danger (for instance, shouting fire in a crowded theater), speech used to defraud a consumer, speech used to fix prices, speech used to communicate a criminal threat (for example, "stick 'em up"), untruthful or irrelevant speech given under oath or during a trial, and disrespectful words aimed at a judge or military officer.

See Laura J. Lederer & Richard Delgado, Introduction, in THE PRICE WE PAY, supra note 17, at 6-7.

n46 Id.

-End Footnotes-

In one of its cases permitting the regulation of speech in the workplace setting, NLRB v. Gissel Packing Co., n47 the Supreme Court upheld regulations of employer and employee speech during labor organizing against a First Amendment challenge. Under Gissel, employers must not make coercive statements to employees nor suggest retaliation if employees decide to support a union in their workplace. In Gissel, the Court balanced the employer's free speech interests against employees' rights of association and concluded that "an employer's rights cannot outweigh the equal rights of the employees to associate freely." n48 [*885] Furthermore, the Court stated that "any balancing of those rights must take into account the economic dependence of the employees on their employers." n49

-Footnotes-

n47 395 U.S. 575 (1969).

n48 Id. at 617.

n49 Id.

-End Footnotes-

The Court recognized explicitly that the enormous disparity in bargaining power between employers and employees makes a difference in the power of messages conveyed by employers: employees could not help but be coerced in the face of the power imbalance, and this coercion justified the regulation. n50 The Court continued:

What is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be free to listen more objectively and employers as a class freer to talk. n51

The Court thus recognizes a significant, perhaps dispositive, difference between speech in the workplace, which may be regulated, and political speech, which deserves the highest level of protection under the First Amendment. n52

- - - - -Footnotes- - - - -

n50 Id.

n51 Id. at 617-618 (emphasis added).

n52 Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

- - - - -End Footnotes- - - - -

More generally, it seems that the Supreme Court's crafting of its categories of protected and non-protected speech has often reflected a balancing of the value of the speech at issue against the potential harms generated by the speech. This was true in Gissel. As another example, in deciding that First Amendment protections do not apply to the regulation of obscenity, important elements of the Court's reasoning balance the offensiveness of explicit sexual materials against their social value: obscene materials can be regulated when they "appeal to the prurient interest in sex, . . . portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." n53 When the offense caused by explicit sexual materials outweighs the marginal, at [*886] best, value of these materials, then they are deemed to be appropriately prohibited. The Court also recognized the legitimacy of the state interest in prohibiting the offensive harms that sexually explicit materials inflict upon unwilling recipients or observers. n54

- - - - -Footnotes- - - - -

n53 Miller v. California, 413 U.S. 15, 23-24 (1973).

n54 Id. at 18. See also Elena Kagan, Regulation of Hate Speech and Pornography after R.A.V., 60 U. CHI. L. REV. 873, 892-96 (1993) (arguing that government can regulate sexually graphic materials).

- - - - -End Footnotes- - - - -

In Chaplinsky v. New Hampshire, n55 the Court recited its often-quoted list of classes of speech that could be prevented or punished: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." n56 An although its list may sound a bit dated, the Court's rationale for allowing the regulation of these classes of speech is most timely: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." n57 It is not difficult, in balancing the harms resulting from sexual or racial harassment against their low value in any kind of reasoned discourse to reach the conclusion that harassing speech is of "such slight social value" that it should appropriately be regulated in the interests of promoting values of equality in the workplace. n58

-Footnotes-

n55 315 U.S. 568 (1942).

n56 Id. at 571-72.

n57 Id. at 572 (footnotes omitted).

n58 See Sharon Rush, Feminist Judging: An Introductory Essay, 2 S. CAL. REV. L. & WOMEN'S STUD. 609, 622 (1993).

-End Footnotes-

VII. THE REGULATION OF HATE SPEECH IN OTHER JURISDICTIONS

Although American courts have refused to permit the regulation of hate speech because of the First Amendment, n59 other jurisdictions have handled the same problem very differently. International norms of human rights and other common-law jurisdictions have resolved the problem of hate speech very differently than American courts. The International Convention on the Elimination of all Forms of Racial Discrimination was [*887] adopted by the General Assembly of the United Nations in 1965. n60 Article 4 of this Convention condemns "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin." n61 Article 4 also prohibits:

All dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of another persons of another colour or ethnic origin, and also the provision of any assistance to racist activities. n62

These principles of international law would prohibit comfortably racial harassment in the workplace. Although the United States signed the Convention, it made a reservation explicitly grounded in "the right of free speech" and declared that "nothing in the Convention shall be deemed to require or to authorize legislation . . . incompatible with the provisions of the Constitution of the United States of America." n63 Thus the United States committed itself to the values of racial equality embodied in the Convention, while allowing free speech values to override equality values. n64 In its rigid adherence to its

traditional free speech doctrines, the United States lags somewhat behind international human rights norms and other common-law jurisdictions.

