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THE SHRINKING ROLE OF THE JURY IN CONSTITUTIONAL LITIGATION

JOHN M. BAKER†

INTRODUCTION

The civil jury is an institution which is guaranteed by the Constitution, but which is distrusted when given the task of deciding constitutional cases. Much of this distrust results from a fundamental incompatibility between the functions of constitutional rights and juries. Constitutional rights generally serve countermajoritarian functions, including the protection of political minorities from certain oppressive tendencies and prejudices of popularly elected governments. The jury, by contrast, is accepted and sometimes defended as a means of injecting populist norms and standards into the legal process.

This tension makes it especially important to examine the control which courts exercise over juries in constitutional cases. This control may be exercised as judges withhold cases or issues from the jury prior to trial, as courts frame the questions left to juries in jury instructions, and as courts review a

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1. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). The United States Supreme Court has refused to incorporate this provision into the fourteenth amendment due process clause and thereby make it applicable to the states. See Walker v. Sanvinet, 92 U.S. 90 (1896). A section 1983 action seeking damages is considered a "suit at common law" within the meaning of this amendment. See, e.g., Drone v. Hutto, 565 F.2d 543, 544 (8th Cir. 1977).


3. See Gregg v. Georgia, 428 U.S. 153, 181 (1976) (juries are "a significant and reliable objective index of contemporary values"); Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) ("one of the most important functions any jury can perform [in imposing criminal liability] is to maintain a link between contemporary community values and the penal system").


jury's verdict in post-trial motions and appeals. The greater the control, the smaller the risk that jury majorities will stymie the countermajoritarian purposes of constitutional rights.

The purpose of this article is to describe two developments which have reduced the role juries play in civil constitutional cases. Neither of these developments result from a direct attempt to counter the majoritarian tendencies of juries. Instead, they are rooted in the United States Supreme Court's inability to reduce constitutional law to coherent rules which officials can be expected to understand and juries can be expected to apply. First, the Supreme Court has expanded the immunity of governmental officials from the burdens of trial in situations in which their conduct did not violate a clearly established constitutional right. Because such immunity is properly enforceable by the court prior to trial, fewer constitutional cases reach the jury. Second, the Supreme Court has re-evaluated the distinction between questions of law and questions of fact in constitutional cases. Where a constitutional standard can be given its proper meaning only when properly applied, the Supreme Court has indicated that a jury's application of such standards to undisputed facts can be second-guessed by judges.

The vast majority of lawsuits raising constitutional questions are filed pursuant to 42 U.S.C. § 1983. Accordingly, this article will focus upon section 1983 litigation, while recognizing that constitutional litigation in other contexts has influenced the manner in which courts perceive the jury's role in section 1983 cases.

9. Section 1983 of title 42 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party in an action at law, suit in equity or other proper proceeding for redress.
This provision originated from section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and was re-enacted as section 1 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.
10. The doctrine of independent review of constitutional facts predates the Supreme Court's rediscovery of section 1983 in Monroe v. Pape, 365 U.S. 167 (1961). Thus, many of the most important decisions involving the jury's role in con-
I. QUALIFIED IMMUNITY: FROM QUESTION OF FACT TO QUESTION OF LAW

A common issue in most constitutional cases is whether individual government officials sued in their personal capacities are immune from liability. In 1982 the Supreme Court reassessed the qualified immunity given to executive officials, and found that immunity should protect government officials from insubstantial lawsuits and not simply from liability. It therefore modified its previous standard, which had included an inherent jury question, in order to provide a test which it hoped could be applied prior to trial. As subsequent cases have demonstrated, qualified immunity is now generally considered a question of law, which usually can be resolved without any assistance (or interference) from a jury.

On its face, section 1983 does not provide that any government officials will be immune from liability. However, the Supreme Court has recognized immunities from section 1983 liability which have no source in the statute's text or legislative history. The Court's original justification for such immuni-
ties rested upon the questionable premise that the Reconstruction Congresses which created section 1983 must have intended to permit such immunities, at least to the extent they were available to defendants under the common law of that era.\textsuperscript{14}

The Supreme Court has occasionally strayed from that original justification, and has crafted certain immunities in order to advance policy objectives which the Reconstruction Congresses and the nineteenth-century common-law courts may never have actually considered.\textsuperscript{15} The qualified immunity given to executive officials has not been shaped by reference to nineteenth-century common law, but only by reference to twentieth-century concerns.

