

FEDERAL RULE OF CIVIL PROCEDURE 52(A) AS AN IDEOLOGICAL WEAPON?

BRYAN L. ADAMSON*

ABSTRACT

In this Article, the author explores Federal Rule of Civil Procedure 52(a) and standard of review choice to determine whether appellate judges can exploit the Rule's terms to pursue ideological goals. The author examines the operative terms of Rule 52(a)—namely, “findings of fact,” “clear error,” and “documentary evidence”—and concludes that they are so malleable as to give appellate judges wide discretion in deciding whether clear error, de novo, or some other standard of review is to be applied. The Article then goes on to identify a fact typology appellate courts invoke which also enables them to circumvent Rule 52(a) and engage in de novo review of a trial court's factual findings. The Article concludes that standard of review choices can serve as a prism through which to view a judge's ideological predisposition, especially when those choices are made in an undisciplined, unprincipled manner. The author argues that appellate courts' treatment of Rule 52(a) and fact typology can impair decisional legitimacy, administrative efficiency, and comity between the trial and appellate courts. As Rule 52(a)'s malleable character and fact typology serve important jurisprudential functions, the author makes several recommendations to clarify decisional rules as they apply to standard of review and to mitigate unwarranted perception of ideological bias in making judgments about the applicable standard of review.

I. INTRODUCTION.....	1027
II. URGING, AVOIDING, OR CIRCUMVENTING RULE 52(A):	1032
THREE CASE STUDIES	1032
A. Urging Rule 52(a)'s Applicability to Uphold the Trial Court's Decision?..	1032
B. Avoiding Rule 52(a)'s Applicability to Overrule the Trial Court's Decision?	1034
C. Circumventing Rule 52(a) Through Fact Typology?	1036
D. Summary.....	1038
III. RULE 52—HISTORY.....	1038
A. The Appellate System 1789-1803	1038
B. The Appellate System 1865-1935	1041
C. Summary.....	1042
IV. THE ROLE OF COURTS—GENERALLY	1043
A. What Courts Do	1043
B. Rule 52(a) as an Allocation of Responsibility Mechanism.....	1044
C. Rule 52(a) as an Allocation of Power Mechanism.....	1045
D. Summary.....	1046
V. THE MALLEABLE NATURE OF RULE 52(A)	1046
A. No.1: Articulating Findings of Fact.....	1046

* Associate Professor, Seattle University School of Law.

1.	<i>Defining and Articulating “Facts”</i>	1046
2.	<i>Distinguishing “Facts” from “Law”</i>	1047
B.	<i>No. 2: The Documentary Evidence “Mandate”</i>	1049
1.	<i>Treatment of “Traditional” Documents</i>	1049
2.	<i>“Documents” and New Technology</i>	1049
C.	<i>No. 3: Defining and Applying “Clear Error”</i>	1051
D.	<i>No. 4: Fact Typology</i>	1053
1.	<i>Historical Facts</i>	1054
2.	<i>Mixed Statement of Law And Fact</i>	1055
(a)	<i>Ultimate Facts</i>	1056
(b)	<i>Constitutional Facts</i>	1057
(c)	<i>Legislative Facts</i>	1059
VI.	SPECIFIC CONCERNS ABOUT CONSTITUTIONAL AND LEGISLATIVE FACTS.....	1063
A.	<i>Constitutional Fact Review</i>	1063
B.	<i>Legislative Fact Review</i>	1065
1.	<i>Legislative Fact Finding, Separation of Powers, and Judicial Competency</i>	1065
2.	<i>Fundamental Deficiencies of Legislative Fact Finding</i>	1066
C.	<i>Summary</i>	1067
VII.	RULE 52(A) AND FACT TYPOLOGY AS IDEOLOGICAL WEAPONS? <i>CONCRETE WORKS, EASLEY, AND EQUALITY FOUNDATION</i> REVISITED.....	1067
A.	<i>In Concrete Works, Was Justice Scalia Advocating “Clear Error” Review on Principle or Because of Ideological Bias Against Affirmative Action Programs?</i>	1067
B.	<i>Did the Easley Majority Give Heightened Scrutiny to the District Court Decision Because of Its Solicitude Toward Minority Voting Interests?</i>	1069
C.	<i>Was the Sixth Circuit in Equality Foundation Correct in Its Characterization of the District Court’s Factual Findings or Did It Apply De Novo Review Because It Was Ideologically Opposed to the Trial Court Decision?</i>	1070
D.	<i>Summary</i>	1075
VIII.	BALANCING THE INTERESTS SERVED BY RULE 52(A) AND FACT TYPOLOGY.....	1075
A.	<i>Appellate Interpretation of Rule 52(a) and Its Use of Fact Typology Protect Substantive Rights by Correcting Error and Legitimizing Legal Norms Through Doctrinal Coherence</i>	1076
1.	<i>Appellate Court Interpretation of Rule 52(a) and Fact Typology Should Seek to Correct Trial Court Error to Protect Substantive Rights</i>	1076
2.	<i>Appellate Court Interpretation of Rule 52(a) and Fact Typology Provide Doctrinal Coherence</i>	1077
3.	<i>Summary</i>	1078
B.	<i>Appellate Court Interpretation of 52(a) and Fact Typology Impair Procedural Legitimacy, Efficiency, and Comity</i>	1078
1.	<i>Appellate Court Interpretation of 52(a) and Fact Typology Impair Procedural Legitimacy</i>	1079
2.	<i>Appellate Court Interpretation of 52(a) and Fact Typology Impair Administrative Efficiency</i>	1080
3.	<i>Appellate Court Interpretation of 52(a) and Fact Typology Impair Comity Between the Courts</i>	1081
4.	<i>Summary</i>	1081
IX.	SOLUTIONS.....	1082
A.	<i>Create Bright Lines Where They Can Be Created</i>	1082
1.	<i>Refine Approach to Fact Typology</i>	1083
(a)	<i>Amend Rule 52(a) to Explicitly Address Ultimate, Constitutional, and Legislative Facts from Clear Error Review ...</i>	1083

(b) Give Consistent Reason to the Constitutional Fact Doctrine.....	1083
(c) Legislative Facts Should Be Subject to De Novo Review.....	1083
2. Remove Documentary Evidence from Rule 52(a) or Keep It In and Adhere to It.....	1084
B. Separate “Facts” from “Law”.....	1085
C. In All Circumstances, Lawyers and Trial Judges Should More Carefully Articulate Findings of Fact.....	1085
D. Acknowledge the Fact that Judges Make Law.....	1086
E. Live with the Outcomes.....	1086
X. CONCLUSION.....	1087

I. INTRODUCTION

Is Federal Rule of Civil Procedure 52(a) a decisional tool with which appellate judges can pursue ideological ends? If so, what should be done about it? In cases tried without a jury, Rule 52(a) is the standard appellate courts apply when reviewing trial court factual determinations. Rule 52(a) directs that “[f]indings of fact, whether based on oral or *documentary* evidence, shall not be set aside unless *clearly erroneous*.”¹ A judgment as to whether Rule 52(a) applies often controls any ultimate decision to affirm, reverse, modify, or otherwise direct a consequence for the district court’s holding. Thus, to say that critical consequences flow from the appellate court’s standard of review² choice is no overstatement.

1. FED. R. CIV. P. 52(a) (emphasis added). Federal Rule Civil Procedure 52(a) states in full:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

2. It is important to distinguish between standard of review and scope of review. A standard of review is the limit of review, or the extent to which and manner by which, a court will scrutinize the findings of fact, conclusions of law, or rulings. Often, the level of scrutiny given matters which touch upon constitutional rights (for example, rational basis, intermediate, strict) is also referred to as the standard of review, although in a narrower sense. The “scope of review” speaks to the “range of issues” the court will examine. Richard H.W. Maloy, “Standards of Review”—*Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 608 (2000) (“The applicable standard of review determines whether the trial court has committed an error. The scope of review defines what the reviewing court will examine to determine whether the trial court has committed an error.”); *see also* W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY’S L.J. 1045, 1049 (1993); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 14

The decisive nature of Rule 52(a) warrants analysis to explore whether judges can urge, reject, or avoid its application to pursue ideologically consonant outcomes. The instance in which a judge, from the bench or by written word, *articulates* an unequivocal ideological bias is the easy case. It is also possible to learn from a series of opinions on, say, affirmative action, a jurist's ideological philosophy. The hard case arises when assessing whether an appellate judge obscures his bias behind a clear error, *de novo*,³ or some standard of review in between. If an appellate court wants to reweigh the facts as found by a lower court, it may characterize the trial court's factual findings as "legal conclusions" or "mixed questions of law and fact." On the other hand, if an appellate court wishes to give the greatest deference to the trial court decision, then findings of fact will be reviewed only for "clear error." Suspicion of judges making result-oriented standard of review choices is most palpable when the substantive issues in play carry broad moral, social, or political consequences.

Debate over ideological bias has been intense, recently evidenced by the bitter controversies over judicial opinions and the judicial appointment process. Current tensions surround opinions in which divisive public issues are being decided⁴ and questions as to where

(1994). Rule 52(a)'s "clear error" standard is also to be distinguished from appellate review for "abuse of discretion," which applies to the level of scrutiny given a trial judge's evidentiary rulings.