-Footnotes-

n59 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding state hate speech ordinance unconstitutional).

n60 See International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 U.N.T.S. 212 n.1. See also NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1980).

n61 See International Convention on the Elimination of All Forms of Racial Discrimination, supra note 60, at 218.

n62 Id. at 220.

n63 See LERNER, supra note 60, at 53, 161 (describing United States' stipulations in signing convention).

n64 See Matsuda, supra note 16, at 2345 (discussing United States' stipulations in signing Article 4 of Convention).

-End Footnotes-

In England, for example, the Race Relations Act punishes "incitement to racial hatred." n65 This statute punishes the publication or distribution of writings, or the use of words, "which are threatening, abusive, or insulting, in a case where . . . hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question." n66 The racial harassment [*888] described in American cases would seem to be prohibited under these English principles.

-Footnotes-

n65 ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 419 (1972).

n66 Id. See generally Matsuda, supra note 16, at 2347 (discussing advances in race relations in other countries).

-End Footnotes-

Canada, too, has prohibited hate propaganda. The Canadian example can be particularly instructive for us since the Canadian Charter of Rights and Freedoms guarantees to everyone the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press." n67 Section 15 of the Canadian charter guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." n68 Coexisting with the guarantee of freedom of expression, Canada prohibits verbal "statements, other than in private conversation, [that] willfully promote[] hatred against any identifiable group." n69 Accordingly, decisions of the Canadian Supreme Court considering the validity of prosecutions for engaging in hate propaganda or distributing

pornography have balanced the freedom of expression guarantee against the injury to the equality guarantee produced by such expression. n70 Canadian courts have found in favor of equality rights, upholding the conviction of a teacher who made anti-semitic remarks in his classroom n71 and the general validity of a prosecution for distribution of hard core pornography. n72

- - - - -Footnotes- - - - -

n67 CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), @ 2(b).

n68 See Kathleen Mahoney, The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography, 55 LAW & CONTEMP. PROBS. 77, 78 (Winter 1992) (quoting @ 15(1) of Canadian Charter).

n69 Hate Propoganda Act, R.S.C. @ 319(2) (1985) (Can.) (pt. VIII (Offences Against the Person and Reputation)).

n70 See Kathleen Mahoney, Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propoganda, in THE PRICE WE PAY, supra note 17, at 278, 282-89. But see Robert Marten, Group Defamation in Canada, in GROUP DEFAMATION AND FREEDOM OF SPEECH 190, 213 (Monroe H. Freedman & Eric M. Freedman eds., 1995) (criticizing "new and repressive orthodoxy" promulgated by Supreme Court of Canada in Keegstra).

n71 Regina v. Keegstra, 61 C.C.C. 3d 1 (Can. 1990).

n72 Regina v. Butler, 70 C.C.C. 3d 129 (Can. 1992).

- - - - -End Footnotes- - - - -

CONCLUSION

So the ways are there to prohibit racial and sexual harassment, if the courts come to recognize what is currently only a [*889] potential First Amendment problem. The Supreme Court may develop further the traditional conception of our First Amendment jurisprudence. The Court may learn from other jurisdictions, and allow them to influence its interpretation of the First Amendment. Whatever route the Court chooses, any balance between the principle of equal treatment and the degrading and demeaning values of racist and sexist speech in the workplace must be struck in favor of equal treatment.

Equality is an evolving idea, a process of recognition and gradual implementation. n73 Its full realization is still a work-in-progress. Further steps in the development and refinement of First Amendment jurisprudence in the service of this equality-process and equality-progress are well worth the taking. Rather than ask "How can such speech possibly be regulated?," the time has come to ask different questions: "How can we allow such speech to go unregulated? Why have we waited so long to regulate it?" Rather than "How can we?" the question has become "Why not and how?" n74 The Court's concluding words in Miller v. California are worth repeating in this conclusion:

To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It

is a "misuse of the great guarantees of free speech and free press." n75

So too, to equate the highest First Amendment values with the subordinating vulgarity of sexist and racist speech in the workplace demeans the First Amendment. Let us not misuse our great guarantees.

- - - - -Footnotes- - - - -

n73 See Mahoney, supra note 70, at 280 (quoting Canadian Justice Rosalie Abella on evolutionary nature of equality).

n74 See generally Lederer & Delgado, supra note 45.

n75 Miller v. California, 413 U.S. 15, 34 (1973).

