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Exceptions to the Clearly Erroneous Test
After the Recent Amending of Rule 52(a)
for the Review of Fact Based Upon
Documentary Evidence

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I. Introduction

Federal Rule of Civil Procedure 52(a) provides that findings of fact made by a trial court shall not be set aside by an appellate court unless found to be "clearly erroneous." The Supreme Court of the United States long ago defined this standard to mean that appellate courts should not set aside the factual findings of the lower court unless, upon examination of the entire record, the appellate court is "left with the definite and firm conviction that a mistake has been committed." While the courts have agreed that the clearly erroneous standard only applies to findings of fact and that conclusions of law are fully reviewable on appeal, almost since the rule’s inception the

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circuits have split as to whether the standard applies to factual findings based on documentary evidence.¹

Some appellate courts maintain that factual findings based on documentary evidence do not involve evaluations of demeanor,⁴ and thus, no reason exists to give deference to the trial court. Other appellate courts, while accepting the idea that they are in as good a position as the trial courts to find facts based on documents, do give some deference to the lower court’s reading of the evidence. These courts reason that although Rule 52(a) applies to findings based on both documentary and oral evidence, it is easier to reverse a lower court’s findings that are based on documentary evidence. Essentially these courts apply a less deferential standard of review to documentary-based findings of fact.⁵ Finally, the majority of courts contend that these findings, whether based on oral or documentary evidence, are still factual and are, therefore, within the parameters of the trial courts’ function. In their view, allowing appellate courts to independently make findings of fact would undermine the legitimacy of the trial courts, encourage appeals, and “needlessly reallocate judicial responsibility.”⁶

In 1985, to quell this debate, the Supreme Court amended Rule 52(a) to provide that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.”⁷ This amendment should end the debate. Nevertheless, some exceptions to the clearly erroneous rule survive; this article focuses on these exceptions.

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¹. “The main unsettled question in the construction of Rule 52 is whether the deference that must normally be paid to the findings by the trial court applies when the finding rests on an inference drawn from undisputed facts or documentary evidence.” 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2587 at 740 (1971). See also Notes of Advisory Committee on 1985 Amendment to Rules (and authorities cited therein).

⁴. FED. R. CRIM. P. 52(a) provides that “due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.”

⁵. E.g., Onaway Transp. Co. v. Offshore Tugs, Inc., 695 F.2d 197 (5th Cir. 1983); Marcum v. United States, 621 F.2d 142 (5th Cir. 1980); Jennings v. General Medical Corp., 604 F.2d 1300 (10th Cir. 1979); Oscar Gruss & Son v. First State Bank, 582 F.2d 424 (7th Cir. 1978).


⁷. FED. R. CRIM. P. 52(a) (emphasis added).
The article begins with a review of the controversy that existed prior to Rule 52(a)'s amendment, including a discussion of Supreme Court cases addressing the applicability of Rule 52(a) to findings based on documentary evidence. The split in the circuits prior to the rule's amendment follows, with a brief description of the three positions taken by the circuit courts. The article then turns to the 1985 amendment to Rule 52(a) and the Supreme Court's reaction to it. Finally, the article addresses the remaining exceptions to the rule that findings based on documentary evidence must be reviewed under the clearly erroneous test.

II. Decisions Prior to the 1985 Amendment

A. Supreme Court Decisions

Confusion over the standard of appellate review for non-jury "paper cases" consisting primarily of documentary evidence motivated the Supreme Court to amend Rule 52(a) in 1985. Ambiguous and sometimes inconsistent Supreme Court decisions led, in part, to this confusion in the lower courts.

The Supreme Court addressed the application of the "clearly erroneous" rule to documentary evidence for the first time in *United States v. United States Gypsum Co.* In this case, the evidence against the defendants, who were accused of violating the Sherman Antitrust Act, consisted of over 600 documents and the testimony of twenty-eight witnesses. The trial court granted the defendant's motion to dismiss. On direct appeal, the Supreme Court applied the clearly erroneous test, even though the evidence consisted primarily of documents and undisputed facts. The Court stated: "[i]n so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts . . . Rule 52(a) of the Rules of Civil Procedure is applicable."

While this language appears to state clearly that Rule 52(a) applies to findings based upon documentary evidence, some eighteen years after *United States Gypsum* the Court hinted at the opposite conclusion. In *United States v. General Motors Corp.*, which also involved

9. *Id.* at 372.
10. *Id.* at 394.
an alleged violation of the Sherman Act, the district court found that General Motors had not participated in a conspiracy to fix prices. The Supreme Court, on direct appeal, disagreed and reversed the district court. Addressing the proper role of the appellate court in reviewing a trial court’s decision, the Court, in a footnote, distinguished “paper cases” from those based on oral evidence. It stated that appellate courts may have more freedom in reviewing lower court decisions where the evidence is primarily documentary than when it is primarily testimonial. The Court noted that the rationale underlying Rule 52(a) was to give deference to “the trial court’s customary opportunity to evaluate the demeanor and thus the credibility of the witnesses.” Therefore, Rule 52(a) “plays only a restricted role” in these “‘paper cases.’”

At least one student commentator has noted that the above language was dicta; the primary reason for the conclusion in General Motors that Rule 52(a) was inapplicable was the Court’s holding that the issue on review was one of law and not of fact. Nevertheless, the language suggesting that Rule 52(a) was inapplicable because of the nature of documentary evidence caused confusion in the circuit courts.