3. Courts use "*de novo*," "plenary," and "independent" review synonymously. Maloy, *supra* note 2, at 611.

4. To appreciate the profound consequences of standards of review and how they can be ideologically driven, one need look no further than to the recent controversy involving Theresa Marie Schiavo, who, after suffering cardiac arrest from a potassium imbalance in 1990, had been in constant nursing care. *Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001). After it was ruled that she was in a persistent vegetative state, Ms. Schiavo's guardian (and husband) was granted a request to order her hospice facility to cease hydration and nutrition. That request led to an emotionally charged contest by Ms. Schiavo's parents, who sought to have their daughter's feeding tube reinserted. Seven years after this conflict over end-of-life decisions consumed then literally exhausted the courts, publicity began to develop around the dispute. The parents prevailed upon the Florida governor, the United States Congress, and the President to intervene. See Maya Bell, *Sophisticated Tactics Aid Schiavo's Parents*, ORLANDO SENTINEL, Mar. 13, 2005, at A1; Keith Epstein, *Congressmen Rush Schiavo Bill*, TAMPA TRIB., Mar. 9, 2005, at 1; Abby Goodnough & Carl Hulse, *Feeding-Tube Case Roils Washington and Florida*, N.Y. TIMES, Mar. 18, 2005, at A5; Notes, FYI Nation, *Congress Steps into Schiavo Debate*, CHI. TRIB., Mar. 18, 2005, at 12. In response, Congress passed a law mandating that the case be reviewed *de novo*, at each federal court level. *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1276-78 (11th Cir. 2005), Appendix. Public Law 109-3 required the Federal District Court for the Middle District of Florida to

determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

along the ideological spectrum judicial candidates lie.⁵ In today's climate, labeling a judge's opinion as the sign of a "judicial activist" or "extremist" has become the rhetorical equivalent of drawing the line in the sand. "Legislating from the bench" is another pejorative catchphrase used to denounce judicial opinions. Many recognize those invectives to merely mean "*I didn't agree with the decision*"; however, their power in this age of political demagoguery as weapons to attack judges and their decisions cannot be underestimated.⁶

Id. at 1277.

In directing *de novo* review, Congress sought to have the matter retried as many times as possible, hoping that a federal court would eventually render an "ideologically correct" decision. The appellate court found Public Law 109-3 was unconstitutional, as it sought to mandate *de novo* review of state proceedings, which was "beyond Congress's constitutional power." *Id.* at 1274 (Birch, J., concurring).

The Act not only unconstitutionally attempted to set a standard of review for each federal court to follow, but also expressly denied "federal courts the ability to exercise abstention or inquire as to exhaustion or waiver under State law." *Id.* at 1274. In doing so, the Act violated the Separation of Powers Doctrine. *Id.* at 1274-75. The appellate court's decision to refuse to reinsert Ms. Schiavo's feeding tube was called "judicial activism" by many, prompting a call by one congressman that the judges who refused to intervene "be held accountable for their actions," and resulted in death threats to one judge and Ms. Schiavo's former husband. See Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case but House Leader Calls for Probe of 'Judicial Activism,'* BOSTON GLOBE, Apr. 14, 2005, at A9; Warren Richey, *Judicial Aftershocks from the Schiavo Case,* CHRISTIAN SCI. MONITOR, Apr. 4, 2005, at 02; Maro Robbins, *Passing Judgment on Activist Judges,* SAN ANTONIO EXPRESS-NEWS, Apr. 24, 2005, at 1A; Richard Schmitt, *The Terri Schiavo Case: Judicial Effect,* L.A. TIMES, Mar. 24, 2005, at 22; Howard Troxler, *At Painful Road's End, May Peace Find Them,* ST. PETERSBURG TIMES, Apr. 1, 2005, at 1B.

5. The tension is due in no small part to the new "transparency" and demystification of judicial decision making, the profound questions being raised in recent cases, and the politicization of the federal judicial appointment process. Where study of judicial opinions was once the exclusive bailiwick of the legal academy, judicial analysis has been democratized. News analysts, issue advocates, talk show hosts, bloggers, politicians, pundits and community leaders alike have significantly moved judicial opinion interpretation into the mainstream. Today, actors within and outside of the legal academy initiate discourse upon "important" decisions, attempting to glean from those opinions a judge's views on a host of moral, social, political, or legal issues.

Moreover, evolution within the legal academy has brought new perspectives into judicial reasoning and opinion analysis. This evolution has resulted in new legal disciplines explicitly directed toward the study of judicial decision making. Positive law scholarship, critical legal studies (and all of its subsets, such as race, "queer," gender, latino/a), law and literature, interdisciplinary studies, legal empiricism, and law and society each, to important degrees, engage in searching exploration of judicial opinion text and subtext, the possibility of jurist objectivity, and the complex interrelationships between case subject (for example, law and facts), object (litigants and the public), and arbiter (judge and/or jury).

6. For example, the confirmation process of Chief Justice John Roberts was framed by concerns over Supreme Court candidates who might "legislate from the bench." See Press Release, The White House, President Announces Judge John Roberts as Supreme Court Nominee (July 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/07/20050719-7.html> (stating that John Roberts will "strictly apply the Constitution and laws, not legislate from the bench"). The selection and confirmation process of Justice Samuel Alito was framed in the same manner. See Press Release, The White House, President Nominates Judge Samuel A. Alito as Supreme Court Justice (Oct. 31 2005), available at <http://whitehouse.gov/news/releases/2005/10/20051031.html> (stating that Alito "under-

Nor should the importance that attaches to standard of review choices be underestimated. All too often, however, judges, lawyers, and scholars do not fully appreciate the consequences which attend such choices. Judges do not appreciate the importance of decision making transparency to litigants and the public, failing to clearly articulate their choice of standard when that articulation is warranted. Lawyers fail to appreciate the pivotal role choice of standard plays in articulating issues for appeal or in other aspects of trial practice. Both judges and lawyers confront difficulty in crafting findings of fact and conclusions of law in a way that will shield, or ensure, appellate review.⁷ Finally, scholars have devoted considerable scholarship to judicial bias regarding standing⁸ and abstention⁹ principles; much less attention has been given to Rule 52(a) and standard of review doctrine.

The fact is that Rule 52(a) is malleable and can be evaded by appellate courts. There are four primary reasons. First, the Rule does not define the term “clearly erroneous”; although the Supreme Court has sought to give definitive meaning to the term,¹⁰ that definition has not been consistently applied by lower courts. Second, articulating *findings* of fact—which entails making sometimes subtle distinctions between “facts” and the “law”—is more art than science for trial courts, giving appellate courts broad discretion to reclassify the trial court’s findings. Third, not only have courts effectively ignored Rule 52(a)’s directive as it regards documentary evidence, the availability of electronically based trial records for appellate review expands the

stands that judges are to interpret the laws, not to impose their preferences or priorities on the people”).

7. “It is difficult to overstate the practical significance of the standard of review.” Hall, *supra* note 2, at 1049; *see also* Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367, 368-69 (1997) (standards of review “provide functional definitions of the advocate’s scope of appeal, the power of a reviewing court to rule on that appeal, and depending upon the standard of review utilized, an influence on the outcome of an issue”); Kunsch, *supra* note 2, at 13 (“Practitioners should pay attention because it determines what/how to argue/the likelihood of success on appeal.”); Judge Paul R. Michel, *Effective Appellate Advocacy*, 24 LITIG. 19 (1998) (“Jurisdiction is an issue on every appeal. So is the standard of review.”); Nevin Van de Streek, *Why Not “Findings of Law” and “Conclusions of Fact” and Opinions About Both?*, 70 N.D. L. REV. 109 (1994) (lawyers “twist[] in agony” when asked to submit findings of fact and conclusions of law).

8. *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rule-making*, 85 VA. L. REV. 1243 (1999); Gene R. Nichol Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548 (1993); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004).

9. *See, e.g.*, C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819 (1995); Barry Freidman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Lisa Vanderhoof, *Indian Law*, 73 DENV. U. L. REV. 815 (1996).

10. *See* United States v. U.S. Gypsum, 333 U.S. 364, 395 (1948).

notion of what constitutes a “document” and arguably diminishes traditional rationales for subjecting documentary evidence to review under a “clearly erroneous” standard.

Finally, though Rule 52(a)’s plain language makes no exceptions to the type of evidentiary fact found, appellate jurisprudence has developed a typology of facts: “historical,” “ultimate,” “constitutional,” “legislative,” “sociological,” “scientific,” “political,” “economic,” and “jurisdictional.” In appellate opinions, how and why a fact is classified within this typology is an often-veiled determination. The rationale for classifying a fact under one of these types is important to know, because with the exception of “historical” facts, all other fact types take on legal dimensions¹¹ and move appellate review into *de novo* territory. While Rule 52(a)’s clear error standard gives the highest degree of deference to a trial court’s factual findings, a plenary review determination “allows a court to do precisely what it is not permitted to do when the standard of review is deferential”¹²—that is, redecide the issues litigated.

Rule 52(a)’s pliant character, along with appellate power to classify facts, enables judges to urge, avoid, or circumvent the Rule altogether. Moreover, appellate courts’ often cavalier approach toward Rule 52(a)’s applicability fuels speculation that judges exploit the Rule’s malleable nature or indeed utilize it to achieve ideologically consonant results. In any event, appellate court determination of an applicable standard of review offers a unique prism through which to examine jurist ideological disposition. Unprincipled application, circumvention, or avoidance of Rule 52(a) raises other critical issues which go to the heart of the precepts long a hallmark of our judicial system: legitimacy, efficiency, and comity.¹³

Part II of this Article attempts to set the stage for the discussion of Rule 52(a), describing three cases in which the applicable standard of review was the subject of controversy. Part III examines the history of Rule 52(a), noting its evolution out of debate surrounding the scope of authority between the trial and appellate courts, and the most efficient means by which to allocate decision making. Part IV places Rule 52(a) in the broader context of what courts do, with Part V taking up its operative terms and expanding upon the use of fact typology. Part VI raises pointed concerns about appellate court

11. *But see* discussion of historical facts, *infra* Part V.D.1.