- - - - -End Footnotes- - - - -

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SYMPOSIUM: DEVELOPMENTS IN FREE SPEECH DOCTRINE: CHARTING THE NEXUS BETWEEN SPEECH AND RELIGION, ABORTION, AND EQUALITY: ARTICLE: How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience

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-Footnotes-

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-End Footnotes-

SUMMARY:

... This symposium provides an occasion for some reflections on Stanford's policy on Free Expression and Discriminatory Harassment, which was recently struck down by a California trial court. ... We had already seen at the University of Michigan how a vaguely drafted anti-harassment policy based on the EEOC's Title VII regulation had allowed campus administrators to threaten discipline for core protected speech, and any campus hostile environment policy had to make clear that speech of this kind was not covered. ... Second, the tort law of emotional distress in most jurisdictions probably would not support a damage award for a single insult using a racial epithet from one peer to another; the cases seem to require some additional factor such as action in addition to speech, sustained abuse over time, or a relationship of responsibility or control between speaker and victim. ... In the case of Title VII's prohibition on hostile environment discrimination, what was the applicable unit of analysis, the "law" to be categorized as regulating either speech or conduct? If the EEOC hostile environment regulation were considered a separate law, its explicit and extensive concern with speech would be hard to call "incidental". ... These liberals generally support strong hostile environment discrimination enforcement in the workplace, but when it shows up on campus, they readily see its manifestation is a "speech code" and turn against it. ...

TEXT:

[*891] This symposium provides an occasion for some reflections on Stanford's policy on Free Expression and Discriminatory Harassment, which was recently struck down by a California trial court. n1 I'll tell how the policy came to be enacted, say why I thought it was a good idea, then why I think it should have been found lawful, n2 and end with some observations on the

politics of the hate speech issue.

-Footnotes-

n1 Corry v. Stanford, No. 740309 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995). The opinion is unreported, but can be found in hypertext format on the Stanford Law Library home page at http://www-leland.stanford.edu/group/law/library/welcome.htm (under "Treasures"). Stanford announced it would not appeal the decision on March 9, 1995. Casper: Fundamental Standard Court Case Won't Be Appealed, STAN. CAMPUS REP., Mar. 15, 1995, at 13 [hereinafter Case Won't Be Appealed].

n2 I was the main drafter of the policy, and so I must tell the reader here that I am exercising something like the losing lawyer's right to reverse the judge on appeal down at the bar next to the courthouse. Actually, Stanford was represented by its General Counsel's Office and by David Heilbron, Esq., of the San Francisco firm of McCutchen, Doyle, Brown, and Enersen. These able counsel were stuck with defending my legislative handiwork, and so I think of myself as one of the losing lawyers.

-End Footnotes-

In its opinion, the court used the official title of the Stanford policy only once, followed by: "(hereinafter the 'Speech Code')." n3 You don't have to read any further than that to know how the case came out. Once placed in the category "Campus Speech Codes," the policy was doomed, first in the public relations arena, and then in court -- especially when further modified [*892] by the term "politically correct," which became part of our national idiom soon after the policy was adopted.

-Footnotes-

n3 Corry, No. 740309 at 1.

-End Footnotes-

I doubt you think a great university should operate under a Code of Politically Correct Speech. Neither do I. We might also agree that protecting people against sex and race discrimination at work or study is a good thing. In helping draft the Stanford policy, I was trying to define (and so limit) the speech incidental to a kind of conduct the university is legally and morally obligated to deal with -- harassment of students on invidiously discriminatory grounds.

At the same time, because repeatedly offending someone can be seen as harassment, and people can be offended by ideas they think wrong, a simple prohibition of discriminatory harassment could have the effect of chilling the free flow of ideas in the university. To prevent that, I proposed limiting the speech that could be punished as harassment to "fighting or insulting words" -- narrowed in this context to speech that was targeted to an individual, was intended to insult that individual, and made use of one of the commonly recognized racial epithets or their equivalents. n4 But -- here's the crux -- an anti-harassment regulation that takes extra care to protect free speech will end up talking about speech a lot, and these days that will tend to get it called a "speech code" and condemned. This creates perverse incentives.

-Footnotes-

n4 The full text of the Stanford Policy, along with the supporting explanation of its terms which was distributed to Stanford Students while it was in effect, are located infra in the Appendix.