Executive immunity is "qualified" in the sense that its availability depends upon certain special circumstances which can exist at one moment and not the next. Between the Supreme Court's 1975 decision in \textit{Wood v. Strickland}\textsuperscript{16} and its 1982 decision in \textit{Harlow v. Fitzgerald},\textsuperscript{17} two circumstances were necessary before executive officials performing discretionary functions would be immune. Such officials were required to demonstrate that they acted in subjective good faith (without a "malicious intention") and were further required to show that the right alleged to have been violated was not a "clearly established" right at the time of the alleged violation.\textsuperscript{18} Lower courts soon recognized that the subjective prong of this test involved a question of fact.\textsuperscript{19} As with many subjective issues, plaintiffs could easily controvert the official's good faith and the issue was seldom resolved prior to trial. Thus, qualified

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\textsuperscript{14} Tenney, 341 U.S. at 376. For a sophisticated critique of the Court's application of the doctrine, see generally Matasar, \textit{Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis}, 40 ARK. L. REV. 741 (1987).
\textsuperscript{15} 457 U.S. at 815-20; see also Anderson v. Creighton, 483 U.S. 635, 645 (1987) (admitting that in \textit{Harlow}, the Supreme Court had "completely reformulated qualified immunity along principles not at all embodied in the common law.").
\textsuperscript{16} 420 U.S. 308 (1975).
\textsuperscript{17} 457 U.S. 800 (1982).
\textsuperscript{18} See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975) (in context of school discipline action, school board member not liable under section 1983 unless member "has acted with an impermissible motivation or with ... disregard of the student's clearly established constitutional rights").
\textsuperscript{19} See, e.g., Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978).
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immunity rarely protected government officials from the burdens of trial.

In *Harlow v. Fitzgerald*, the Supreme Court found that this two-part approach permitted too many “insubstantial claims” to distract public officials. Accordingly, it eliminated the subjective prong altogether. A key premise for this decision was the Court’s belief that qualified immunity should not simply protect government officials from ultimate liability, but should protect them from unwarranted trials, and if possible, discovery prior to such trials. Under the *Harlow* standard, “government officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

The Supreme Court hoped that the modified immunity standard could be applied prior to trial, on a motion to dismiss or a motion for summary judgment. When a claim is legally “insubstantial” and not simply factually insubstantial, the *Harlow* standard has generally worked as intended. It has permitted courts to dismiss novel claims against government officials prior to trial which previously would have gone to trial because the plaintiff would have controverted the defendant’s subjective good faith.

However, the *Harlow* standard has been less successful in protecting government officials from litigating factually insubstantial claims. The Federal Rules of Civil Procedure have been construed to require courts considering motions to dismiss and motions for summary judgment to assume the plaintiff can prove all pleaded or properly controverted facts. The *Harlow* Court simply directed courts to adopt a “firm applica-

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21. *Id.*
22. *Id.* at 818.
25. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”); *Union Nat’l Bank v. Federal Nat’l Mortgage Ass’n*, 860 F.2d 847, 854 (8th Cir. 1988) (Summary judgment is inappropriate where the evidence presents “conflicting rationally possible conclusions.”).
tion of the Federal Rules of Civil Procedure." A right may be clearly established in the context pled or properly controverted by the plaintiff, but may be novel in the context which is ultimately established at trial. In such cases a court cannot remain faithful to both the expectations of the Harlow Court and the Federal Rules.

In 1987 the Supreme Court reinterpreted the Harlow standard in a manner which made it more difficult for section 1983 plaintiffs to survive a pretrial motion. In Creighton v. City of St. Paul, plaintiffs alleged they were the victims of an unreasonable search after local police and at least one FBI agent entered and searched their home without a warrant in the mistaken belief a fugitive might be found there. In U.S. district court, summary judgment was granted, resulting in dismissal of plaintiffs' fourth amendment action against the FBI agent. The court ruled that the agent was entitled to qualified immunity under Harlow because the warrantless search of the home was reasonable.