In 1982, the Court returned to this issue. In Pullman-Standard v. Swint, the district court found that the defendants in an employment discrimination suit did not intentionally discriminate against the plaintiffs. On appeal, the Fifth Circuit found discriminatory intent in the defendant’s practices and reversed. The Supreme Court reversed,

12. Id. at 141 n.16.
13. Id.
14. See Note, Review of Findings, supra note 1, at 239.
15. Compare, e.g., Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980) which states:

Where the evidence before the trial court consisted solely of depositions and other written matter, the court hearing no live witnesses, the burden of showing clear error is not so heavy as in the case where the court has the opportunity to assess the credibility of witnesses by personal observation.

with Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U.S. 976 (1982) (“We therefore review the district court’s determinations as findings of fact, which, although based solely on documentary evidence, will be set aside only if clearly erroneous.”).
17. Id. at 275.
holding that the question of intent was a question of fact that clearly fell under Rule 52(a); therefore, the circuit court could not conduct a searching review.

The Court in *Pullman-Standard* said nothing specific about whether the clearly erroneous rule applies to findings based on documentary evidence. However, the Court majority observed that "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."¹⁹

This language can be interpreted to mean that appellate courts should apply Rule 52(a) when reviewing findings of all types of facts, including those deduced from documentary evidence. The example the Court gave after this statement, however, casts some doubt on this conclusion. The Court proceeded to explain that appellate courts should not divide facts into those which are "ultimate" and those which can be called "subsidiary."²⁰ A discussion concerning facts based on documentary evidence was conspicuously absent.

Justice Marshall in his dissent, however, squarely addressed the issue of whether Rule 52(a) applies to findings based on documentary evidence. While admitting that appellate courts should give deference to facts based on live testimony, Justice Marshall stated: "[i]n the cases before the Court today this usual deference is not required because the District Court's findings of fact were entirely based on documentary evidence."²¹ He cited lower court cases holding that findings based on documentary evidence do not require the full deference contained in Rule 52(a).²²

Although Justice Marshall only spoke for himself and Justice Blackmun, the dissent's existence affects the analysis of the majority's opinion. In alluding to different types of factual findings, perhaps the majority was thinking of findings based on documentary evidence when it held that "all" findings should be given deference under Rule 52(a). Yet the fact that the dissent discussed documentary evidence may cut the other way; the majority's silence may indicate that they agree with Justice Marshall's opinion on this point. Thus, the language in *Pullman-Standard* can be read as the Supreme Court's approval of

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¹⁹. 456 U.S. at 287.
²⁰. Id.
²¹. Id. at 301.
²². Id. at 301-02.
applying Rule 52(a) to all factual findings, and, indeed, it has been read as such. However, there may be room to argue that the Court was not thinking of factual findings based on documents when it made this statement, and that it was in fact providing support, *sub silentio*, for the position taken in the dissent.

The Supreme Court addressed the issue again in 1985 in *Anderson v. City of Bessemer City*, just one month before the effective date of the amendment to Rule 52(a). Once again, however, the Court left room to interpret its holding to mean that Rule 52(a) either does not apply to factual findings based on documentary evidence or that a modified, less stringent view of the clearly erroneous standard should be adopted for “paper cases”. In *Anderson*, an unsuccessful female applicant for the position of city recreation director charged the city with sex discrimination when it hired a male applicant instead. Although the trial court found in favor of the plaintiff, the appellate court reversed. The Supreme Court reversed because the circuit court misapplied the clearly erroneous standard. After holding that a finding of intentional discrimination is a finding of fact subject to Rule 52(a), the Court ruled that the trial court’s finding of intent was not clearly erroneous within the meaning of the rule. The Court also stated that the clearly erroneous standard applies to findings that are based “on physical or documentary evidence” and affirmed the dictum in *Pullman-Standard* to this effect.

This statement alone would have clarified the matter. However, the Court went on to say that when the findings are based on a “determination regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” This passage can be read to mean that a less stringent standard of review should be applied when factual findings based on documentary evidence are on appeal than when the findings are based on the trial court’s evaluation of the credibility of live testimony. As a logical matter, if a greater level of deference is due to findings

25. *Id.* at 571-81.
26. *Id.* at 573.
27. *Id.* at 574.
28. *Id.*
based on live testimony, a comparatively lower standard is required for findings based on documentary evidence.

Thus, while at first blush it seems that the Supreme Court’s consistent position has been that the clearly erroneous standard of Rule 52(a) should apply to all factual findings whether based on documentary evidence or live testimony, there is also some room in the Court’s opinions to conclude otherwise. Indeed, some circuit courts have responded to the ambiguity in the Court’s decisions. Prior to the 1985 amendment to Rule 52(a), the circuits differed on whether they should apply the clearly erroneous standard to factual findings based on documentary evidence.

B. Circuit Court Decisions

On the issue of Rule 52(a)’s application to factual findings based on documentary evidence, before 1985, the circuit courts were divided roughly into three camps. First, some circuits held that the review of any finding of fact was uniformly subject to the clearly erroneous standard. Second, a group of courts applied a modified clearly erroneous rule, sometimes referred to as the “gloss approach”. These courts held that when a trial court’s findings did not rest on demeanor evidence, little reason existed to defer to the lower courts’ findings; on appeal, the court could more easily find them to be clearly erroneous. Third, a group of courts simply did not apply the clearly erroneous standard of review to facts based on documentary evidence. They reasoned that they were in as good a position as the trial court to evaluate such evidence. The ambiguous language of the Supreme Court’s holdings seemed to lend justification to all of these positions.

1. Uniform Application

The first category of Rule 52(a) interpretations were those courts that uniformly applied the clearly erroneous standard of review to all findings of fact. The courts held that “the clearly erroneous standard of review applied to findings of fact even when the district court relied solely on a written record.”


30. See, e.g., Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573 (1st Cir. 1980) (court applied the clearly erroneous standard when much of evidence was documentary).