12. Bosse, *supra* note 7, at 369; Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 508 (1969) (noting Wright’s lament over the “[t]he esoteric theories by which appellate courts pretend that questions of fact have somehow become questions of law, and thus can be decided anew by the appellate judges.”); Charles A. Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A. J. 742, 748 (1966).

13. Hon. John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the “Clearly Erroneous Rule” Being Avoided?*, 59 WASH. U. L.Q. 409, 426 (1981).

treatment of constitutional and legislative facts and how those fact types uniquely impact the appellate approach to standard of review choice. Part VII revisits the cases described in Part II, explaining how each court's approach to standard of review choice arguably illuminated the ideological predispositions of the opinion's author. Part VIII discusses appellate treatment of Rule 52(a) and fact typology and how various jurisprudential concepts, including allocation of power and authority interests, are advanced or impaired by such treatment. Finally, Part IX sets forth ways to clarify appellate courts' approach to standard of review choice and mitigate the possibility or perception of ideological bias through their standard of review determinations.

II. URGING, AVOIDING, OR CIRCUMVENTING RULE 52(A): THREE CASE STUDIES

To place the discussion of Rule 52(a) and fact typology into context, it is useful to introduce three cases, *Concrete Works of Colorado, Inc. v. City & County of Denver*,¹⁴ *Easley v. Cromartie*,¹⁵ and *Equality Foundation v. City of Cincinnati*.¹⁶ They will be expanded upon later in this Article. Each case has at its core controversial substantive issues, that is, affirmative action/race and gender, race/voting rights, and sexual orientation. As we will see, each case demonstrates that the circumstances in which Rule 52(a)'s clear error standard should be applied can be unclear at best, controversial to be sure, and ideologically driven at worst.

A. Urging Rule 52(a)'s Applicability to Uphold the Trial Court's Decision?

Calling a judge's legal conclusion a finding of fact is an all too easy way for appellate judges to obscure or even avoid legal issues when the result of the trial suits them.

—Judge Henry J. Friendly¹⁷

Justice Antonin Scalia's dissent from a denial of certiorari in *Concrete Works*¹⁸ illustrates how Rule 52(a)'s clear error standard is urged when the trial court decision appears to be ideologically consonant with an appellate judge's views. When a government-created minority and women set-aside program is challenged on its constitu-

14. *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950 (10th Cir. 2003).

15. *Easley v. Cromartie*, 532 U.S. 234 (2001).

16. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

17. *Ruby v. Am. Airlines, Inc.*, 329 F.2d 11, 23 (2d Cir. 1964) (Friendly, J., dissenting).

18. *Concrete Works of Colo., Inc. v. City & County of Denver*, 540 U.S. 1027 (2003).

tionality, the governmental entity bears the burden of presenting a “strong basis in evidence” of past or present discrimination to justify the remedial program.¹⁹ In a 2003 *Concrete Works* opinion, the Tenth Circuit reversed the district court’s finding that Denver’s ordinances codifying its minority and women set-aside program for public works contracting was unconstitutional.²⁰

It was in a 1994 *Concrete Works* appeal from summary judgment that the Tenth Circuit first held that a “strong basis in evidence” finding was a *conclusion of law* to be reviewed *de novo*, reversing and remanding the trial court decision.²¹ On remand, the district court conducted a bench trial, concluding that Denver had failed to prove the existence of past or present discrimination which would justify the program.²² On appeal, because it had earlier directed that whether a “strong basis in evidence” had been shown was a question of law, the Tenth Circuit engaged in plenary review and reversed the trial court’s ruling.

Justice Scalia, who has made no secret of his skepticism towards such programs,²³ raised a standard of review conflict in urging a reversal of the Tenth Circuit.²⁴ In his dissent from denial of certiorari, Justice Scalia urged the Court to

resolve this significant and unsettled [standard of review] question. Any doubts about the question’s practical importance dissolve when one considers the manner in which the Tenth Circuit’s application of *de novo* review in this case permitted it to rule as it did notwithstanding the factual determinations made by the District Court after trial.²⁵

19. See *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (“[T]he institution that makes the racial distinction must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary, ‘before it embarks on an affirmative-action program.’”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (city must “demonstrate a strong basis in evidence” that remedial action was necessary); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (“In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.”).

20. *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950 (10th Cir. 2003).

21. *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995).

22. *Concrete Works*, 321 F.3d at 956, *cert. denied*, 540 U.S. 1027 (2003) (Scalia, J., dissenting).

23. See, e.g., *J.A. Croson Co.*, 488 U.S. at 520 (“The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.”) (Scalia, J., concurring in judgment); *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1985) (“In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”) (Scalia, J., concurring).

24. *Concrete Works*, 540 U.S. 1027 (2003) (Scalia, J., dissenting).

25. *Id.* at 1034.

Justice Scalia's position was that the court of appeals was bound to review the district court's finding for clear error, which would have upheld the trial court's finding of unconstitutionality.

Despite his having several prior opportunities to correct the standard of review, his 2003 opinion marked the first time Justice Scalia had taken issue with the standard of review relating to a "strong basis in evidence" determination. This was the second time that the *Concrete Works* litigation found its way to the Supreme Court. In the *Concrete Works* 1994 iteration, where the court of appeals first held that a "strong basis in evidence" determination was to be reviewed *de novo*, the Supreme Court denied certiorari, with no objection to the standard by Justice Scalia.²⁶ In 1997, a circuit split as to the correct standard of review became apparent in challenges to Miami-Dade County²⁷ and Philadelphia²⁸ minority set-aside programs. Supreme Court certiorari was denied in both challenges; in neither case did Justice Scalia opine upon the correct standard of review.²⁹ In both cases, the appellate courts *upheld* the trial court rulings *against* the minority set-aside programs at issue. Justice Scalia's latent clear error argument in *Concrete Works* thus begs the question: is his application of Rule 52(a) warranted by its terms or does he believe appellate courts must give the highest deference to a trial court's "strong basis in evidence" determination only when a trial court *strikes down* a minority set-aside program?

B. Avoiding Rule 52(a)'s Applicability to Overrule the Trial Court's Decision?

Appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the Clearly Erroneous Rule.

—Honorable John F. Nangle³⁰

*Easley v. Cromartie*³¹ illustrates how the Supreme Court itself circumvents Rule 52(a) for less-than-principled reasons. *Easley* was the legislative redistricting case involving the infamous North Carolina 12th Congressional District, whose proposed configuration was 160

26. *See City & County of Denver, Co. v. Concrete Works of Co., Inc.*, 514 U.S. 1004 (1995).

27. *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997).

28. *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 91 F.3d 586 (1st Cir. 1996).

29. *Metro. Dade County v. Eng'g Contractors Ass'n*, 523 U.S. 1004 (1998); *City of Philadelphia v. Contractors Ass'n*, 519 U.S. 1113 (1997).

30. Nangle, *supra* note 13, at 410.

31. 532 U.S. 234 (2001).

miles long, and much of it no wider than Interstate 95.³² The substantive issue was the extent to which voting patterns of African Americans could be used to draw district boundaries. The district court found that the North Carolina Legislature had improperly used race, not politics, as a predominant consideration when it redesigned the 12th Congressional District, violating the Equal Protection Clause. Justice Breyer, writing for a 5-4 majority,³³ acknowledged that clear error was the proper standard of review, as the “ultimate finding”³⁴ of race as a predominant motivating factor was an evidentiary one.³⁵ That standard, he recognized, would entail a high degree of deference to the trial court determination, as well as to legislative decision making. Nonetheless, the majority decided to operate under a more searching standard, an “*extensive review . . . for clear error.*”³⁶

The majority defended this “clear error plus” standard of review on the grounds that the district court’s conclusion that the General Assembly used facially race-driven criteria to redraw the districts without any compelling justification was a “constitutionally critical” one.³⁷ The majority also felt extensive review was appropriate because the trial below was “not lengthy,” there had been no intermediate appellate review, and the “key evidence consisted primarily of documents and expert testimony.”³⁸ After engaging in an “extensive” analysis of the district court’s factual findings for clear error, the majority held that the legislature had *not* improperly considered race in its redistricting plan and overturned the district court’s decision.³⁹

In his dissent, Justice Clarence Thomas wrote at length about the majority’s “foray into the minutiae of the record.”⁴⁰ Citing earlier Supreme Court decisions, he asserted that the majority’s “extensive review for clear error” standard had neither precedent nor support in precedent.⁴¹ In the dissent’s view, the race question in *Easley* regarding motive (that is, to what extent did the legislators consider the racial makeup of the constituents when drawing the congressional district?) should have been a purely fact-based inquiry.⁴² His concluding

32. The Supreme Court was well acquainted with the *Easley* controversy. Legal challenge to that redistricting scheme was initiated in 1992 as *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), and it reached the Supreme Court for full review four times in ten years: *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Hunt v. Cromartie*, 526 U.S. 541 (1999); and *Easley*, 532 U.S. 234 (2001).

33. Justice Breyer was joined by Justices Ginsburg, O’Connor, Souter, and Stevens.

34. *Easley*, 532 U.S. at 241.

35. *Id.*

36. *Id.* at 243 (emphasis added).

37. *Id.* at 240.

38. *Id.* at 243.

39. *Id.* at 258.

40. *Id.* at 262.

41. *Id.* at 259.