The Eighth Circuit reversed, holding that the issue of the lawfulness of the search could not be properly decided on summary judgment. The court also held that the agent was not entitled to summary judgment on qualified immunity grounds. The court noted that the fourth amendment rights at issue (i.e., the validity of warrantless searches where elements of probable cause and exigent circumstances are present) were clearly established rights. The Eighth Circuit refused to con-
sider whether those rights had or had not been respected in the circumstances with which the officer was confronted at the time. The court proclaimed that these were questions properly to be decided by the jury on remand.\[32\]

In reversing the Eighth Circuit, the Supreme Court recognized that many constitutional rights are meaningful only in a factual context. Writing for the Court in Anderson v. Creighton, Justice Scalia noted that every constitutional right is clearly established at a very high level of generality.\[33\] The Justice then added:

But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiff would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.\[34\]

Justice Scalia clarified the proper interpretation of the term "clearly established," holding that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."\[35\]

For government officials, Anderson provides both a blessing and a curse. The decision precludes plaintiffs from using artful pleading to deprive government officials of their immunity. However, by forcing courts to consider immunity in a factual context, the Anderson decision redirects trial courts to questions of fact not necessarily resolvable prior to trial.
The Eighth Circuit has developed a two-step approach to applying the Anderson test. First, the trial court must determine whether the law prohibiting the alleged conduct was clearly established at the time it occurred. If not, the official is immune, and no further analysis is necessary.\(^{36}\) According to the Eighth Circuit, for the second step, a trial court must determine whether the conduct, as alleged by the plaintiff, constituted actions that a reasonable officer could have believed lawful. If so, the defendant is entitled to dismissal prior to discovery. If not, and the parties disagree as to what actions the police officers took, then discovery may be necessary before the defendant’s motion on qualified immunity can be resolved.\(^{37}\)

In Ginter v. Stallcup, the Eighth Circuit emphasized that discovery should occur on the issue of qualified immunity only if the parties disagree as to what actions the law enforcement officers took and if the plaintiff can present some evidence to support her allegations. Mere allegations, without more, do not create a question of fact as to qualified immunity.\(^{38}\)

Thus, the court can resolve the question of immunity prior to discovery and trial unless the parties present conflicting evidence on a fact upon which a violation of a clearly established constitutional right depends.\(^{39}\)

The United States Court of Appeals for the District of Columbia has taken an additional step designed to permit sum-

\(^{36}\) See Ginter v. Stallcup, 869 F.2d 384, 387 (8th Cir. 1989).

\(^{37}\) Id. at 387-88 (citation omitted) (emphasis added). The Ninth Circuit Court of Appeals, among others, has ruled that the second step of analysis constitutes a question for the jury. See Brady v. Gebbie, 859 F.2d 1543, 1556 (9th Cir. 1988), cert. denied, 109 S. Ct. 1577 (1989) (“Whether a reasonable official would know that she is violating that clearly established law is a question for the jury.”). See also Melear v. Spears, 862 F.2d 1177, 1184 (5th Cir. 1989); Brisk v. City of Miami Beach, 726 F. Supp. 1305, 1309-15 (S.D. Fla. 1989). Instead of submitting special interrogatories on disputed details material to the court’s resolution of this question, these courts would submit the ultimate issue of immunity to the jury and use “appropriate instructions” to guard against confusion. See Brisk at 1314-15. Such an approach would make it easier for section 1983 plaintiffs to frustrate an early resolution of the immunity question. A plaintiff could use vague pleading to survive the first step of the analysis, and survive the second step by showing that reasonable jurors could differ about what a reasonable official would know.

\(^{38}\) Ginter v. Stallcup, 869 F.2d at 388 (emphasis added).

\(^{39}\) See, e.g., Poe v. Haydon, 853 F.2d 418, 426 (6th Cir. 1988) (“[S]ummary judgment would not be appropriate if there is a factual dispute . . . involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights.”).
primary judgment of certain factually insubstantial lawsuits against officials. In *Martin v. D.C. Metropolitan Police Dep't.*, a plaintiff alleged that an otherwise constitutional arrest was unconstitutional because it was motivated by a desire to deter him from vindicating his rights. The court held that while the issue of subjective motivation was, in some contexts, still relevant after *Harlow*, direct evidence of unconstitutional motive would be necessary if the case was to proceed to trial. Otherwise, the purposes of qualified immunity would be frustrated.