31. E.g., Marino Sys., Inc. v. J. Cowhey & Sons, 631 F.2d 313 (4th Cir. 1980)
Sixth, Eighth, Ninth, Eleventh, and the District of Columbia circuits follow this theory.

In justifying this stance, these courts and the commentators who have supported this position have cited several rationales. First, there is concern that allowing the appellate courts to fully review the findings of the lower courts diminishes the esteem and confidence litigants have for the trial courts. Second, the primary fact-finding responsibility (absent a jury) is clearly vested in the trial court. Many believe that erosion of the clearly erroneous standard will imperil this traditional delegation of responsibility. These commentators also fear (court rejected application of full appellate review to question of infringement of a patent based wholly on documentary evidence and a comparison of structures of certain devices); Nalle v. First Nat'l Bank, 412 F.2d 881 (4th Cir. 1969) (findings only reviewable under the clearly erroneous standard even though most of the evidence was documentary).

32. There is some conflict within this circuit on the appropriate standard of review. Compare United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981) (applying the clearly erroneous standard in a criminal case where there was no oral testimony); Ingram Corp. v. Ohio River Co., 505 F.2d 1364, 1369 (6th Cir. 1974) ("the clearly erroneous rule should control even where the entire record consisted of 'depositions . . . and other written material'") with Lydle v. United States, 635 F.2d 763, 765 n.1 (6th Cir. 1981) (court acknowledged in dicta the disagreement within the circuit over the standard of review and noted that "where the trier of fact has observed no witnesses, the 'clearly erroneous' test is inapplicable; [the circuit court] . . . is in as good a position as the district court to review a purely documentary record and to arrive at conclusions of mixed law and fact").

33. E.g., Hoefelman v. Conservation Comm'n, 718 F.2d 281 (8th Cir. 1983) (factual determinations based upon conflicting depositions are only reviewable under the clearly erroneous standard).

34. E.g., Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U.S. 976 (1982) (applied the clearly erroneous standard of review even though findings were based solely on documentary evidence); see also Burlington N. v. Weyerhaeuser Co., 719 F.2d 304 (9th Cir. 1983).

35. Dothan Coca-Cola Bottling Co. v. United States, 745 F.2d 1400 (11th Cir. 1984) (clearly erroneous standard applied to findings of fact based upon documents and transcripts of evidence presented in an earlier action).

36. Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973) (The court stated that the clearly erroneous test applied even when the findings "are based on inferences drawn from documents or undisputed facts.").


38. See, e.g., Randall Found., Inc. v. Riddell, 244 F.2d 803, 805 (9th Cir. 1957).
that a lower standard of review causes congestion in already crowded appellate court dockets.\textsuperscript{39} Finally, some argue that the clear language of Rule 52(a) and the stated intent of its drafters was that it be applied to all findings of fact.\textsuperscript{40}

2. The Gloss Approach

The second school of thought on the application of the clearly erroneous rule to findings based on a written record was often referred to as the "gloss approach". These courts, while applying the clearly erroneous standard, held that when evidence was primarily documentary, the burden of establishing clear error was not as great.\textsuperscript{41} For example, the Fifth Circuit stated:

[W]here the evidence before the trial court consisted solely of depositions and other written matter, the court hearing no live witnesses, the burden of showing clear error is not so heavy in the case where the court has the opportunity to assess the credibility of the witness by personal observation.\textsuperscript{42}

The Seventh\textsuperscript{43} and Tenth\textsuperscript{44} Circuits also adhered to this theory.

This position found support in several places. First, the language of the rule as originally written emphasized that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."\textsuperscript{45} This language can be read to indicate that special deference is warranted when the trial court had the opportunity to weigh credibility, but less deference is needed when the factual findings are based on nondemeanor evidence. The language in General Motors

\textsuperscript{39} See Wright, supra note 1, at 761, 778-82.
\textsuperscript{40} See, e.g., Commercial Standard Ins. Co. v. Maryland Casualty Co., 248 F.2d 412, 416 (8th Cir. 1957); Clark, supra note 37, at 505-06.
\textsuperscript{41} E.g., Marcum v. United States, 621 F.2d 142, 145 (5th Cir. 1980). Accord Onaway Transp. Co. v. Offshore Tugs, Inc., 695 F.2d 197 (5th Cir. 1983). The Fifth Circuit has also referred to this approach as the "hard look" rule. See Bolius v. Wainwright, 597 F.2d 986, 989 (5th Cir. 1979).
\textsuperscript{42} Marcum v. United States, 621 F.2d 142 (5th Cir. 1980).
\textsuperscript{43} E.g., Oscar Gruss & Son v. First State Bank, 582 F.2d 424 (7th Cir. 1978).
\textsuperscript{44} E.g., Jennings v. General Medical Corp., 604 F.2d 1300 (10th Cir. 1979). As the trial court's findings were based on documentary evidence, the Tenth Circuit found that it was "equally capable of examining documents, depositions, and stipulations, and drawing its own conclusions." Id. at 1305-06. At the same time the court stated: "Our independent judgment, however, should not be substituted without regard to the trial court's findings." Id. at 1306.
\textsuperscript{45} Fed. R. Civ. P. 52(a).
also lends support to this reading. At least one student commentator found this the most logical position, demonstrating that this practice corresponds very closely to the type of review favored historically in federal equity practice.

3. The Frank Rule

The last theory regarding the applicability of Rule 52(a) to factual findings based on documentary evidence was often called the “Frank rule.” First adopted by Judge Jerome Frank in Orvis v. Higgins, some courts held that the clearly erroneous standard simply did not apply to factual findings based primarily on documentary evidence or undisputed facts, because the appellate court is in as good a position as the trial court to determine the facts based upon documentary evidence.