42. *Id.*

statement summed up his objection: "If I were the District Court, I might have reached the same conclusion that the Court does But I am not the trier of fact, and it is not my role to weigh evidence in the first instance."⁴³ The Court, in the dissent's judgment, was therefore obligated to review the district court's factual findings for clear error, regardless of the length of the trial, regardless of the absence of intermediate review, regardless of the form of the evidence.⁴⁴

C. Circumventing Rule 52(a) Through Fact Typology?

Presumably, if the court feels that a trial judge's determination should be reversed, it will classify it as a legal conclusion, thereby making reversal easier.

—Stephen A. Weiner⁴⁵

*Equality Foundation v. City of Cincinnati*⁴⁶ demonstrates how a district court's factual findings are vulnerable to fact typology and plenary review. *Equality Foundation* also illustrates how the undisciplined application of fact typology foreshadows an ideologically tinged opinion. In 1993, Cincinnati voters approved Article XII of the City Charter by a 62-38% margin.⁴⁷ The Amendment, popularly referred to as Issue 3, directed that neither Cincinnati nor its subentities could "enact, adopt, enforce, or administer any ordinance, regulation, rule or policy" which would permit "homosexual, lesbian or bisexual orientation status, conduct, or relationship" to be a basis for anyone to claim a "minority or protected status, quota preference or other preferential treatment."⁴⁸ The proponent of the Amendment

43. *Id.* at 267.

44. *Id.* at 259 ("We are not permitted to reverse the court's finding 'simply because [we are] convinced that [we] would have decided the case differently.'" (citing *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573 (1985))).

45. Stephen A. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020, 1022 (1967).

46. 54 F.3d 261 (6th Cir. 1995).

47. *Equal. Found. v. City of Cincinnati*, 860 F. Supp. 417, 422 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995).

48. The Amendment read as follows:

ARTICLE XII NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Id. at 422.

was Equal Rights Not Special Rights, a political action group part of a then-national network of similar organizations.⁴⁹

Less than one week after Issue 3's passage, Equality Foundation of Greater Cincinnati, Inc., and other plaintiffs filed a motion for preliminary injunction in federal district court, challenging its constitutionality on First and Fourteenth Amendment grounds.⁵⁰ The court ordered a preliminary injunction, staying its implementation pending a full hearing on the merits.⁵¹ Seven months later, after a bench trial, Judge Spiegel issued a permanent injunction.⁵²

In finding Issue 3 unconstitutional, the judge relied on live and documentary expert testimony of citizens, psychologists, historians, municipal law and civil rights experts, and political scientists.⁵³ The district court made clear that

[i]n weighing the testimony of the witnesses, we considered each witness' relationship to the Plaintiff or to the Defendant; their interest, if any, in the outcome of the trial; their manner of testifying, particularly where they testified in Court; their opportunity to observe or acquire knowledge concerning facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence.⁵⁴

In particular, with regard to the experts, the court found them "on the whole" to be "extremely knowledgeable, well-prepared and credible."⁵⁵ From that testimony and the "massive amount of evidence"⁵⁶ admitted into the record, the district court encapsulated its evidentiary conclusions into twenty-three findings of fact. Judge Spiegel concluded that Issue 3 violated the plaintiffs' Fourteenth Amendment rights as a quasi-suspect class and their fundamental rights to association freedom and government petition under the First Amendment.⁵⁷

In reversing the trial court's decision, the Sixth Circuit did not waste its first breath: "most, if not all" of the district court's findings were "findings of 'ultimate' facts which entail the application of law, or constitute sociological judgments which transcend ordinary factual

Incidentally, the intent of the Amendment is clear from the use of the phrase "other preferential treatment." The Amendment was drafted by Equal Rights Not Special Rights and evinces a purpose to equate "minority," "quota," and "protected status" with the pejorative phrase "preferential treatment." This rhetoric is legion in the modern anti-civil-rights movement.

49. *Id.*

50. *Id.*

51. *Id.* at 423.

52. *Id.* at 449.

53. *See id.* at 424.

54. *Id.* at 420.

55. *Id.* at 424.

56. *Id.* at 426-27.

57. *Id.* at 449-50.

determinations,” constitutional facts, or mixed questions of law and fact.⁵⁸ With that, the Sixth Circuit was able to engage in plenary review and mine the assumptions underlying each and every evidentiary finding. After announcing plenary review, the Sixth Circuit launched into its opinion, whose text adopted much of the most inflammatory rhetoric of the Equal Rights Not Special Rights campaign.⁵⁹

D. Summary

Concrete Works, *Easley*, and *Equality Foundation* alternatively raised instances in which Rule 52(a)'s clear error standard was urged, rejected, or circumvented altogether in favor of fact typology. Importantly, each case also involved salient issues of broad social consequence. The question then arises whether each case represented a legitimate approach to Rule 52(a) or:

1. In *Concrete Works*, did Justice Scalia urge clear error review because the district court's opinion about Denver's set-aside program was consonant with his opposition to such programs?
2. Did the *Easley* majority avoid clear error review as a way to enforce its assumptions about African-American voting habits?
3. Did the Sixth Circuit in *Equality Foundation* circumvent the clear error standard because of an ideological hostility towards gay and lesbian rights?

Answering those questions requires a review of Rule 52(a)'s history and how its text facilitates circumvention of its own terms. Responding to those questions also requires investigation into how appellate courts classify facts so to engage in *de novo* scrutiny of a trial court's factual findings and how courts' inconsistent approaches to selecting and articulating the chosen standard of review can mask ideological bias.

III. RULE 52—HISTORY

A. The Appellate System 1789-1803

A look at Rule 52(a)'s emergence reveals that the attempt to strike the proper balance between trial court deference and *de novo* appellate review is not new. The effort began at the time of this country's founding, when the Constitution's framers were attempting to create a unified system of appellate review between actions at law and equity. At that time, actions at law were reviewable only as to whether legal error had been committed in the lower court. Actions in equity,

58. *Equal Found. v. City of Cincinnati*, 54 F. 3d 261, 265 (6th Cir. 1995).

59. See *infra*, at Part VII.C.

in which the evidence taken was in the form of documents and depositions, were retried *de novo*.⁶⁰

Review at law or equity could be triggered by two mechanisms: by writ of error or by appeal. Review by appeal—practiced by courts in equity and carried over into the colonies from chancery courts—involved reexamination of both facts and law and even allowed for testimony or other evidence to be taken.⁶¹ Actions reviewed by writ applied only to actions at law, with a bill of exceptions submitted, and facts found were conclusive. Similarly, jury verdicts were reversible only if the law was wrongly applied or if the jury was wrongly instructed on the law.⁶² With Article III, Section 2(2) of the Constitution⁶³ conferring federal appellate jurisdiction over both “law and fact” to the Supreme Court, a debate emerged about the federal judiciary’s power to direct the form and scope of review, as well as trial processes.

More specifically, some saw the Supreme Court Article III powers as a threat to the proposed Seventh Amendment right to trial by jury. Those critical of the Article III powers feared they encroached upon the province of citizens of the states who, sitting as jurors, would have their decisions second-guessed. State judges also viewed the provisions as an affront to their integrity, while diminishing their authority, and sanctioning the Supreme Court’s potential exercise of arbitrary power.⁶⁴ Those such as Alexander Hamilton saw the need to reconcile Article III with state practices—fearing the concerns could actually hinder the Constitution’s ratification.⁶⁵ Ultimately, a

60. For general history, see Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 192 (1937); LEON GREEN, JUDGE AND JURY 380 (1930) (“From the moment that the appellate courts became a separate organization from the trial courts, a silent and probably unconscious struggle for supremacy began . . .”); see also Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 647-49 (1988); Kunsch, *supra* note 2, at 15-18; Nangle, *supra* note 13, at 411-13; Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 508-16 (1963).

61. Kunsch, *supra* note 2, at 16; Note, *supra* note 60, at 511.

62. Nangle, *supra* note 13, at 411-12; Note, *supra* note 60, at 508-09 n.12. Review of jury verdicts was only by writ of error and not overturned unless there was no substantial evidence to support the finding. Nangle, *supra* note 13, at 411.

63. U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

64. Clark & Stone, *supra* note 60, at 192-94; Note, *supra* note 60, at 508.

65. Clark & Stone, *supra* note 60, at 192 (“So great was the fear of any semblance of arbitrary power in the hands of the central government that men turned to the jury as the very symbol of their freedom from automatic power.”).

balance was struck whereby the Supreme Court's Article III powers were revised and the Seventh Amendment adopted.⁶⁶

Despite the resolution of the jury issue, there remained a debate as to how, upon review, appellate courts would examine judgments or decrees under the dual systems of law and equity. At that time, even though review of cases in equity was *de novo*, factual findings carried a presumption of correctness, where trial court findings were upheld unless they were clearly against the weight of the evidence or premised upon an erroneous view of the law.⁶⁷ The presumption of correctness, however, depended upon the form of evidence proffered. Findings based on oral testimony were afforded greater deference, the rationale being that the trial judge was in the best position to consider issues of witness credibility. Findings based on documentary or undisputed evidence were given less deference, as such evidence gave the trial judge no observational advantages.⁶⁸

The First Judiciary Act of 1789 unified the dual systems by allowing for review only through writ of error.⁶⁹ Relevantly, the Act allowed Supreme Court review of judgments rendered in civil actions, circuit court equity cases, cases removed to circuit courts from the States, or by appeal from district court where liability of greater than two thousand dollars had been adjudged.⁷⁰ The Act also directed that courts in equity, admiralty, and maritime jurisdictions adopt oral testimony and witness examination in open court as a mode of proof, as was the practice in actions at law.⁷¹ This latter provision was met with objections of advocates of the chancery procedure, as it forced chancellors to adapt their practice of trying cases to civil principles. Similarly, admiralty lawyers were concerned with the time and effort needed to adjust to this new practice, especially in light of the increasing number of court decisions arising out of maritime legal conflicts between the United States and other sovereigns.⁷²

66. *Id.* at 193. See U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

67. Clark & Stone, *supra* note 60, at 193-94.

68. Nangle, *supra* note 13, at 412-13.

69. Note, *supra* note 60, at 509.

70. Clark & Stone, *supra* note 60, at 193. If it reversed the lower court's decision, the Supreme Court could enter another ruling or pass a decree the lower court should have. *Id.* But if the reversal favored the plaintiff, the decree was uncertain, or damages were assessed, the Court was directed to remand. *Id.* The Supreme Court would not execute, but direct that a lower court do so. *Id.* at 194.