The “direct evidence” requirement is unlikely to catch on without the Supreme Court’s endorsement. That Court has acknowledged the difficulties of proving that governmental conduct was motivated by a discriminatory intent. In an era in which public admissions of racism and sexism are rare, section 1983 plaintiffs frequently have little choice but to rely upon inferences from circumstantial evidence to prove wrongful motivation. Under *Martin*, however, such cases would be deemed too “insubstantial” to proceed to trial. It is worth recalling that one of section 1983’s original purposes was to provide an effective remedy for victims of racial discrimination by state and local officials. It would be ironic indeed if one of the solutions federal courts adopt to prevent abuses of section 1983 frustrates that purpose, while permitting section 1983 claims the Reconstruction Congresses never conceived of to proceed to trial.

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40. 812 F.2d 1425, 1427 (D.C. Cir. 1987). The plaintiff was allegedly assaulted by law enforcement officers during a public demonstration. Subsequent to the assault, the plaintiff was arrested and charged with certain crimes. The plaintiff alleged that the purpose behind these charges was to deter him from asserting any legal rights he might have with respect to the assault. See id.

41. See id. at 1431-32.

42. *Id. at 1435. See also Poe, 853 F.2d at 432* (adopting *Martin’s “direct evidence” requirement in section 1983 gender discrimination action*).

43. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”); Washington v. Davis, 426 U.S. 229, 242 (1976) (“Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”).
II. THE INCREASING DOMINANCE OF QUESTIONS OF LAW IN CONSTITUTIONAL ANALYSIS

In the most simple case, the jury's role is easily understood. The jury is permitted to render a general verdict as long as the evidence creates a genuine issue of material fact. The jury's general verdict will ordinarily stand as long as the court provided the jury with a correct statement of governing law in its instruction, and any reasonable trier of fact could have reached the same verdict.

Two complications arise in constitutional litigation with some frequency. These complications make it difficult to use general verdicts and narrow standards of review without compromising the values protected by the Constitution.

The first complication arises from the inherent conflict between constitutional values and jury tendencies. Constitutional rights are commonly countermajoritarian; they exist in order to limit the power of popularly elected government. Because jurors are usually selected from the same pool of voters which elect state and local officials, a danger exists that they will abuse their discretion to see that the government's ends are served.

The Supreme Court is reluctant to presume that any part of the judicial system is prone to bias. However, on occasion the Court has been sensitive to this tension. In Monitor Patriot v. Roy, the Supreme Court restricted the jury's authority in a libel case to determine the relevance of a defamatory statement to the plaintiff's status as a public figure. The Court explained that the jury's application of such a standard "is unlikely to be

44. In the absence of a genuine issue of material fact, motions may be made for summary judgment or directed verdict. See Fed. R. Civ. P. 56, 50(a).
46. See sources cited supra note 2.
47. See Lawton v. Nightingale, 345 F. Supp. 683, 684 (N.D. Ohio 1972) (Permitting jury trial in section 1983 case would produce "the very evil the statute is designed to prevent... the person seeking to vindicate an unpopular right would never succeed before a jury drawn from a populace mainly opposed to his views."). As a basis for denying a trial by jury, this rationale did not survive the Supreme Court's decision in Curtis v. Loether, 415 U.S. 189 (1974). See Hildebrand v. Board of Trustees of Mich. State Univ., 607 F.2d 705, 707 (6th Cir. 1979).
48. See McCleskey v. Kemp, 481 U.S. 279, 297 (1987) ("exceptionally clear proof" is necessary before the court will infer that a jury abused its discretion in treating murderers of white victims more harshly than murderers of black victims at the death penalty stage).
neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail."

Similarly, jurors' local interests may conflict with national interests protected by the Constitution. A state which regulates commerce in order to protect local industries and businesses may violate the dormant commerce clause if the protections afforded by the regulation come at the expense of out-of-state industry. A jury drawn from the population of the regulating state, and empaneled to decide an underlying fact issue in commerce clause litigation, may have no interest in frustrating such protectionism.