-End Footnotes-

I. WHAT HAPPENED

During 1988-89 I was chair of the campus judicial body that hears contested disciplinary charges at Stanford. n5 That fall two white students got into an argument with a black student when he claimed that Beethoven had African ancestry. In the after-math of the argument, the white students made a blackface caricature of Beethoven and placed it outside the black student's [*893] dormitory room. Campus-wide protests followed, including demands for discipline of the white students. Stanford's basic rule of conduct, the Fundamental Standard, simply requires that students respect "the rights of others." n6

-Footnotes-

n5 The Stanford Judicial Council (SJC) is made up of student, faculty, and administration members, and is chaired by a law student in cheating cases, and by a member of the law school faculty in cases involving charges of non-academic misconduct.

n6 The Fundamental Standard, adopted at the time of the University's founding in the 1890s, states: "Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens." The Standard had been applied for nearly a century case-by-case, supplemented in recent years by a few legislative interpretations, one of which had defined the campus policy against disrupting public speakers, while another had specified that drunk driving on campus would be treated as a violation of the Fundamental Standard.

-End Footnotes-

After some deliberation, the University's Judicial Affairs Officer decided not to prosecute the white students. Prior to the Judicial Officer's decision, the University's General Counsel issued a report stating that the Fundamental Standard should be interpreted in light of the University's commitment to free expression, and the posting of the Beethoven caricature did not fall within any of the standard exceptions to First Amendment protection. n7 The decision implied that the University would not treat speech as a disciplinary violation unless the First Amendment allowed it to be subject to criminal punishment or tort liability. Soon afterward, however, University President Donald Kennedy stated that a student who directly insulted another using a racial epithet would violate the Fundamental Standard. n8

-Footnotes-

n7 John J. Schwartz & Iris Brest, First Amendment Principles and Prosecution for Offensive Expression under Stanford's Student Disciplinary System, STAN. DAILY, Feb. 8, 1989, at 9. The permitted forms of content-based speech

regulation mentioned in the Schwartz-Brest memorandum were obscenity, defamation, incitement, and fighting words. The memorandum made no mention of the University's possible obligations under federal civil rights laws to remedy hostile environment discrimination.

n8 See Senate Hears President on Free Speech, Report on Centennial Campaign Progress, STAN. CAMPUS REP., Feb. 15, 1989, at 19.

- - - - -End Footnotes- - - - -

A few weeks later, the University's legislative body proposed to interpret the Fundamental Standard to prohibit discriminatory abuse or harassment. The proposal was aimed at protecting "diversity" in the student body, and would have prohibited the conduct involved in the Beethoven incident itself. While it strongly affirmed free speech rights in the abstract, some of its language could easily be read to censor ordinary political and cultural debate. n9 Stanford had pledged respect for First Amendment [*894] limitations, though as a private university it was not bound by them, and the constitutional lawyers on campus, myself included, did not think the draft was consistent with this pledge, nor did we think it good policy for a university committed to academic freedom and free debate. Protest to this effect led to the withdrawal of the proposal, with some of the protesters stating that they could support a narrower provision aimed at discriminatory personal abuse. n10

- - - - -Footnotes- - - - -

n9 The draft proposed "Interpretations and Applications of the Fundamental Standard in the Area of Diversity," and stated that community members had a right to be free of "personal attacks which involve the use of obscenities, epithets, and other forms of expression that by accepted community standards degrade, victimize, stigmatize, or pejoratively characterize them on the basis of personal, cultural, or intellectual diversity." Even more sweepingly, it stated that community members have a right (under the heading "defamation of groups") not to be "inescapably and involuntarily exposed to" such expression. Council Proposes Fundamental Standard Additions, STAN. CAMPUS REP., Mar. 1, 1989, at 17.

n10 My constitutional law colleagues Gerald Gunther and William Cohen filed statements arguing that in First Amendment terms (and as a matter of policy) the original proposal's "personal attack" provision was too broadly drawn, and the "defamation of groups" provision was mistaken in principle. Both said that they could support a narrowly drawn prohibition of personal attacks based on race, etc. See Proposed Amendments Raise Concerns About Free Expression, STAN. CAMPUS REP., Mar. 15, 1995, at 18; Proposed Code Conflicts with First Amendment, Gunther Says, STAN. CAMPUS REP., Mar. 15, 1995, at 17. I agreed with their criticism, and it was this narrow provision that I undertook to draft -- though in the end my efforts did not win their support.

- - - - -End Footnotes- - - - -

Because as chair of the campus judicial body I had been concerned about the prospect of having to decide charges based on an alleged racial insult without any more guidance than the vague terms of the Fundamental Standard, I accepted the invitation of the members of the legislative council (none of whom was a lawyer) to attempt a workable and constitutionally acceptable policy. I

offered a draft to the council which it then proposed in the Spring of 1989, and a year later, after much campus-wide debate and some revision, the succeeding legislative council (chaired by my law school colleague Robert Rabin) promulgated it as an interpretation of the Fundamental Standard. Upon receiving the President's approval, the policy took effect in July of 1990 under the title, "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment." Thereafter, in the nearly five years during which the policy was in effect, no charges were brought for violation of its terms, [*895] nor, as best I have been able to determine, were any such charges informally threatened.