Judge Frank reached this conclusion by relying on language in United States v. United States Gypsum Co. where the Court stated:

The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witness would best be judged, had great weight with the appellate court. These findings were never conclusive, however.

46. For example, the Supreme Court stated in a footnote that Rule 52(a) “plays only a restricted role” in cases where the trial court has no “opportunity to evaluate the demeanor and credibility of witnesses.” General Motors, 384 U.S. at 141 n.16.

47. Note, Appellate Review, supra note 37, at 519; see also sources cited supra note 1.


49. 180 F.2d 537 (2d Cir.), cert. denied, 340 U.S. 810 (1950).

50. Judge Frank wrote:

a) If he [the trial judge] decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge’s finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge’s finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.

Id. at 539-40 (citations omitted).


52. Id. at 395 (quoted in Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir.), cert. denied, 340 U.S. 810 (1950)).
Judge Frank read the converse of this statement and concluded that if the trial judge was not afforded the opportunity to judge the demeanor and credibility of the witnesses, no deference was due. This he construed as federal equity practice and concluded that it was the result intended by the original drafters of Rule 52(a). Prior to the 1985 amendment, this position had been strongly supported by Professor Moore, as well as the Second and Third Circuits.

Thus mirroring the Supreme Court’s ambiguities, the circuits were in conflict regarding the application of Rule 52(a) to findings based on documentary evidence. Most appellate courts held that the rule applied to all factual findings. Some courts used the gloss approach and applied the rule to facts based on documentary evidence with less force. Those courts following the Frank rule believed that Rule 52(a) did not apply to documentary factual findings at all. This confusion, in part, led the Advisory Committee to recommend amending the Rule.

III. The 1985 Amendment

In 1985, the Supreme Court formally amended Rule 52(a) to expressly provide that findings of fact based on documentary evidence are to be treated in the same manner as other factual findings and are subject to the clearly erroneous standard. The Notes of the Advisory Committee, moreover, clearly convey the intent to clear up the "conflict among the circuits as to the standard of review of findings of fact by the court," and establish once and for all that "the trial court, not the appellate tribunal, should be the finder of facts," even if based solely on documentary evidence.

As this amendment is so new, the Supreme Court has had little opportunity to address its impact. However, in *Icicle Seafoods, Inc. v. Worthington* the Court addressed the applicability of Rule 52(a)

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53. See Note, Review of Findings, supra note 1, at 247.
56. See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .") (emphasis added).
58. Id.
to undisputed facts. In this case, the respondents were suing the petitioner to recover overtime benefits under the Fair Labor Standards Act (FLSA) for work performed on the petitioner's barge. The district court found that the respondents were "seamen" under the Act and as such excluded from overtime benefits. The appellate court reversed, holding that the question of exemption under the statute was one of law suitable for review de novo. A majority opinion written by Justice Rehnquist held that this issue was really a question of fact appropriate for the trial court. "We therefore reaffirm our holding... that the facts necessary to a proper determination of the legal question of whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a)...."60

The Supreme Court found that the appellate court independently reviewed the facts and reached a different conclusion than the district court on an important factual question: the "dominant employment" of the respondents. The Court admonished the circuit court for engaging in such fact finding.

Justice Stevens' dissent pointed out that the factual findings made by the circuit court were uncontested facts and therefore within the parameter of review.61 In fact, the circuit court stated that one of the reasons Rule 52(a) did not apply was because it had reversed the district court based on a reevaluation of undisputed facts as opposed to resolving a conflict in the witness' testimony, an area clearly within the purview of trial courts.

Thus, it could be argued that the Court in *Icicle Seafoods* held that Rule 52(a) applied because the appellate courts must give deference to the lower courts' findings of facts when determining the legal question of exemptions under the FLSA. If true, then the Court was merely asserting that findings of fact in their application to the law are for the district court to decide. This issue goes more to the question of whether mixed questions of law and fact are reviewable under Rule 52(a), an issue discussed in more detail below. Another reading of *Icicle Seafoods*, however, could be that the Supreme Court frowns on the appellate court making findings different from the lower court, even when based on undisputed facts. This is how the dissent reads the majority's opinion.62 In this light, one could read

60. *Id.* at 712-13.

61. *Id.* at 715-16.

62. "The Court chastises the Court of Appeals for supplying a gap in the District Court's factual findings with uncontested facts...." *Id.* at 1530 (Stevens, J., dissenting).
the majority as holding that Rule 52(a) always applies to findings of fact based on undisputed evidence.

Perhaps the Court is saying both. In any case, together with the strong, clear language in the Advisory Notes to the amendment, it appears that the clearly erroneous rule applies to factual findings based on documentary or undisputed evidence. The conflict in the Circuits on this issue should cease. Of course, with every rule come its exceptions.

IV. Exceptions to the Application of Rule 52(a)

A. The "Actual Malice" Exception

The first and clearest exception to the understanding that Rule 52(a) applies regardless of the nature of the fact finding process concerns the area of the first amendment. In *Bose Corp. v. Consumers Union of the United States, Inc.*, a case decided prior to the recent amendment, the Court held that federal constitutional law required a *de novo* appellate review on the issue of actual malice in a defamation action.

Justice Stevens, writing for the Court majority, reasoned that the issue was one of balancing "two well-settled and respected rules of law [which] point in opposite directions." On the one hand, Rule 52(a) applies to findings of facts such as the "actual malice" issue of what a "person knew at a given point in time." On the other hand, the Court recognized that the rule also established an appellate court's obligation to independently examine the entire record in order to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." The Court held that "Rule 52(a) . . . does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan.*" While this holding seems only to create a narrow exception to Rule 52(a), an analysis of the Court's decision facilitates

64. *Id.* at 498.
65. *Id.*
67. *Id.* at 514.
an understanding of when it may make a similar exception in the future.