The second complication arises from the impossibility of adequately capturing the full meaning of many constitutional principles in jury instructions. On rare occasions, the Supreme Court reduces its constitutional analysis to a coherent rule which a jury can be trusted to apply. With increasing frequency, however, the Court has been unable or unwilling to settle on a rule. Instead, it has chosen to adopt a case-by-case approach or a mode of analysis which is meaningful only in its application to a specific context. In theory, it may be possible to quote the Court's test in an instruction and hope that the jury's application of it will reflect the interests and values which the Supreme Court had in mind. In practice, however, something will be lost in the translation.

50. Id. at 277 (citation omitted).
51. When a state enacts regulations governing an aspect of commerce, those regulations may conflict with Congress' power under the commerce clause in article I, section 8, clause 3 of the U.S. Constitution. This conflict may occur even if Congress has enacted no regulations of its own in the particular area of commerce. The "dormant commerce clause" is a reference to a court's interpretation of congressional "silence" in an area of commerce. For a discussion, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 8.1-8.5 (3d ed. 1986).
For decades, the Supreme Court's approach to the law-fact distinction in constitutional cases has been somewhat inconsistent, and certainly incomplete. On several occasions, the Court simply treated factual findings in constitutional cases in the same manner as factual findings in non-constitutional cases.\(^{55}\) However, in other decisions, the Supreme Court has abandoned its usual deference to factual findings (usually labeled as "mixed questions of law and fact") in reliance on a purported obligation to conduct an "independent examination of the whole record"\(^{56}\) in order to ensure that the Constitution has been properly applied.\(^{57}\)

In 1984 in *Bose Corp. v. Consumers Union of United States, Inc.*,\(^{58}\) the Supreme Court attempted to synthesize these two lines of cases into a coherent doctrine. In *Bose*, a manufacturer of unique stereo loudspeakers brought a product disparagement suit against a leading consumer magazine which had given its product a mixed review. On appeal from a trial court's judgment in favor of the plaintiff, a critical question was whether the magazine's reviewer acted with actual malice when he wrote that the "individual instruments heard through the Bose system . . . tended to wander about the room."\(^{59}\) The reviewer had admitted at trial that the instruments merely wandered along the wall.\(^{60}\) The First Circuit did not defer to the trial court's finding of actual malice.\(^{61}\) Instead, it performed a "de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof."\(^{62}\) Unable to find clear and convincing evidence that the magazine published the statement with knowledge that


\(^{60}\) Id. at 1276–77.

\(^{61}\) See Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 195 (1st Cir. 1982).

\(^{62}\) Id.
it was false or with reckless disregard of whether it was false or not, the First Circuit reversed the judgment.

The plaintiff understandably could complain that the court of appeals had invaded the factfinder's province. The First Circuit had second-guessed a finding about what the reviewer actually knew. The factfinder's determination of actual knowledge was based in large part upon an evaluation of the demeanor of the reviewer on the witness stand. The court of appeals' scrutiny seemed inconsistent with the Supreme Court's prior description of the question of actual malice. In Herbert v. Lando, the question of actual malice had been described by the Court as a question of "ultimate fact." If the finding in Bose could be subjected to de novo review, would any finding of fact in a constitutional case be safe?

By six-to-three vote, the Supreme Court affirmed the First Circuit's decision. Writing for the majority, Justice Stevens acknowledged that "two well-settled and respected rules of law point in opposite directions." On the one hand, Federal Rule of Civil Procedure 52(a) mandated a "clearly erroneous" standard of review for findings of fact, and "it surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'" However, the rule of independent review, which the Supreme Court itself had invoked repeatedly in first amendment cases, could not be ignored.

Justice Stevens avoided the obstacle of Rule 52(a) in a familiar manner, by implicitly framing the Court's task as an application of the fact-law distinction. His analysis focused upon three characteristics of the "actual malice" requirement which made independent review justifiable from a historical and constitutional perspective. First, the "actual malice" requirement was derived from common-law standards which allow the judge the maximum of power in passing judgment in a particu-
lar case. 70 Second, "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." 71 Justice Stevens added that the Supreme Court's "role in marking out the limits of the [actual malice] standard through the process of case-by-case adjudication is of special importance." 72 Third, "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." 73

In explaining these factors, Justice Stevens left no doubt that his analysis should apply with equal force to jury verdicts. 74 Indeed, the Supreme Court had already exercised independent review of evidence supporting jury verdicts in cases such as Fiske v. Kansas, 75 New York Times v. Sullivan, 76 and Jenkins v. Georgia. 77 Moreover, two of the judges dissenting in Bose viewed jury verdicts with more suspicion than the findings of a judge. 78

On its face, the holding in Bose and its reasoning were limited to first amendment cases. However, the doctrine of independent review had been applied outside of the first amendment long before Bose, 79 and it was not apparent why Justice Stevens's broad justification of independent review should be limited to a single constitutional amendment. 80 Moreover, the Court's extension of independent review to a state-of-mind issue raised concerns that verdicts on similar issues—such as discriminatory intent—would now be subject to de novo review.