This did not mean it passed out of controversy. The debate over multiculturalism and political correctness began to focus national attention on how campus harassment regulations were dealing with politically charged speech. n11 As a prominent private university with a "speech code," n12 Stanford was a frequent target for charges of enforced political correctness, despite the extremely narrow range of speech defined as harassment by the policy. The University had recently also undertaken a much-publicized modification of its undergraduate core curriculum in a more multicultural direction, and this helped make it a natural target in the campaign against political correctness. n13 A very broad regulation of campus speech in the name of equal access to education had been enacted at the University of Michigan, and then struck down by a federal court, n14 and issues involving "speech codes" were beginning to fill the law reviews as well as the editorial pages as the 1990's began. n15

-Footnotes-

n11 See DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 138-56 (1991); America's Decadent Puritans, THE ECONOMIST, July 28, 1990, at 11; Chester Finn, The Campus: An Island of Repression in a Sea of Freedom, COMMENTARY, Sept. 1989, at 17, 18.

n12 In my view, developed infra, every university has a "speech code," explicit or implicit, by operation of federal law, which requires universities to take reasonable steps to prevent creation of a discriminatorily hostile environment on the basis of race or sex. Stanford differed from the other major private universities in making its position explicit. I thought being explicit was good policy, but from early on it turned out to be unquestionably bad public relations.

n13 D'SOUZA, supra note 11, at 59-93.

n14 Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

n15 See, e.g., Charles R. Lawrence, If He Hollers, Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 449-51 (discussing Stanford's racist speech regulation); Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal? 1990 DUKE L.J. 484, 523-31 (arguing that Stanford's speech policy was unconstitutional).

-End Footnotes-

In 1992, two events combined to put the Stanford policy in legal jeopardy. First, in June, the U.S. Supreme Court decided R.A.V. v. City of St. Paul, n16 striking down a city ordinance that banned the display of bigoted symbols like swastikas or burning crosses; on the surface at least, the holding seemed to

apply as well to Stanford's singling out of racial and other bigoted epithets for discipline under its anti-discrimination policy. n17 Second, [*896] in September California adopted a new statute, the Leonard Law, a product of the attack on political correctness and hate speech codes, which applied First Amendment requirements to the disciplinary regulations of private universities and granted standing to students to challenge any regulations claimed to violate those requirements. n18

- - - - -Footnotes- - - - -

n16 505 U.S. 377 (1992).

n17 Id. at 396-97. The St. Paul ordinance made it a misdemeanor to display symbols that caused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Id. at 380. In a five-four decision, the Court held that even if the ordinance were construed narrowly to prohibit only displays that amounted to constitutionally unprotected "fighting words," it would still violate the First Amendment because the subset of utterances it singled out were chosen on impermissibly ideological grounds -- the disfavored ideologies being racial, ethnic, religious, or gender-based bigotry and intolerance. Id. at 391, 397. However the majority opinion made an exception for anti-discrimination laws aimed mainly at conduct, such as Title VII. Id. at 389. For the argument that the Stanford policy fell within this exception, see infra Part III.

n18 CAL. EDUC. CODE @ 94367 (West Supp. 1996). Subsection (a) provides:

No private postsecondary educational institutions shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

Id.

- - - - -End Footnotes- - - - -

With the combination of R.A.V. and the Leonard Law in hand, nine students brought suit in state court to have the Stanford policy declared invalid. The statute's broad standing provision meant that the plaintiffs did not have to claim that they wanted to do anything prevented by the policy (i.e. to address a hate epithet to a fellow student), or show that the University was enforcing the policy beyond its terms. The case was thus litigated as an abstract question of law before Peter Stone, a respected Superior Court judge in Santa Clara County, who decided in February of 1995 that in light of R.A.V. and other Supreme Court First Amendment decisions, the Leonard Law invalidated Stanford's policy. A few weeks later, Gerhard Casper, the constitutional law scholar who had inherited the speech and harassment policy when he became President of Stanford in 1992, announced his decision not to appeal. He said that while he disagreed with the ruling, n19 he believed that the time and expense [*897] of an appeal did not justify what might be gained by it, and so Stanford would live with the decision. He told the campus that the invalidation of the policy did not disable the University from invoking the Fundamental Standard to discipline students who harassed other students. n20 Thus Stanford returned to the post-Beethoven

incident status quo.