The Court conceded that the intent question involved in an "actual malice" determination can be construed as a question of fact. In fact, only a few years earlier, in *Pullman-Standard v. Swint* the Court held that the question of intent in a discrimination suit was indeed a question of fact subject to Rule 52(a). Without saying that it was distinguishing *Pullman-Standard*, the Court concluded that because of the special nature of libel suits and their first amendment implications, it was reasonable to make an exception. The Court explained this exception in light of the common-law heritage of the *New York Times* rule, which grants a particularly broad role to the judge in applying the law to the facts because the meaning and extent of the common law can only be discovered by the evolutionary process of common law adjudication, and because the constitutional values surrounding the rule are so highly regarded, it was imperative that the appellate court had an opportunity to independently verify the decision.

Thus, one reading of *Bose* is that the factual question of actual malice is so important that the normal clearly erroneous standard could be set aside, allowing the appellate court to make an independent review. Under this analysis, in order to extend the category of exceptions to Rule 52(a) beyond actual malice, one would have to maintain that the issue on appeal was similar in nature and importance to the question of actual malice. Under *Bose*, it would have to be an issue concerning a rule which was developed primarily through the common law, which has been historically judged on a case by case basis, and which involved a constitutional value.

Language in *Bose*, however, supports carving out another exception to the strict application of the clearly erroneous standard to all findings of fact made by the trial court. In discussing the various standards of review, the Court in *Bose* explained that Rule 52(a) does not apply to appellate courts' review of questions of law, "including . . . a so-called mixed finding of law and fact." One commentator argued,
citing this language, that the Court characterized the question of actual malice as a mixed question of law and fact, and therefore, declared it to be beyond Rule 52(a). While this may explain the result in Bose, nowhere in the opinion does the Court explicitly say that the question of actual malice in a defamation case is a mixed question of law and fact. The Court notes that mixed questions are outside the scope of Rule 52(a) yet the holding only concluded, without clear explanation, that the issue of actual malice was outside the Rule. The Court may have reached this conclusion based on a belief that the policy considerations surrounding the first amendment were strong enough, in and of themselves, to warrant an independent review on the issue of actual malice. Justice Rehnquist, in his dissent in Bose, concluded that the majority was carving out an exception to the "clearly erroneous" rule by treating a "pure question of fact, as something more than a fact—a so-called 'constitutional fact'" and not merely ruling that the determination of "actual malice" is a mixed question of law and fact.

To summarize, the first exception to the application of the clearly erroneous standard of Rule 52(a) occurs when the appellate court determines the issue of whether the plaintiff satisfied the actual malice standard in defamation suits against a media defendant; under these circumstances, appellate courts may conduct an independent review. It is not clear that in so holding, the Supreme Court declared this issue to be one of fact and yet outside the rule because of important policy considerations, or if it held the issue to be one of a mixed question of law and fact, falling outside the scope of Rule 52(a). In


75. At one point the Court even stated that "the 'finding' of the District Court on the actual malice question could have been set aside under the clearly erroneous standard of review." 466 U.S. at 514.

76. Id. at 517.

77. In a footnote Justice Rehnquist stated:

[i]n attempting to justify independent appellate review of the "actual malice" determination, the majority draws an analogy to other cases which have attempted to define categories of unprotected speech, such as obscenity and child pornography cases . . . . To my mind, however, those cases more clearly involve 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.

Id. at 517 n.1 (citations omitted).
either case, clearly the issue of actual malice in defamation suits represents one of the exceptions to the strict application of the clearly erroneous rule. The reasoning in Bose has been extended to apply to other first amendment protections such as freedom of speech and freedom of religion. One court, however, explicitly rejected extending Bose to cases involving commercial speech. Thus far the reasoning in Bose does not appear to have been extended beyond the first amendment, although it is possible that a court will do so in the future.

B. The Mixed Question of Law and Fact Exception

The Bose opinion also concluded that the clearly erroneous standard does not apply to mixed questions of law and fact, thus representing a second exception to the strict application to the rule. Two years before Bose, the Court in Pullman-Standard v. Swint defined mixed questions of law and fact as “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or... whether the rule of law as applied to the established facts is or is not violated.” In the same opinion, the Court admitted the “vexing nature” of the distinction between law and fact.

Thus, the first step in determining whether or not the issue comes under this exception to the clearly erroneous standard is whether it

78. McMullen v. Carson, 754 F.2d 936, 938 (11th Cir. 1985) (In a free speech case, the appellate court may make independent review of findings of fact.).
79. Bender v. Williamsport Area School Dist., 741 F.2d 538, 542 n.3 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986) (In a free exercise case, the appellate court stated that Rule 52(a) does not apply to findings of fact and extended the reasoning in Bose to all cases under the first amendment.).
81. E.g., Maine v. Taylor, 477 U.S. 131, 145, 106 S. Ct. 2440, 2451, 91 L. Ed. 2d 110, 125 (1986) (clearly erroneous rule applied—“no broader review is authorized here simply because this is a constitutional case”)
84. Id. at 289 n.19.
85. Id. at 289; see also Baumgartner v. United States, 322 U.S. 665, 671, 64 S. Ct. 1240, 1243, 88 L. Ed. 1525, 1529 (1944); K.C. DAVIS, ADMINISTRATIVE LAW TEXT § 4.05, at 99 (3d ed. 1972) (characterizing the separation between “law” and “discretion” as a “zone” rather than a sharp line).
fits a recognized category of a mixed question of law and fact. Some clear examples of mixed questions include: (1) deciding in obscenity cases whether published material appeals to the "prurient interest";\textsuperscript{86} (2) the question in a "fighting words" case of whether the words are likely to provoke retaliation from the average person\textsuperscript{87}; or (3) whether in a prior restraint case the "rational inference from the import of the language" is that it is "likely to produce imminent disorder."\textsuperscript{88}