70. See id. at 502.
71. Id. at 502.
72. Id. at 503.
73. Id. at 502.
74. Id. at 501 ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function can be performed in the particular case by a jury or by a trial judge.").
75. 274 U.S. 380, 385 (1927) (involving a criminal conviction for union activity).
76. 376 U.S. 254, 284–86 (1964) (involving a civil defamation action).
77. 418 U.S. 153, 159–61 (1974) (involving a jury verdict that an R-rated movie was obscene).
78. See Bose, 466 U.S. at 518 n.2 (Rehnquist & O'Connor, JJ., dissenting) ("The factfinding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the factfinding process engaged in by a trial judge who makes written findings as here.").
In three subsequent decisions, the Supreme Court has refused to extend its approach in *Bose* to other treatments of constitutional facts. In *Miller v. Fenton*, the Supreme Court was asked to reconsider its previous decisions holding that the voluntariness of a confession is a question of law requiring independent federal determination in habeas corpus cases. The Court engaged in a re-examination of the fact-law distinction, adopting a central tenet of *Bose* while acknowledging limitations on its scope. Writing for the Court, Justice O'Connor (a dissenter in *Bose*) embraced a key precept of *Bose*:

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 law.  

However, Justice O'Connor was equally respectful of the value of deference where "the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor." Accordingly, she left no doubt that answers to "subsidiary questions such as the length and circumstances of the interrogation," are entitled to a presumption of correctness on review.

The Court, relying on three propositions, treated the ultimate issue of voluntariness as a question of law. First, the Court reasoned that voluntariness analysis required an evaluation of whether the techniques used to extract the confession were compatible with due process values. Second, the Court noted that "assessments of credibility and demeanor [were] not crucial" to the resolution of the voluntariness issue. Finally, "independent federal review has traditionally played an important parallel role in protecting the rights at stake."

In *Maine v. Taylor*, a dormant commerce clause case, the Supreme Court reversed a decision of the First Circuit, which

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82. *Id.* at 114 (citing *Bose*, 466 U.S. at 503).
83. *Id.*
84. *Id.* at 117.
85. *Id.* at 116.
86. *Id.* at 116–17.
87. *Id.* at 117–18.
had conducted an independent review of the trial court's finding that a less discriminatory alternative to the state regulation was not available. With only a passing reference to Bose, the Supreme Court stated in broad terms that "appellate courts are not to decide factual questions de novo, reversing any findings they would have made differently." Because the Court viewed the availability of alternative means as an empirical question, it had little difficulty explaining its reversal.

More recently, the Supreme Court considered the proper application of Bose following a jury trial, where proof of actual malice was heavily dependent upon credibility determinations. In Harte-Hanks Communications, Inc. v. Connaughton, the Court preserved the trier of fact's discretion to evaluate the credibility of witnesses and resolve subsidiary factual disputes. Justice Stevens, again writing for the majority, denied that the Bose decision authorized an invasion of the trier of fact's province. While the jury's credibility determinations would be entitled to deference, the ultimate finding of actual malice remained subject to independent review.

Unfortunately, however, the case was not submitted to the jury in a matter designed to facilitate this mixture of deference and independent review. The jury was asked to reach a verdict on the ultimate issue of actual malice, and was not asked to answer any special interrogatories concerning any of the "subsidiary facts" or the credibility of testimony. However, the Supreme Court deduced from the jury's response and the undisputed evidence that the jury must have rejected the only testimony controverting actual malice.