71. In courts of equity, admiralty, and maritime, evidence was taken by deposition. *Id.* at 195.

72. *Id.* at 194.

A seminal interpretation of the 1789 Act led to a substantial change in practice. In *Wiscart v. D'auchy*,⁷³ Chief Justice Ellsworth's majority opinion holding that the statement of facts found by the circuit court was conclusive evoked a firestorm of controversy.⁷⁴ Justice Ellsworth's affirmation of the Act's writ of error processes prompted Congress to effectively recreate dual systems of review.⁷⁵ In 1802, it enacted a provision whereby either party to an equity action could request, and the court in its discretion might order, testimony to be taken by deposition.⁷⁶ A year later, Congress abolished writs of error in equity, maritime, and admiralty in favor of review by appeal. Up to 1865, two parallel systems of review continued, with no meaningful attempts to create a unified system of review for cases at law and equity.⁷⁷

B. *The Appellate System 1865-1935*

It was about 1865 when two trends came to a head which would compel a restructuring of appellate review. The development of code pleading throughout the states unifying actions in law and equity hastened the decline of the distinction.⁷⁸ State codes, in merging the two forms of actions, also directed trial judges to make findings of fact to aid in review.⁷⁹ In addition, with the country's growth, federal courts began to feel burdened by the number and complexity of cases coming before them.⁸⁰ In 1875, the Supreme Court would eventually raise the amount in controversy needed to confer jurisdiction and limit review of admiralty cases to questions of law.⁸¹

With the Act of March 3, 1865,⁸² Congress codified a provision which would allow for waiver of jury trials in civil actions.⁸³ Civil trials had been designated as actions at law requiring appeal by writ of error.⁸⁴ The Act provided that trial court rulings—if objected to at the time of trial and presented in a bill of exceptions—could be reviewed

73. 3 U.S. 320, 327 (1796); see Clark & Stone, *supra* note 60, at 195.

74. Perhaps indicative of how jurisprudential themes abide, Justice Ellsworth in *Wiscart* wrote: "But surely it cannot be deemed a denial of justice that a man shall not be permitted to try his case two or three times over." Clark & Stone, *supra* note 60, at 195 (quoting *Wiscart*, 3 U.S. at 329).

75. *Id.* at 197.

76. *Id.* at 196.

77. *Id.* at 197.

78. *Id.* at 201.

79. At that time, states did not uniformly require findings of fact, which caused considerable debate and confusion as to code pleading effectiveness. Walter Wheeler Cook, 'Facts' and 'Statements of Fact,' 4 U. CHI. L. REV. 233 (1936); Gunnar H. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25 (1941).

80. Clark & Stone, *supra* note 60, at 199.

81. *Id.* at 201-02.

82. *Id.* at 197; Act of March 3, 1865, § 4, c. 86, 13 Stat. 501.

83. § 4, c. 86, 13 Stat. 501.

84. Clark & Stone, *supra* note 60, at 198.

either upon writ of error or appeal.⁸⁵ As a consequence, *de novo* appellate review was sharply curtailed.

This process prevailed until 1912, when Congress passed the Federal Equity Act.⁸⁶ That Act allowed for the transfer of equity cases to courts at law. Moreover, Equity Act Rule 46 effectively restored the practice exercised following the 1789 Act by requiring that testimony be taken in open court and that judges pass on evidence admissibility as with actions at law.⁸⁷ The 1912 Act was followed by the Law and Equity Act of 1915, which allowed for the transfer of cases at law into courts of equity and the filing of equitable defenses in actions at law.⁸⁸ The passage of Equity Rule 70 1/2 in 1930 required a court to state facts specifically and separately state its conclusions of law, treating facts found as conclusive. Up to that point, despite free review, appellate courts reviewing cases in equity had developed the practice of not disturbing a trial court's factual findings unless they were "clearly wrong."⁸⁹ However, Rule 70 1/2 made that practice explicit and further undercut the rationale for "absolute" plenary review.⁹⁰ It was out of Equity Rule 70 1/2 that Rule 52 emerged and a uniform system of appellate review established.

Adopted in 1935, Rule 52(a) had the purpose of extending the prevailing equity practice applicable in all nonjury cases to actions in law. Since its enactment, Rule 52 has been amended several times. Relevantly, in 1946, it was changed to more clearly require that findings of fact be made.⁹¹ In 1983, where the Rule was formally silent, it explicitly allowed district judges to make findings of fact orally. Finally, in 1985, Rule 52(a) was amended to clarify that it applied to *all* findings of fact "whether based on oral or documentary evidence."⁹²

C. Summary

Out of the history of Rule 52(a)'s emergence, three themes become apparent: (1) reviewing courts possess the final authority to review law for error, misapplication, and declaration, while trial courts engage in fact finding; (2) judicial comity and resources are maximized through effective allocation of decision making responsibilities; and (3) modes by which trial evidence is taken and factual findings are

85. *Id.* However, if the judge's finding was a special verdict, the reviewing court was limited to determining the sufficiency of the facts found to support the judgment. *Id.*

86. *Id.* at 203.

87. *Id.*; Note, *supra* note 60, at 510.

88. Clark & Stone, *supra* note 60, at 203.

89. Note, *supra* note 60, at 510-11 (and cases cited therein).

90. *Id.* at 511.

91. See FED. R. CIV. P. 52 advisory committee's note on 1946 amendments.

92. See FED. R. CIV. P. 52 advisory committee's note on 1985 amendments.

documented seek to maximize judicial efficiencies between the trial and appellate courts.

Rule 52(a) attempts to codify those themes. The Rule seeks to allocate power and responsibilities between the trial and appellate courts and enhance systemic efficiencies. Trial courts are given authority over findings of fact, whether based on oral or documentary evidence. Appellate courts are empowered to independently review law as declared or applied, but must let stand findings of fact unless they are clearly erroneous.

However, Rule 52(a) has not been able to completely prevent appellate courts from crossing the lines of decision making responsibilities and authority, thus tipping the balance of competence, comity, and efficiency. *Concrete Works*, *Easley*, and *Equality Foundation* serve as a few examples of this. As we will see, Rule 52(a) text and court decisions reveal that (1) factual findings cannot always be articulated with sufficient clarity to avert appellate court scrutiny, (2) appellate courts continue to avoid Rule 52(a)'s directive as it regards documentary evidence, (3) Rule 52(a)'s "clearly erroneous" standard is malleable, and (4) appellate court fact typology can render Rule 52(a) inapplicable.

IV. THE ROLE OF COURTS—GENERALLY

A. *What Courts Do*

To fairly consider the overarching Rule 52(a) themes, it is useful to first examine the Rule within the broad framework of what courts do, which is identify facts, declare law, and apply law. Fact identification entails the collection and distillation of information needed to adjudicate within the legal framework of a case.⁹³ That information may be derived from a variety of sources, although the litigants, the judge, and/or the jury act as agents, placing the information into the legal framework.⁹⁴ Law declaration entails the creation and development of legal norms. By their character, legal norms are established not only to articulate the law in a given context, but to provide guidance for future litigants, the courts, and society to be governed by those norms.⁹⁵

93. Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 CORNELL L. REV. 1131, 1154 (2001) (fact "determinations . . . are specific assessments of what actually occurred").

94. However, as we will see, the process of fact identification is never as easy as the term would suggest—due not only to epistemological dilemmas, but to evidentiary rules which cabin facts and the often less-than-precise articulation of "pure" findings of fact.

95. Alogna, *supra* note 93, at 1154 ("legal principles have general normative and prescriptive significance"); Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 918 (1992) (legal norms "prescribe the consequences to be attached to" facts).

Law application entails “relating the legal standard of conduct to the facts established by the evidence.”⁹⁶ In this “complex psychological process,”⁹⁷ legal norms are reinforced, rejected, clarified, or elaborated upon over the situation-specific facts.⁹⁸ Law application can give the legal norm added force through its application to a new factual context. Conversely, law application can dilute or nullify the legal norm through a refusal to apply it. Law application can enhance the legal norm’s predictability through clarification and explication. Finally, law application can create an entirely new legal norm, through explicit declaration or by adding nuance through elaboration upon the existing legal norm.⁹⁹

B. Rule 52(a) as an Allocation of Responsibility Mechanism

Rule 52(a) is a mechanism by which the responsibility for fact identification, law declaration, and law application is allocated.¹⁰⁰ While the act of law application is performed by both the trial and appellate courts, the premise behind giving the trial courts fact finding authority and appellate courts authority over the law is a “determination that . . . one judicial actor is in a better position to decide the issue in question.”¹⁰¹ In making these allocations, Rule 52(a) codifies important values: judicial competence, administrative efficiency, and doctrinal coherence.¹⁰²

Trial courts take testimony and other evidence, render evidentiary decisions, and make judgments about witness credibility in order to develop factual findings. As the role of trial judge as fact finder becomes rooted, judges ideally adapt to and master the act of fact

96. Alogna, *supra* note 93, at 1155 (law application “entails a judgment that that this law is relevant to *these* facts, or stated conversely, that the facts, by meeting the standard instantiated in the law, trigger legal consequences”); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 236 (1985).