Professor Charles R. Calleros, in a 1983 article,\textsuperscript{89} defined a mixed question as a "finding that requires refinement or interpretation of a legal rule in the application of that rule to findings of fact."\textsuperscript{90} He helpfully described the problem as a continuum with questions of clear fact on one end and those of pure law on the other. According to Professor Calleros, those which should be classified as mixed questions of law and fact, falling outside of the scope of Rule 52(a), are those where the historical facts are relatively clear, and the law, "although 'undisputed' in its abstract formulation, is technical, uncertain, or bound up with sensitive matters of social or political policy."\textsuperscript{91} These are the types of issues for which an appellate court, with its responsibility of formulating new legal standards, is particularly suited.\textsuperscript{92}

Professor Calleros illustrated his approach by explaining two otherwise conflicting Supreme Court cases: \textit{Commissioner v. Duberstein}\textsuperscript{93} and \textit{Baumgartner v. United States}.\textsuperscript{94} In \textit{Baumgartner}, the Court decided that an appellate court may freely review a trial court's ruling that a naturalized citizen fraudulently procured his certificate of naturalization. This determination required interpretation of an uncertain legal standard, with important social and political ramifications. Thus, it qualified as an issue falling into the "mixed law and fact" section of Professor Calleros' continuum.\textsuperscript{95} In \textit{Duberstein}, the issue on review

\textsuperscript{86} Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 2614, 37 L. Ed. 2d 419, 430 (1973).
\textsuperscript{88} Hess v. Indiana, 414 U.S. 105, 109, 94 S. Ct. 326, 329, 38 L. Ed. 2d 303, 307 (1973) (per curiam).
\textsuperscript{89} Calleros, supra note 1.
\textsuperscript{90} Id. at 425.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960).
\textsuperscript{94} 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525 (1944).
\textsuperscript{95} Calleros, supra note 1, at 428.
concerned two transfers to taxpayers deemed taxable by the Internal Revenue Service as income or gifts. The Supreme Court held that this was an issue of fact, falling within the clearly erroneous standard. Professor Calleros explained the definition of "gift" for income tax purposes as a fairly certain and definite standard, with factual elements playing the major role in the final determination. Thus, this issue fell on the factual end of the continuum and was subject to the clearly erroneous standard of review.

These examples delineate one useful approach to determine whether the issue before the court is one of law, fact, or a mixed question. The scope of this article limits a fuller analysis of these distinctions. Once that determination is made, however, the next question is under what standard the issue will be reviewed. Questions of mixed law and fact fall outside of Rule 52(a) and can be reviewed independently by the appellate court. Thus, if one can successfully characterize the issue on appeal as a question of mixed law and fact, one could obtain a searching review.

C. Legislative Facts

Another possible exception to Rule 52(a)'s general applicability is legislative facts. Legislative facts are, in general, the type of facts usually relied upon by legislators in justifying new statutes. One circuit stated that a legislative fact question "is not a question specifically

96. Duberstein, 363 U.S. at 281.
97. Id. at 289-91.
98. Calleros, supra note 1, at 429.
99. For further discussion of the distinction between law and fact, see Pullman-Standard v. Swint, 456 U.S. at 286 n.16; K.C. Davis, Administrative Law Text §§ 4.05, at 99, 30.01-.02, at 545-47 (3d ed. 1972); Bohlen, Mixed Questions of Law and Fact, 72 U. Pa. L. Rev. 111 (1924); Childress, supra note 1, at 145-49, 152-54.
101. It is possible, of course, that appellate courts seeking to strengthen their reviewing power may stretch the definition of a "mixed question," thus distorting the distinction even further in order to get around the strict application of Rule 52(a). See Note, Appellate Review, supra note 37, at 527 (arguing that in the past courts have stretched issues to fit into questions of law to escape the clearly erroneous standard of review).
related to [a particular] case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning."  

The Supreme Court, in Lockhart v. McCree, recently discussed in passing the proper standard of review for judicial findings of legislative facts. In Lockhart, a habeas corpus petitioner challenged the removal of prospective jurors who stated that they could not under any circumstances impose the death penalty. The petitioner submitted fifteen social science studies in support of his contention that the so-called "Witherspoon excludable" principle violated his rights under the sixth and fourteenth amendments to an impartial jury selected from a cross-section of the community. The district and circuit courts held, apparently based in part on these social science data, that death qualification of the jury prior to the guilt phase of the bifurcated trial violated the "fair cross-section and the impartiality requirements" of the Constitution. The Supreme Court reversed. In a footnote, Justice Rehnquist's majority opinion, written for himself and four other justices, addressed the question of the standard of review of legislative facts such as the social science studies:

Because we do not ultimately base our decision today on the invalidity of the lower courts 'factual' findings, we need not decide the 'standard of review' issue. We are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here . . . . The difficulty with applying such a standard to 'legislative' facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by [the petitioner], has reached a conclusion contrary to that of the Eighth Circuit.