These decisions reflect a division of labor in constitutional cases which is easy to defend but difficult to apply. The reviewing court must now scrutinize the record closely enough to ensure that the trier of fact has given the proper meaning to the constitutional standards involved. In so doing, however, it must not judge the credibility of witnesses and cannot second-

89. Id.
90. Id.
92. Id. at 2696 n.35.
93. Id. at 2695.
94. Id. at 2682 n.2.
95. Id. at 2697.
96. Bose, 466 U.S. at 505.
guess findings of so-called subsidiary facts.97

Under a careful application of Bose, the role of the jury will be limited to deciding "what happened,"98 if a genuine dispute exists about what happened and a resolution of that dispute is material to the outcome of the case. For example, in a case involving the presence of probable cause for an arrest, a trial may be necessary to decide which witnesses' description of circumstances leading to the arrest is accurate. However, under Bose, the evaluation of those circumstances to determine whether they provided the officer with a sufficient justification for the arrest should not be left to the jury. Such an evaluation is the process through which the constitutional standard of probable cause is given meaning.99

The Supreme Court and the Eighth Circuit appear to have adopted this approach. In New Jersey v. T.L.O., the Supreme Court reviewed a state court's ruling that a teacher lacked reasonable grounds to search a student's purse for cigarettes.100 The Supreme Court recognized that the "reasonable grounds" standard applied by the state court was not substantially different from the proper standard.101 However, its own review of the facts surrounding the search led the Supreme Court to conclude that the search was reasonable.102

In Warren v. City of Lincoln, the Eighth Circuit, sitting en banc, reviewed a section 1983 claim brought by an attempted burglary suspect against three police officers and the municipality which employed them.103 At trial, two of the officers testified that they believed they lacked probable cause to arrest the plaintiff for attempted burglary, but persuaded the jury to find in their favor nevertheless.104 The majority of the Eighth Circuit's judges concluded that probable cause not only existed

98. Cf. Monaghan, supra note 80, at 235.
99. See Illinois v. Gates, 462 U.S. 213 (1982) (in criminal investigation context, magistrate applies constitutional standards to totality of the circumstances in order to determine existence of probable cause necessary for issuance of search warrant). See also Watts v. Indiana, 338 U.S. 49, 51 (1949) ([T]he term "'issue of fact'... does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights.'").
101. Id. at 343.
102. Id.
103. Warren v. City of Lincoln, 864 F.2d 1436, 1437 (8th Cir. 1989) (en banc).
104. Id. at 1439.
but existed as a matter of law. Rejecting the arguments of four dissenting judges who insisted that a jury must decide whether probable cause existed, the majority reviewed the uncontroverted facts which were within the officers’ knowledge, compared those facts to other cases in which probable cause existed, and affirmed the judgment. 105

In an excessive force case, a similar application of Bose would limit the jury’s province to a resolution of any dispute concerning the circumstances in which force was used. An evaluation of whether the force used was too much force under those circumstances arguably should be decided by the court. 106 However, this approach is hardly popular. Many courts continue to permit juries to decide whether force was constitutionally excessive, and reverse judges who interfere with that decision. 107

In other section 1983 cases, there are relatively few material underlying facts. Where the constitutionality of a law or regulation depends upon the adequacy of the government’s justification, for example, the credibility of witnesses is largely beside the point. 108 Thus, in cases involving the constitutionality of local sign ordinances, reviewing courts have shown no deference to the trial court’s conclusion that the ordinance directly advances the city’s interest, and is not more extensive than necessary. 109

In the area of prisoners’ rights, the Supreme Court has now required courts to focus almost exclusively on the government’s justification for its conduct, without reaching the empirical question of whether a less restrictive means was in fact

105. Id. at 1440–42.

106. As Professor Nahmod recently noted, “[o]ne result of this movement toward ‘objectiveness’ is that with respect to excessive force and qualified immunity issues, the role of the jury has been considerably diminished, if not altogether eliminated.” S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983, § 3.04, p.80 (2d ed. Supp. 1989).