97. Monaghan, *supra* note 96, at 236.

98. *Id.*

99. In the elaboration upon existing norms, new law can be made in intended and unintended ways. When the norm elaboration becomes more visible, courts enter the territory of law declaration. The distinction drawn between norm elaboration and law application attempts to parse holding versus dictum. Monaghan, *supra* note 96, at 264. However, separating court holdings from dicta is not an easy proposition. George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14 (1992). Christie criticizes Monaghan, who, he says, assumes that it is possible to distinguish clearly between norm elaboration and norm application, feeling that the assumption that such a distinction can be clearly drawn is “untenable on both theoretical and practical grounds [T]he distinction is certainly always one of degree and not one of discrete logical categories.” *Id.* at 31.

100. Monaghan, *supra* note 96, at 234.

101. *Miller v. Fenton*, 474 U.S. 104, 114 (1985); see also Alogna, *supra* note 93, at 1157 (quoting *Miller*, 474 U.S. at 114); Cooper, *supra* note 60, at 659.

102. Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 629, 630 (2004); Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957).

finding.¹⁰³ Moreover, given the structure of the court system which does not permit nor can sustain matters being fully relitigated at each level, having facts fully adjudicated at the trial level promotes efficiencies by relieving appellate courts of that often lengthy and arduous task.¹⁰⁴ Appellate judges, on the other hand, are not bound to try cases, but are expected to thoughtfully consider and apply the law with a greater degree of intellectual rigor. As apparent since the creation of appellate review, their role is to finally articulate the law and give doctrinal uniformity to legal norms.

C. Rule 52(a) as an Allocation of Power Mechanism

Directing that findings of fact “shall not be set aside *unless . . .*” suggests that Rule 52(a) was intended to fix the realm of authority trial courts would possess. That the drafters did not have Rule 52(a) read “*shall* [] be set aside *if . . .*” reflects that they did not intend Rule 52 to articulate the reach of the appellate courts *over* the trial courts. Thus, Rule 52(a), by giving trial courts explicit authority over findings of fact, acts as an empowerment mechanism. In the process, Rule 52(a) lends a presumption of finality to the trial courts’ factual determinations.

Conversely, by not subjecting “conclusions of law” to Rule 52(a)’s clearly erroneous standard, the appellate courts’ role as final arbiter of “what the law is”¹⁰⁵ is also reinforced. The clearest example occurs when a trial court errs by committing a mistake of law or has misapplied the law.¹⁰⁶ Furthermore, at the juncture where a trial court applies the law in a manner that approaches norm declaration or norm elaboration,¹⁰⁷ appellate courts’ power to engage in *de novo* review becomes explicit. Rule 52(a) implicitly empowers appellate courts to affirm the trial court judgments. Affirming trial court decisions furthers jurisprudential values of comity and systemic legitimacy as well, reinforcing the correctness of those judgments and mitigating perceptions of unwarranted trial court bias. In turn, the legitimacy of the legal norms is enhanced.

103. Wright, *supra* note 102, at 782.

104. Thus, the controlling factor is the relative competence of the two tribunals and not promotion of trial court dignity and administrative efficiency.

105. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); Monaghan, *supra* note 96, at 264.

106. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 79 (1986); *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 855 n.15 (1982); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *see also* JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE, CIVIL*, § 52.32, (3d ed. 1997).

107. Monaghan, *supra* note 96, at 236-37.

D. Summary

Rule 52(a), as a mechanism for allocating responsibility and power between the courts, serves important functions. Giving legal norms consistency, enhancing systemic efficiencies, and promoting judicial competence are the goals Rule 52(a) strives to enforce. However, Rule 52(a), by its terms, enables appellate courts to cross the lines of responsibility and authority. Rule 52(a)'s operative words—"findings of fact," "documentary evidence," and "clearly erroneous"—are so malleable that appellate courts freely depart from their plainest meaning. What is more, appellate courts are aided in Rule 52(a) circumvention by their power to classify or reclassify facts.

V. THE MALLEABLE NATURE OF RULE 52(A)

A. No.1: Articulating Findings of Fact

Established in equity practice and incorporated into Rule 52(a), trial courts are required to articulate findings of fact for appellate review.¹⁰⁸ The requirement that findings of fact be placed on the record serves three purposes: (1) to assist the appellate court by giving it a clear understanding of the ground or basis of the decision of the trial court,¹⁰⁹ (2) to make definite precisely what is being decided by the case in order to apply the doctrines of estoppel and res judicata in future cases, and (3) to evoke care on the part of the trial judge in ascertaining the facts.¹¹⁰ As for their value as precedent, findings of fact serve a vital role. "Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon."¹¹¹ The two challenges inherent in Rule 52(a) aspiring to that role are (1) defining and articulating "facts" and (2) distinguishing "facts" from "law."

1. Defining and Articulating "Facts"

Defining what is a "fact" has eluded epistemologists and philosophers alike, to say nothing of jurists. The most commonly understood definition of a fact is something that has actual existence, an objective reality.¹¹² Gary Lawson defines the concept of truth as "a reality that exists independently of its acknowledgement by the conscious

108. FED. R. CIV. P. 52(a).

109. MOORE, *supra* note 106, at § 52-03(2) (to require findings of fact and conclusions of law to be stated "is to furnish the causal link between the facts and the judgment rendered").

110. CHARLES ALAN WRIGHT & ARTHUR B. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL SECTION, §§ 2571, 2579 (1971).

111. FED. R. CIV. P. 52 advisory committee's note on 1946 amendments.

112. See MERRIAM-WEBSTER DESK DICTIONARY 175 (2005).

mind of a perceiver.”¹¹³ Even the most objective facts, however, are modified by the perceiver and the context in which they are perceived.¹¹⁴ Participants in the legal process account or recount acts, events, or conditions which have occurred, which currently exist, or even which might occur.¹¹⁵ More than this, inferences and deductions drawn from those acts, events, or conditions are couched as facts. In making a statement of fact about a given situation, participants (or observers) account certain aspects, neglect others, and interpret the selected data.¹¹⁶ Facts—regardless of who articulates them—are embedded with subjective value, reason, and belief. Thus, it is “impracticable, if not impossible, to make a pure fact statement.”¹¹⁷

2. Distinguishing “Facts” from “Law”

In the adversarial system, the legal context itself determines which facts are articulated: those perceived to be relevant to responding to the legal issues raised or those needed to respond to the process. To identify “relevant” facts, then, is to imbue them with legal value.¹¹⁸ As a result, the distinction between “law” and “fact” is not always an easy one to make.¹¹⁹ Nonetheless, the role of the trial

113. Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. U. L. REV. 859, 866 (1992); see also Cook, *supra* note 79, at 234 (“Facts are coercive—they exist whether or not we will them to.”); Monaghan, *supra* note 96, at 239 (“All facts are not ‘the direct result of observation, unmodified by any act of reason.’”).

114. Physicist Werner Heisenberg’s uncertainty principle notes how the act of observation requires intervention into a system; yet we can never know whether the intervention into a system necessarily alters it. WERNER HEISENBERG, *PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE* 47-48 (1958).

115. Monaghan, *supra* note 96, at 235; Weiner, *supra* note 45, at 1022.

116. Cook, *supra* note 79, at 239 (facts “are not ‘the direct result of observation, unmodified by any act of reason’”).

117. Cook, *supra* note 79, at 238 (“To make a ‘statement’ about such facts suggests we can do so. It is a scientific and philosophical impossibility.”).

118. Even terms that purport to state facts have legal dimensions. For example, to say in a complaint that the “defendant had in his possession ten barrels of flour” is to couch fact as legal conclusion. See *id.* at 243.

119. Alogna, *supra* note 93, at 1153 (noting the “‘elusive’ character of a technique for distinguishing fact from law”); Lawson, *supra* note 113, at 863 (“The law-fact distinction, whatever its utility, is purely a creature of convention.”); see also, e.g., Williams v. Taylor, 529 U.S. 362, 408 (2000) (“[I]t is sometimes difficult to distinguish a mixed question of law and fact from a question of fact.”) (O’Connor, J., concurring); Thompson v. Keohane, 516 U.S. 99, 110-11 (1995) (“[T]he proper characterization of a question as one of fact or law is sometimes slippery.”); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990) (“The Court has long noted the difficulty of distinguishing between legal and factual issues.”); Miller v. Fenton, 474 U.S. 104, 113 (1985) (“[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.”); Wainwright v. Witt, 469 U.S. 412, 429 (1985) (“It will not always be easy to separate questions of ‘fact’ from ‘mixed questions of law and fact’”); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (citing the “vexing nature of the distinction between questions of fact and questions of law” and the lack of a “rule or principle that will unerringly distinguish a factual finding from a legal conclusion”); Dobson v. Comm’r, 320 U.S. 489, 500-01 (1943) (“[T]he chief difficulty in consistent and uniform compliance with the congressional limita-

judge is to do just that, to discern “that part of reality which is relevant to the adjudication of the action.”¹²⁰ Moreover, “constructing a *finding* of fact requires a judge to do more than simply identify and describe a ‘reality’; it requires the judge to interpret, choose between, make inferences from, deduce toward, and/or synthesize data, then articulate one or more ‘relevant realities.’”¹²¹ As Professor Henry Monaghan has observed, in constructing findings of fact, a judge must be able to “yield only assertions that can be made without *significantly* implicating the governing legal principles.”¹²² Monaghan’s use of the qualifier “significantly” concedes the impossibility of wholly divorcing facts from their legal context. Consequently, judges are challenged to make factual findings which, to the extent practicable, are devoid of legal terms, concepts, or norms.¹²³

The Supreme Court has acknowledged the difficulty in distinguishing between law and fact, but it has failed to develop a “rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”¹²⁴ Doubtlessly, the root of the difficulty is in the “vexing nature” of the distinction.¹²⁵ What can best be said is that the law/fact distinction is only one of degree, with “pure” law at one end of the continuum¹²⁶ and “pure” fact at the other end. In this way, it is said that “law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience.”¹²⁷ It is the point at which a factual finding “crosses the line between application of [] ordinary principles of logic and common experience . . . into the realm of a legal rule” when Rule 52(a)’s clear error standard yields to *de novo* review.¹²⁸ It is precisely this “nodal quality” of the law/fact distinction that provides the leeway for appellate courts—

tion upon court review lies in the want of a certain standard for distinguishing ‘questions of law’ from ‘questions of fact.’ . . . [I]ts difficulties in practice are well known and have been subject of frequent comment.”)