This dicta clearly indicates the direction in which the Court leans on the applicability of Rule 52(a) to legislative facts. It appears that

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104. Id. at 168-69.
106. Lockhart, 106 S. Ct. at 168.
107. Justice Blackmun only concurred in the result. Id. at 184.
108. Id. at 168-69 n.3 (citing Keeten v. Garrison, 742 F.2d 129, 133 n.7 (4th Cir. 1984)).
109. There appears to be a split in the lower courts on this issue. Compare Dunagin v. City of Oxford, 718 F.2d 738, 748 n.8 (5th Cir. 1983), cert. denied, 467 U.S.
this reasoning actually commands a substantial majority on the Court. The dissent in Lockhart, written by Justice Marshall and joined by Justices Brennan and Stevens, does not appear to contest Justice Rehnquist's observation that legislative facts may be independently reviewed on appeal. In fact, the dissent independently analyzed the data presented by the respondent.\textsuperscript{110} It did not take the position which would have led to the same result: that the trial court's analysis was not clearly erroneous. Therefore, it appears that at least six sitting justices support the position that the "clearly erroneous" standard of review should not apply to legislative facts.\textsuperscript{111}

Scholarly authority supports the Court's apparent view. Professors John Monahan and Laurens Walker, in a 1986 article completely unrelated to the Lockhart case,\textsuperscript{112} contended that when social science research and other legislative facts are used to establish a rule of law, the data should be treated as conclusions of law rather than findings of fact. Thus, appellate courts should independently review the evidence as an exercise of their institutional authority.\textsuperscript{113} The authors contend that these data are more analogous to "law" than to "fact" because they have "the same kind of future-oriented generality that case precedent possesses."\textsuperscript{114} It follows that the appellate court should be free to evaluate \textit{de novo} any social science evidence introduced at trial. "A court, for example, should have the discretion to find a study cited by a lower court insufficiently valid or generalizable, and, conversely, should be empowered to find methodological virtue in a piece of research dismissed by the court below."\textsuperscript{115}

\textsuperscript{1259} (1984) (finding review of social science "facts" clearly outside of the clearly erroneous standard) \textit{with} Ibn-Tamas v. United States, 407 A.2d 626, 639 n.25 (D.C. App. 1979) (finding an appellate courts' re-evaluation of social science studies that had been introduced at trial to be improper). The California Supreme Court in a relatively recent case not only reviewed the social science data submitted to the court as evidence on a Witherspoon issue, but went on to criticize the methodology employed in these studies. Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); \textit{see generally} Levine & Howe, \textit{The Penetration of Social Science into Legal Culture,} 7 \textit{Law \\& Policy} 173 (1985) (discussing Hovey's sophisticated approach to social science data).

\textsuperscript{110.} Lockhart, 106 S. Ct. at 187-88.

\textsuperscript{111} Justice Blackmun concurred in the result without writing, therefore it is not clear whether he accepts Justice Rehnquist's reading of the applicability of Rule 52(a) to legislative facts. The authors have not found evidence of the opinions of either Justice Scalia or Justice Kennedy on this matter.


\textsuperscript{113.} \textit{Id.} at 478.

\textsuperscript{114.} \textit{Id.} at 491.

\textsuperscript{115.} \textit{Id.} at 514.
While a conflict appears in the lower courts regarding the appropriate standard of review for "legislative facts," the Supreme Court, albeit in dicta, has indicated that it would treat such data as "law," free from the constraints of the clearly erroneous standard of review.\textsuperscript{116} Professors Monahan and Walker, eminent legal scholars, provide important support for this position.

D. Undisputed Facts

Finally, it should be noted that Justice Stevens dissented in \textit{Icicle Seafoods, Inc. v. Worthington},\textsuperscript{117} contending that the appellate court should be able to make a finding of undisputed facts not made at trial so as to promote the "just, speedy, and inexpensive determination" of civil actions which Rule 52(a) is intended to secure . . . [while at the same time, allowing] appellate courts to give guidance to trial courts by illustrating the proper application of a new legal standard in a particular case."\textsuperscript{118} Thus, Justice Stevens maintained that an appellate court may, instead of remanding to the trial court, make a finding of undisputed facts and apply them to the law.

While Justice Stevens cited no authority, several courts adopted this position.\textsuperscript{119} These courts hold that if the "factual" finding made simply requires applying law to an undisputed fact, then this is the job of the appellate courts and Rule 52(a) does not apply. However, if the court must make a factual \textit{inference} from an undisputed fact, then this clearly is within the purview of the trial court subject to the "clearly erroneous" standard of review.\textsuperscript{120} This position may find

\textsuperscript{116} The Supreme Court recently passed up an opportunity to clarify this matter. In \textit{Wells v. Ortho Pharmaceutical Corp.}, 788 F.2d 741 (11th Cir.), \textit{cert. denied}, \textit{788} F.2d \textit{741} (11th Cir.), \textit{cert. denied}, \textit{107} S. Ct. \textit{437}, 93 L. Ed. 2d \textit{386} (1986), the defendant in a products liability case contended that the trial court based a finding of causation on scientifically unreliable studies that the plaintiff's expert presented. Rather than decide what standard of review to apply to a finding of fact based on scientific studies, the Eleventh Circuit characterized the problem as giving deference to the trial court in assessing the credibility of the experts presented by both sides. \textit{Id. at 745}.


\textsuperscript{118} \textit{Id. at 716}.


\textsuperscript{120} \textit{Calleros, supra}, note \textit{1}, at \textit{413}.
support in the fact that when Rule 52(a) was amended, no mention was made of undisputed facts.\textsuperscript{121} Therefore, one may conclude that the amendment was not intended to prevent appellate courts from applying law to undisputed facts on appeal.

One student commentator warns of the hazards of this approach. It is a fine line between applying a legal principle to an undisputed fact and drawing a factual inference from an undisputed fact.