107. See, e.g., Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (Jury should be instructed that it could find in favor of plaintiff if it believed his testimony and if it was persuaded that the conduct of defendant was not objectively reasonable in light of the facts and circumstances confronting him.). See also Patzner v. Burkett, 779 F.2d 1363, 1371–72 (8th Cir. 1985) (“[T]he alleged use of excessive force is generally an issue of fact.”).


available. In its 1987 decision in *Safley v. Turner*, the Court appeared to reduce the constitutional rights of prisoners down to a single rule: prison regulations infringing on inmates' constitutional rights are valid if reasonably related to legitimate penological interests. As the Court demonstrated in *Safley*, government officials can satisfy this step by drawing a logical connection for the court, whether or not that connection is well-grounded in fact. Because the *Safley* officials' explanation for an inter-prison correspondence regulation was satisfactory, the Court did not inquire further. In such cases a jury seems largely unnecessary.

The Supreme Court's commitment to the principles set forth in *Bose* will be severely tested when a section 1983 plaintiff asks for independent review of a verdict on the issue of unconstitutional motivation. Prior to *Bose*, the Supreme Court firmly reversed the Fifth Circuit's longstanding practice of independently reviewing findings of discriminatory intent in Title VII cases. One year after *Bose*, it unanimously reaffirmed this position, without a single reference to *Bose*. Its ruling in *Pullman-Standard v. Swint* was based in part upon the Supreme Court's use of a "clearly erroneous" standard of review on the issue of intentional segregation in the 1979 decision in *Dayton Board of Education v. Brinkman*. In each case, however, the Court did little more than label questions of intent as "pure questions of fact"—an approach which should have compelled a different result in *Bose*.

Independent review of the record where racial discrimination is alleged is hardly new; the Supreme Court exercised it in *Norris v. Alabama* to reverse a conviction in the notorious "Scottsboro Boys" case. Indeed, the risk of majoritarian bias makes routine deference to a jury's verdict on this issue

110. 428 U.S. 78, 89 (1987). The judges of the Eighth Circuit have been engaging in an on-going battle over the degree of deference which should be given to the trial court's findings in prisoner Section 1983 actions. Compare Hill v. Blackwell, 774 F.2d 338, 343 (8th Cir. 1985) ("[T]he ultimate conclusion as to constitutionality is a question of law.") with Goff v. Nix, 809 F.2d 530, 531 (8th Cir. 1987) (Lay, J., dissenting) ("Selective reliance on Anderson v. City of Bessemer City converts the clearly erroneous rule into a doctrine of convenience for the reviewing court.").

111. *Safley*, 428 U.S. at 93–95 n.*.


especially difficult to defend. While credibility determinations can play an important role in discrimination cases, they are no more important than in cases such as Bose involving actual malice.

The most significant difference between actual malice and discriminatory intent lies in the ease with which the constitutional standard can be captured in a rule. While the full meaning of actual malice has developed on an ad hoc basis through its application in various contexts, the notion of intentional discrimination has not. At most, the Supreme Court has enumerated the kinds of evidence which can or cannot support an inference of discriminatory motive. Such guidance can be more easily provided to a jury.

**Conclusion**

It is easy to overstate the significance of whether a judge or jury wields primary authority in constitutional litigation. Judges, like jurors, can be prone to localism, and may reflect the same biases and prejudices as the jury pool. A judge's sense of how much force is too much force, or what a reasonable police officer would know about citizens' rights, is as likely to reflect his or her own background as it is to result from a scholarly interpretation of what the Constitution means.

The greatest benefits of a diminished jury role are subtle, but important. Absent a settlement, only a judge can bring a case to an end prior to the close of evidence. As the Supreme Court recognized in Harlow, public officials should be protected from the burdens of trial (and discovery, if possible) on insubstantial claims. A proper application of Harlow and Bose should permit judges to reach the merits and immunity defenses in many constitutional cases at an earlier stage, so long as no genuine disputes exist about what happened.

The Bose decision should also make the Constitution less mysterious to officials whose responsibilities require them to anticipate how it will be enforced. A judge can apply a constitutional standard by comparing the case before him to previous cases. Officials can thus anticipate how a court might rule by looking for factually analogous cases prior to taking action.

Any issues which may arise about the constitutionality of such actions can then be resolved by reference to the same decisions.

However, such arguments by analogy cannot be made to a jury. Because jurors cannot know how the standard was applied in other cases, the same standard can be applied in identical cases with opposite results. The shrinking role of the jury diminishes the risk that the Constitution will be applied in contradictory or inconsistent ways, by placing the task in the hands of a judge. As constitutional application becomes more consistent, it will become more predictable, and fewer violations should occur.