120. Friedman, *supra* note 95, at 918.

121. Adamson, *supra* note 102, at 631 (citing Emmet T. Flood, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795, 1808-13 (1991) (emphasis added)); Lawson, *supra* note 113, at 863.

122. Monaghan, *supra* note 96, at 235.

123. Nordbye, *supra* note 79, at 28 (“Findings of fact, as a basic matter, should not contain a mere recitation of the evidence, nor matters of argument or explanation.”). Nordbye asserts that opinion or memoranda do not constitute findings of fact. While valuable in offering a judge’s view or rationale, opinion or memoranda do not state findings of fact strictly speaking, and thus the appellate court has the onus to “glean findings of issuable facts.” *Id.* at 32.

124. *Pullman-Standard*, 456 U.S. at 288.

125. *Id.*

126. Monaghan, *supra* note 96, at 233.

127. *Id.* So even a “pure” fact is not so, because every fact exists within a context, surrounded by other “facts” and, importantly, propelled by inferences which move it down the continuum. See *id.* at 232-36; Alogna, *supra* note 93, at 1155 (“[T]he nodes of law and fact are not necessarily distinct; they may blur together.”).

128. *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 501 n.17 (1984).

intentionally or unintentionally—to adhere to Rule 52(a) or avoid it altogether.

B. No. 2: The Documentary Evidence “Mandate”

Rule 52(a)’s 1985 amendment was intended to explicitly resolve any question as to the form of evidence which must be reviewed for “clear error.” Since then, appellate courts have been bound to give the appropriate deference to a trial court’s factual findings “whether based on oral or documentary evidence.”¹²⁹ Despite the amendment, several appellate courts have elected to review documentary evidence *de novo* or upon some heightened standard other than clear error.

1. Treatment of “Traditional” Documents

Appellate court standard of review varies wildly in cases in which the trial record is solely or predominantly made up of documentary evidence. Some appellate courts have maintained that when a trial court’s factual findings do not rest on demeanor evidence and evaluation of a witness’ credibility, heightened review is permissible.¹³⁰ More specifically, while some courts engage in *de novo* review when the trial record consists of undisputed documents, others will announce plenary review even under circumstances in which documents are in contradiction.¹³¹ The underlying rationale behind both approaches is that the appellate court is in an equally competent position as the trial court in making evidentiary proof determinations and resolving disputes in documents. Where document review calls for making factual inferences towards an “ultimate” legal conclusion, some appellate courts feel deference is unwarranted, as facts move farther down the continuum toward their province of law application and declaration.¹³²

2. “Documents” and New Technology

The growth of trial court evidence and testimony through electronic preservation has been exponential. The traditional trial court record used to consist of a trial transcript in paper form, along with

129. FED. R. CIV. P. 52(a).

130. See, e.g., *Easley v. Cromartie*, 532 U.S. 234-43 (2001); *First Nat’l Bank v. Am. States Ins. Co.*, 1998 U.S. App. LEXIS 335, at *15 (10th Cir. 1998) (“This case was resolved by the district court on stipulated facts and documentary evidence so that we can review *de novo* whether those facts establish just cause or excuse.”); *Alexander Proudfoot Co. World Headquarters L.P. v. Thayer*, 877 F.2d 912, 916 (11th Cir. 1989) (“The appellate court, in reviewing the documentary evidence presented, is in as good a position as the district court to determine the existence of personal jurisdiction. Our review, therefore, is plenary.” (citation omitted)); *Marcum v. United States*, 621 F.2d 142, 144-45 (5th Cir. 1980).

131. See, e.g., *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1994).

132. See *supra* Part II.C.

briefs and exhibits. However, for at least the past forty-five years, trial courts have used motion cameras to record proceedings and other media forms to capture the trial record. Technology such as digital recording, enhanced audio and video capacities, computer-assisted transcription, index and search functions, electronic briefs, and hyperlinked legal resources have become increasingly available at the trial and appellate court level. These advancements have made the use of electronic media more efficient through preservation of trial proceedings, documentary evidence, depositions, and legal resources on CD-ROMs.¹³³ Today, as federal courts become electronically equipped,¹³⁴ the use of multimedia forms for taking and preserving evidence for appeal compels a reevaluation not only of the definition of “documentary evidence,”¹³⁵ but also of what the appropriate standard of review should be.¹³⁶

A fundamental rationale behind Rule 52(a) ceding fact finding authority to the lower court is that the trial judge has the best opportunity to observe the demeanor of the witnesses’ live testimony at trial. Some argue that the force of that rationale is diminished, however, if trial proceedings (and other evidentiary documents) can be fully preserved for review.¹³⁷ Effectively, new “[v]ideo technology refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decision making.”¹³⁸ Appellate judges have equal access to the same trial data and can more efficiently review that data than in the past. As a result,

133. Several state court appellate procedure rules now allow video or digital transcripts to constitute the record on appeal. See Briana E. Chua, Comment, *Arizona’s Digital Record & Its Use on Appeal*, 35 ARIZ. ST. L.J. 605 (2003) (discussing Arizona, Kentucky, Ohio, Vermont, Alabama, and Tennessee rules).

134. For example, over 25% of the 1366 federal district courtrooms in the United States have laptop wiring and/or some form of computer monitor displays for the jury. “Still more courtrooms have access to portable equipment . . . 94% of districts have access to an evidence camera and 66% to a digital projector and projection screen.” Frederic I. Lederer, *Courtroom Technology: For Trial Lawyers, the Future Is Now*, 19 CRIM. JUST. 14, 15 (Spring 2004).

135. Indeed, the rules of discovery have expanded the definition of “documents” to accommodate the role technology has played in the making, storing, and retention of evidence for purposes of disclosure and exchange. See FED. R. CIV. P. 34 (as amended 2006); see, e.g., *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437 (D.N.J. 2002) (stating that Rule 26(f)(1) conferences should encompass discussions regarding whether parties possess discoverable information in electronic form and whether such information will be produced, as well as software, privilege, and costs concerns).

136. Frederic I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 252 (2000) (“In one sense the most sweeping change facing the appellate courts is the likely change in the record of trial from text to multi-media, a change that presents at least the possibility of affecting the standard of appellate review.”).

137. Robert C. Owen & Melissa Mather, *The Decisionmaking Process: Thawing Out the “Cold Record”: Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRACT. & PROCESS 411 (2000).

138. *Id.* at 412.

“studying and assessing the demeanor of witnesses, lawyers, and jurors are no longer the exclusive province of the trial court.”¹³⁹ Given these technological efficiencies, some have gone so far as to suggest that *de novo* appellate review should be compelled where important constitutional rights are at issue.¹⁴⁰ Rule 52(a)’s clear error directive as it regards documentary evidence, consequently, is potentially left open to broader circumvention.

C. No. 3: Defining and Applying “Clear Error”

The term “clearly erroneous,” codified by Rule 52(a) in a bow to equity practice, has proven to be the most fugitive of terms to define. As a legal fiction, the term has “no intrinsic meaning” and is “elastic, capacious, malleable, and above all variable.”¹⁴¹ In *United States v. Aluminum Company of America*,¹⁴² Justice Learned Hand recognized the difficulty in providing substance to the term: “[A]ll that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse if most reluctantly and only when well persuaded.”¹⁴³ In the most widely accepted sense, the Supreme Court has said that clear error exists where “although there is evidence to support” a district court’s factual findings, the appellate court, “on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹⁴⁴ As the term “clearly erroneous” is, “at best, a nebulous concept,”¹⁴⁵ appellate courts’ attempts to give meaning to the term reveal not only its malleable nature, but also something about a court’s view of its authority *vis-à-vis* the trial court.

When articulating its standard of review, an appellate court often signals not only the standard of review which will be applied but also the appellate court’s disposition towards the trial court’s conclusions

139. *Id.* at 413.

140. *See id.* at 420-22 (arguing that in death penalty cases and the jury selection process, videotape should be a rule, given the constitutional questions those cases and processes raise).

141. Cooper, *supra* note 60, at 645.

142. 148 F.2d 416 (2d Cir. 1945).

143. *Id.* at 433.

144. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also* *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Comm’r v. Duberstein*, 363 U.S. 278 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949); Comment, *Scope of Appellate Review Widened*, 2 STAN. L. REV. 784, 787 (1949-50) (opining that the use of the “‘definite and firm conviction’ test” in *Gypsum* did not signal an intent to extend the scope of factual review, but merely did “no more than suggest a means of approach to the nebulous problem of when a finding of fact is subject to reversal under Rule 52(a)”).