The danger . . . arises from the fact that, since the trial court must of necessity use legal\textit{ reasoning} in drawing its factual inferences, this rule can also be applied to those inferences which are traditionally findings of fact subject to the clearly erroneous rule . . . . [This] would allow the appellate court to find the important facts without regard for the trial judge's findings and hence destroy the proper division of responsibility between the two courts. Moreover, it would completely defeat the purpose of the rule while ostensibly complying with it.\textsuperscript{122}

Thus, the exception has the potential to swallow the rule and allow appellate courts to make factual inferences freely while ostensibly just applying law to undisputed facts.

Although it appears that there is some support in the circuits for Justice Stevens' position, there is little support to be found in Supreme Court opinions. In\textit{ Pullman-Standard v. Swint},\textsuperscript{123} the Supreme Court held that if the appellate court sets aside a finding of fact due to an error of law, it must remand the issue to the district court to apply the correct legal principle to the fact. The appellate court is not free to perform this task itself.\textsuperscript{124} Interestingly, Justice Stevens concurred in this portion of the opinion.\textsuperscript{125}

\textit{Pullman-Standard} can be distinguished from\textit{ Icicle Seafoods} in that the factual finding in the former was not undisputed (as in the latter)

\textsuperscript{121} "Findings of fact, whether based on \textit{oral or documentary evidence} shall not be set aside unless clearly erroneous . . . ." Rule 52(a) (emphasis added). There is one reference to undisputed facts in the advisory notes. In describing the positions of the various circuits on the application of Rule 52(a) to documentary findings, the Notes of Advisory Committee state: "[a] third group has adopted the view that the 'clearly erroneous' rule applies in all nonjury cases even when findings are based solely on documentary evidence or on \textit{inferences from undisputed facts}." (emphasis added). The amended rules make no reference to the express language.

\textsuperscript{122} Note, \textit{Appellate Review}, \textit{supra} note 37, at 528.

\textsuperscript{123} 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982).

\textsuperscript{124} \textit{Id.} at 293. The Court acted despite Justice Marshall's dissent, which noted that the lower court did apply the clearly erroneous rule and found that the district court's conclusions were clearly erroneous. \textit{Id.} at 295.

\textsuperscript{125} \textit{Id.}
but was a finding of ultimate fact. In *Icicle Seafoods*, because the finding was undisputed, there is a stronger argument that remanding would be a waste of time, as the fact finding process would be purely ministerial. Allowing the appellate court to make such a finding would not usurp the fact finding responsibility of the trial court and would save some time. While this may be a valid distinction which supports the position that appellate courts should be able to make findings on undisputed facts, Justice Stevens did not attempt to distinguish *Pullman-Standard*, and was in sole dissent in *Icicle Seafoods*. Thus, this may be an exception available at some future date (or perhaps where it has been adopted) but it probably would not survive the direct scrutiny of the present Supreme Court.

V. Conclusion

In summary, it appears that the 1985 amendment to Rule 52(a) clarifies that the clearly erroneous standard of review applies to all findings of fact regardless of whether they are based on documentary or oral evidence. The appellate courts must now give deference to the trial courts' findings of all facts and may set aside such findings only if, in reviewing the evidence on the entire record, the court "is left with the definite and firm conviction that a mistake has been made." Clearly, Rule 52(a) still does not apply to conclusions of law, as it is the unquestioned function of the appellate court to correct legal errors. There are several other instances in which Rule 52(a) will not apply. In *Bose Corp. v. Consumers Union of the United States, Inc.*, the Supreme Court clearly held the finding of actual malice in a defamation case fully reviewable by the court of appeals. It is not clear from the *Bose* opinion, however, if this is true because special policy concerns warrant an exception to the clearly erroneous rule, or if in defamation suits the actual malice issue is simply a mixed question of law and fact, which is a recognized general exception to the rule. Of course identifying the issue as one of mixed law and

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126. *Id.*
128. United States v. United States Gypsum Co., 333 U.S. 364, 397, 68 S. Ct. 525, 543, 92 L. Ed. 746, 766-67 (1947); *see also* Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504, 1511, 84 L. Ed. 518, 527 (1985) (if the evidence will plausibly support two or more conclusions, the trial court's choice cannot be clearly erroneous).
fact is no small task. If the issue is one where the legal theory is novel and the facts are fairly clear, the issue will fall on the "law" side of the fact/law continuum and will be reviewable by the appellate court. The Supreme Court has indicated that it probably will treat "legislative facts," such as social science data, as issues of law, thus creating another exception outside the reach of Rule 52(a). Finally, although Justice Stevens argues to the contrary in his dissent in *Icicle Seafoods, Inc. v. Worthington*, the appellate court probably cannot apply law to findings of undisputed facts, but instead must remand to the trial court to perform that task.

Thus, it appears that with the exception of the actual malice finding in first amendment defamation cases (and perhaps other constitutional areas in the future), issues of mixed law and fact, and possibly findings regarding legislative facts, appellate courts in the federal system are consigned to accepting the factual findings of the lower courts whether based on oral or documentary evidence, unless found to be clearly erroneous under the traditional formula. The appellate courts may be tempted to apply the exceptions to a greater degree than has been true in the past, or even to create new exceptions, as they adjust to life under the amended version of Rule 52(a).

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132. The Second Circuit, a "Frank Rule" follower, recently indicated that it would change its position on the deference accorded trial court findings of fact based on documentary evidence. After the proposed change in the amendment was publicized but before its passage, the Second Circuit in Nissho-Iwai Co. v. M/T Stolt Lion, 719 F.2d 34 (2d Cir. 1983), citing the proposed amendment to Rule 52(a), called into question the circuit's practice on granting *de novo* review to findings based on documentary evidence. The panel stated that in light of the proposed amendment, the circuit court should, in the future, defer to the district court's findings of fact. *Id.* at 39.