-Footnotes-

n19 President Casper particularly stressed his view that the Leonard Law itself violated Stanford's First Amendment right to academic freedom. Case Won't Be Appealed, supra note 1, at 13. The lawyers for Stanford made this their lead argument in defending the Corry suit before the Superior Court. The court rejected the argument, and I do not further consider it in this essay, but treat the Stanford case as if it arose at a state university.

n20 Specifically, President Casper emphasized that "harassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry, continues to be in violation of the Fundamental Standard." Id.

-End Footnotes-

II. THE CASE FOR THE POLICY

The plaintiffs regarded this as a victory for free speech and so did many other civil libertarians; for example, Nat Hentoff wrote a column headlined Free Speech Returns to Stanford. n21 I think they were mistaken. The freedom of students to express conservative or otherwise "politically incorrect" views on issues of race, gender and the like without fear of campus discipline seems to me to have been more secure at Stanford with the policy than it now is without it -- though quite secure in either case. n22

-Footnotes-

n21 Nat Hentoff, Free Speech Returns to Stanford, L.A. TIMES, Mar. 27, 1995, at B5.

n22 No student disciplinary charges have ever been brought at Stanford on the basis of alleged harassing speech.

-End Footnotes-

My view rests on the two premises that convinced me the policy made good sense in 1989, premises that still hold true today. The first is that universities have a legal and moral obligation to deal with at least some abusive speech aimed at students on the basis of their race, national origin, sex, and other personal characteristics, as part of their duty not to discriminate in the provision of educational services. n23 The second is that freedom of expression is better served by narrow and clear definition of any speech that is to be prohibited.

-Footnotes-

n23 Federal law prohibits Stanford as a recipient of federal funds from discriminating in the provision of educational services on the basis of race, color, or national origin, Civil Rights Act of 1964 (Title VI) @ 601, 42 U.S.C. @ 2000d (1994); on the basis of sex, Education Amendments of 1972 (Title IX) @ 901, 20 U.S.C. @ 1681 (1994); and since 1990 on the basis of handicap, Americans with Disabilities Act (Title III) @ 302, 42 U.S.C. @ 12182 (1994). In addition, Stanford on its own initiative pledges not to discriminate on the basis of

religion or sexual orientation.

- - - - -End Footnotes- - - - -

[*898] The first premise derives from the well-established legal concept of hostile environment discrimination. An employer discriminates against an employee not only by firing her or not hiring her or paying her less on account of her race or sex, but also by making the employee do her work in an environment so permeated by sex-based or race-based abuse, including verbal abuse, that it affects her ability to do her job. n24 And where fellow workers subject employees to discriminatory harassment and abuse, again including verbal abuse, an employer, who in the face of complaints does nothing to remedy the situation, is like-wise guilty of discrimination in providing less favorable working conditions to those subject to the abuse. The emotional toxicity of the work environment is a "condition of employment" for the employee, for which the employer is responsible. By analogy, other private parties subject to anti-discrimination requirements under civil rights laws, such as landlords, innkeepers, and educators, are also required to take reasonable steps to protect those entitled to equal treatment from hostile environment discrimination. n25

- - - - -Footnotes- - - - -

n24 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986). The Court has not yet considered the regulation of workplace verbal abuse as raising First Amendment issues. It recently unanimously upheld a finding of hostile environment discrimination based entirely on employer verbal abuse without even discussing whether this was consistent with the First Amendment. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993). See also Richard M. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark, 1994 SUP. CT. REV. 1. Both parties briefed the First Amendment issues in the case, but only after it reached the Supreme Court level. Thus the case does not precisely stand as formal authority for limited First Amendment review of hostile environment claims based on verbal abuse, but rather suggests a climate of judicial opinion in which this is generally assumed.

n25 Following the lead of the U.S. Supreme Court in Franklin v. Gwinnett County Public School, 503 U.S. 60 (1992), courts have applied Title VII standards by analogy in evaluating claims of sex discrimination in education under Title IX, and have held that plaintiffs may bring hostile environment sexual harassment claims under Title IX. See, e.g., Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993). The court in Doe v. Petaluma relied on Franklin as well as on Letters of Findings of the Office of Civil Rights (OCR) of the Department of Education in applying Title VII standards in the Title IX context: "The Office of Civil Rights . . . believes that an educational institution's failure to take appropriate response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX." Petaluma City Sch. Dist., 830 F. Supp. at 1573. Courts have similarly applied Title VII case law in cases of hostile environment sexual harassment by landlords under the Federal Fair Housing Act. See, e.g., Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993); Shellhammer v. Lewallen, No. 84-3573, 1985 WL 13505, at *4 (6th Cir. July 31, 1985); Beliveau v. Caras, 873 F. Supp. 1393, 1396-97 (C.D. Cal. 1995).

- - - - -End Footnotes- - - - -

[*899] These requirements apply to universities as well, where their application must take into account the special importance of both academic freedom and open extra-curricular debate within the university. Still, study is the work of students, and like other work it is made more difficult by an environment permeated with abuse and harassment. n26 A university that did nothing to prevent discriminatory harassment of its students would deny the victims their right to equal access to its educational opportunities.

-Footnotes-

n26 As Justice Ginsburg has put it, the key issue in a hostile environment case is whether "the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" Harris, 114 S. Ct. at 372 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

-End Footnotes-

Suppose, for example, that when a formerly all-male college is required by law to admit a woman, she is treated by her fellow students in the same way Mary Carr, the first female apprentice in a tinsmith shop at a division of General Motors, was treated by her fellow employees. n27 Carr faced daily comments such as "I won't work with any cunt," was regularly called "whore," "cunt," and "split tail," had "cunt" painted on her toolbox, had her toolbox and work area festooned with sexual graffiti and pictures, and received a Valentine card in her toolbox addressed to "Cunt," which showed a man carrying a naked woman upside down like a six-pack, with text explaining that the man has finally discovered why the woman has two holes. After putting up with this treatment and indeed trying to go along with it for some time, she complained, but the company took no action. On these facts and others, General Motors was found liable to Carr for discrimination in conditions of employment. n28 I believe [*900] a university that did nothing in a similar situation would violate a student's right to equal access to educational services under Title IX. And quite apart from the law, shouldn't a college administration concerned with equal treatment of its students take steps to stop this kind of discriminatory abuse?

-Footnotes-

n27 Carr v. General Motors Corp., 32 F.3d 1007, 1012-13 (7th Cir. 1994).

n28 Id. I have selected out the verbal abuse directed to Carr; she suffered other indignities as well. Judge Posner's opinion in the case gives a clear statement of the present law governing an employer's obligation to deal with abuse by coworkers:

There really are only two questions in a case such as this. The first is whether the plaintiff was, because of her sex, subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to affect adversely the conditions under which she worked The second question is whether, if so, the defendant's response or lack thereof to its employees' behavior was negligent If it knows or should have known that one of its female employees is being harassed, yet it responds ineffectually, it is culpable. The two questions, harassment of the employee and negligence of the employer, are

linked as a practical matter because the greater the harassment -- the more protracted or egregious, as distinct from isolated . . . or ambiguous, it is -- the likelier is the employer to know about it or to be blameworthy for failing to discover it.

Id. at 1009.

-----End Footnotes-----

Or suppose an African-American student at a formerly all-white university faced the treatment given to Ray Wells, the first black dockman at a trucking company. n29 Wells regularly found on chalkboards attached to loading carts in his working area statements such as "Ray Wells is a nigger," "The only good nigger is a dead nigger," "Niggers are a living example that Indians screwed buffalo." When Wells started eating lunch in a separate room, his white co-workers wrote "niggers only" above the door. Management did nothing in response to complaints about these and other incidents of abuse and was found to have violated Title VII. n30 Again, I think a university that failed to take disciplinary action in this situation would violate Title VI, but whether or not this is so, it would violate its educational obligations to the student in question.

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n29 EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384 (D. Minn. 1980).

n30 Id. As in Carr's case, Wells also suffered from non-verbal abuse at his coworkers' hands; I have noted only some of the verbal abuse.

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Of course nothing as blatant as the abuse recorded in these and many other employment cases has happened at Stanford, or on most university campuses. To many university lawyers and administrators, this means that the sensible course is to wait and see whether serious harassment occurs, and to deal with it only if and when it does. After all, it is hard to define in advance the speech that amounts to harassment, while protecting the free debate that is essential to the life of a university. Further, if a university does attempt such a definition, it is likely to call down on itself criticism as the craven enforcer of political correctness [*901] through a speech code. There can be repercussions in Nat Hentoff's column and on the editorial pages of the Wall Street Journal. Alumni may think their school has fallen into the clutches of radical multiculturalists, and withhold contributions. Finally, if the university is a public one (or a private one in California), explicitly defining the speech that constitutes discriminatory harassment raises the risk of a possibly costly and embarrassing lawsuit. All these practical considerations are much more forceful today than they were in 1989; they no doubt help explain why the Stanford administration decided not to appeal the invalidation of the Stanford policy in 1995.

Given all this, why shouldn't a university hold off on defining harassing speech at least until a serious situation arises? n31 The main answer lies in my second premise -- that the values of free speech themselves, especially important in a university, are better served by clear definition in advance of

the speech to be regulated, when regulation is necessary. (I would add that general values of due process for students are also better served by clear notice.) The Carr and Wells facts are meant to show that indeed some speech does have to be regulated. n32 The alternative to defining that speech is uncertainty about how far the regulation extends, and this casts a chill on speech that might [*902] or might not fall within the terms of a prohibition of conduct defined loosely as "harassment."

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n31 Thus Title VII law requires employers to take action when workers are being subjected to "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to . . . create an abusive working environment." Harris, 114 S. Ct. at 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).

n32 For the contrary view, see Kingsley R. Browne, Title VII as Censorship: Hostile Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481, 501 (1991), who argues that application of Title VII to verbal abuse in the workplace violates the First Amendment. If his position were correct with respect to the workplace, it would be true a fortiori for the University. Of course universities (like employers) can take action short of discipline to deal with incidents of discrimination -- statements of condemnation of bigotry, support for the students subjected to it, promotion of discussion and debate of the issues, and so on. Charles Calleros describes the effective non-disciplinary responses a university can take to incidents of discrimination that fall short of actual threat or harassment. Charles R. Calleros, Reconciliation of Civil Rights and Civil Liberties after R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University, 1992 UTAH L. REV. 1205, 1206 (describing Arizona State University policy). My premise is that while efforts like these are necessary and may in many cases be sufficient, they need to be backed ultimately by the threat of discipline in cases where, despite them, abuse cumulates to the level of actual harassment of its victims.

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Stanford's official response to the Beethoven incident created just this kind of uncertainty. The General Counsel's memorandum said that the posting of the caricature was not punishable, because the University adhered to free speech standards and the posting did not amount to "fighting words" or one of the other recognized categories of expression exempted from First Amendment protection. n33 The President of the University affirmed the decision not to prosecute, and added publicly that if a student directly insulted another student using a racial epithet, that would be a violation of the Fundamental Standard. n34

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n33 See supra note 6 and accompanying text.

n34 See supra notes 19-20 and accompanying text.

-End Footnotes-

That left it unclear whether, for example, the University would discipline a student who was caught putting an anonymous note saying "Nigger get out" under a black student's door. n35 The President's statement implied that it would, but the General Counsel's memorandum suggested otherwise. A surreptitious message cannot be "fighting words" under the narrow meaning of those terms used in First Amendment law, which requires an imminent likelihood of violent response. n36 Nor was it clear how such an act would fit into any other accepted category of crime or tort. The General Counsel's memorandum had not mentioned any obligation the University might have to protect students against hostile environment discrimination, but in any event a single episode like this would not likely trigger such an obligation. n37

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n35 As I learned from speaking with African-American students, actual discriminatory abuse on campus usually takes the form of anonymous messages.

n36 R.A.V. v. City of St. Paul, 505 U.S. 377, 408 (1992) (White, J., concurring); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

n37 In the employment context, the Supreme Court has said that the "mere utterance of an . . . epithet which engenders offensive feelings in a employee" is not sufficient by itself to create the kind of "severe" and "pervasive" abusive environment necessary for a Title VII case. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1985)).

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On the other hand, if the same student received the anonymous note after being subjected to other direct expressions of racial hostility, a discrimination case would begin to build unless the University took remedial action. This point supported the [*903] President's statement that direct racial abuse would be disciplined. But what kinds of abusive speech should the University treat as subject to discipline under this obligation? If free campus debate was to be protected, the limits of what could count as punishable verbal abuse needed to be spelled out carefully. This was much more important in a university than in most workplaces, where the freedom of political and cultural discussion are not strongly protected either by law or custom, but generally left entirely subject to the discretion of employers. n38 We had already seen at the University of Michigan how a vaguely drafted anti-harassment policy based on the EEOC's Title VII regulation had allowed campus administrators to threaten discipline for core protected speech, and any campus hostile environment policy had to make clear that speech of this kind was not covered. n39

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n38 Mary Becker, How Free Is Speech at Work?, 29 U.C. DAVIS L. REV. 815 (1996). But see CAL. LAB. CODE @ 1101 (West 1989) (forbidding employers to discharge employees because of their "political affiliation").

n39 Doe v. University of Mich., 721 F. Supp. 852, 865-66 (E.D. Mich. 1989). The Michigan policy prohibited "any behavior, verbal or physical, that stigmatizes or victimizes an individual" on discriminatory grounds, and thereby "creates an intimidating, hostile, or demeaning environment for educational