145. Comment, *supra* note 144, at 785. At least one commentator has argued that a clarifying definition of “clearly erroneous” is neither possible nor desirable. Cooper, *supra* note 60, at 645.

of law. In some instances, appellate courts articulate their respect for the line 52(a) attempts to draw by identifying the limits of their authority. Appellate courts have held that a trial court's factual findings are to enjoy a presumption of correctness.¹⁴⁶ Courts have been cautioned not to "substitute their own impressions for those of the [trial] court,"¹⁴⁷ not to overturn the trial court decision "because it would have decided the case differently,"¹⁴⁸ nor "retry the facts."¹⁴⁹ Courts are not to set aside a judgment "because of some doubt about the quantum of evidence,"¹⁵⁰ nor are they to make "independent findings upon [the] evidence."¹⁵¹ Along those lines, trial courts hearing civil matters without a jury will not be found to have committed clear error if conclusions are "plausible"¹⁵² or supported by a "preponderance of substantial evidence,"¹⁵³ "substantial, competent evidence,"¹⁵⁴ or "substantial credible evidence."¹⁵⁵

Conversely, appellate courts have articulated the clear error standard in ways which signal the *reach* of their authority. Thus, an appellate court might say a trial court decision can be overturned if it is "without *adequate* evidentiary support"¹⁵⁶ or is "without *substantial* support."¹⁵⁷ Factual findings may be clearly erroneous if they are "without *sufficient* evidence,"¹⁵⁸ "not supported by *substantial* evidence,"¹⁵⁹ or if "reasonable men could not possibly make such a finding."¹⁶⁰ Moreover, if the decision is "devoid of minimum support,"¹⁶¹ has "no rational relationship to the supportive evidentiary data,"¹⁶² is

146. See *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir. 1980); *J.A. Jones Constr. Co. v. Englert Eng'g Co.*, 438 F.2d 3, 5 (6th Cir. 1971); *Lowden v. Hanson*, 134 F.2d 348, 355 (8th Cir. 1943).

147. *Horner v. Mary Inst.*, 613 F.2d 706, 713 (8th Cir. 1980).

148. See, e.g., *Anderson*, 470 U.S. at 573.

149. See, e.g., *O'Guinn v. Dutton*, 42 F.3d 331 (6th Cir. 1995); *Koch v. Hutchinson*, 814 F.2d 1489, 1496 (10th Cir. 1987) (citing *White v. Conoco*, 710 F.2d 1442, 1443 (10th Cir. 1983)); *Jolly v. Listerman*, 672 F.2d 935, 943 (D.C. Cir. 1982).

150. *Webb v. Frisch*, 111 F.2d 887, 888 (7th Cir. 1940).

151. *Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F.2d 920, 926 (9th Cir. 1958).

152. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (citing *Anderson*, 470 U.S. at 573-74).

153. *Raiche v. Standard Oil Co.*, 137 F.2d 446, 448 (8th Cir. 1943).

154. *Fed. Sav. & Loan Ins. Corp. v. First Nat'l Bank*, 164 F.2d 929, 932 (8th Cir. 1947).

155. *United States v. Charleston County, S.C.*, 365 F.3d 341, 349 (4th Cir. 2006).

156. *Reprosystem v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir. 1984).

157. See *Cont'l Oil Co. v. Jones*, 113 F.2d 557, 564 (10th Cir.), *cert. denied*, 311 U.S. 687 (1940).

158. See *Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 312 n.14 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1975).

159. *Kincade v. Mikles*, 144 F.2d 784, 787 (8th Cir. 1944).

160. *Campbell v. Barsky*, 265 F.2d 463, 466 (5th Cir. 1959).

161. *Krasnov v. Dinan*, 465 F.2d 1298, 1302-03 (1972).

162. *Id.* at 1302 (An "[a]ppellate court [must] accept the ultimate factual determination of the factfinder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility; or (2) bears no rational relationship to

“contrary to the clear weight of the evidence,”¹⁶³ or goes against “the truth and right of the case,”¹⁶⁴ trial courts have committed clear error.

Appellate courts have phrased their standard of review announcement in sometimes subtle but insightful ways. These articulations of Rule 52(a) are not distinctions without difference. Despite the Supreme Court’s attempt to offer guidance, the flesh given to the definition of “clear error” can yield meaningful and inconsistent outcomes.

D. No. 4: Fact Typology

On its face, Rule 52(a) applies to any and all trial court findings of fact, no matter what type of fact.¹⁶⁵ As the Supreme Court famously noted, Rule 52 “does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court’s findings unless clearly erroneous. It does not divide facts into categories”¹⁶⁶ Nonetheless, appellate courts have effectively discarded that plain reading through the development of a fact typology—a direct consequence of the “nodal” quality of the fact/law distinction: historical,¹⁶⁷ ultimate, constitu-

the supportive evidentiary data. Unless the reviewing court establishes existence of either of these factors, it may not alter the facts found by the trial court.”).

163. *Sears, Roebuck & Co. v. Talge*, 140 F.2d 395, 396 (8th Cir. 1944); *Fleming v. Palmer*, 123 F.2d 749, 751 (1st Cir. 1941), *cert. denied*, 316 U.S. 662 (1941).

164. *Sanders v. Leech*, 158 F.2d 486, 487 (5th Cir. 1946).

165. *See, e.g., Tex. Co. v. R. O’Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957) (“Rule 52(a) unambiguously governs all findings”); *Chicago Title & Trust Co. v. United States*, 209 F.2d 773 (7th Cir. 1954) (absent such clear error as to leave court, on entire evidence, with definite and firm conviction that mistake had been committed with respect to findings of trial court, such findings are binding and apply also to factual inferences from undisputed facts; appellate court could not interfere with the finding of the trial court unless that finding was clearly erroneous when the facts were stipulated); *Ball v. Paramount Pictures, Inc.*, 169 F.2d 317 (3d Cir. 1948) (even findings based upon stipulated or undisputed subsidiary facts); *see also* FED. R. CIV. P. 52 advisory committee’s notes.

166. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (Rule 52 “does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court’s findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with ‘ultimate’ and those that deal with ‘subsidiary’ facts.”) (holding that whether a differential impact of the seniority system reflected an intent to discriminate on account of race is a pure question of fact, subject to Rule 52(a)’s clearly erroneous standard); *accord Rogers v. Lodge*, 458 U.S. 613 (1982) (reiterating *Pullman-Standard*, 456 U.S. 273).

167. In referencing “historical” facts throughout this Article, I am using the term to mean those facts giving rise to the case before a court. “Historical facts” are alternatively referred to as “pure” facts, “basic” facts, or “primary” facts. *Brown v. Allen*, 344 U.S. 443, 506 (1953). Such facts have also been referred to as “circumstantial” or “evidentiary” facts. *Bogardus v. Comm’r*, 302 U.S. 34, 39 (1937). Most commonly, “historical” facts are synonymous with “adjudicative” facts. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 353 (1958) (adjudicative facts are those that are specific to the litigation). Historical facts designate “what exists, in contrast with what should, rightfully, exist . . . things, events, actions, conditions, as happening, existing, really taking place.”); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 *VAND. L. REV.* 111, 113 (1988) (adjudicative facts “are the stuff of ordinary litigation”).

tional, legislative,¹⁶⁸ and jurisdictional.¹⁶⁹ Legislative facts themselves have been subcategorized into types: sociological, scientific, political, historical (as a branch of knowledge), economic, or law-legislative. In carving out these “exceptional” types of facts, trial courts have been left with only findings of historical facts which are insulated by clear error (but as we will see, in many instances, even historical facts can be subject to *de novo* review). For all these other fact types, appellate courts have appropriated for themselves the discretion to exercise independent judgment over factual findings. To better appreciate the implications raised by these fact types and their treatment, the following Section will first focus on historical facts before examining those often collectively, imprecisely, referred to as “mixed questions of law and fact.”

1. Historical Facts

Put plainly, historical facts answer the question “*what happened here?*”¹⁷⁰ A historical fact is “*the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.*”¹⁷¹ In this sense, historical facts are value-neutral (at least in theory) when distinguished from conclusions of law. “Determinations that a defendant in a negligence case failed to stop at a stop sign”¹⁷² or, in a criminal case, that a defendant had a gun are examples of adjudicative facts. Once the trier of fact determines these facts, her role is to then apply preexisting legal rules to those facts to reach a decision.

Historical facts, being the “purest” type of fact, should be those most clearly subject to Rule 52(a).¹⁷³ However, appellate courts can

168. See Kurtis A. Kemper, *What Constitutes “Adjudicative Facts” Within Meaning of Rule 201 of Federal Rules of Evidence Concerning Judicial Notice of Adjudicative Facts*, 150 A.L.R. FED. 543, 553 (1998).

169. This Article will not fully examine jurisdictional facts. The jurisdictional fact doctrine concerns itself with the scope of power exercised in administrative agencies and whether, in light of an empowering statute, agencies have appropriately exercised that power. See Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 995 n.13 (1986) (jurisdictional facts are those “fundamental to the existence of an agency’s statutory jurisdiction”); see also Arthur Larson, *The Doctrine of “Constitutional Fact,”* 15 TEMP. L.Q. 185 (1941). Whether “objects, situations or acts” fall within the administrative agency’s decisional power is reviewable *de novo*. *Id.* If jurisdictional propriety is established, the next question is whether there was “substantial evidence” to support the administrative agency conclusions. *Id.* at 187.

170. Monaghan, *supra* note 96, at 235.

171. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 548 (abridged student ed. 1965).

172. Woolhandler, *supra* note 167, at 113-14.

173. The explanatory notes of Rule 52 state that the clearly erroneous provision was applicable to all classes of fact “whether the finding is of a fact concerning which there was

take historical facts out of the realm of clear error. Appellate courts have exercised independent judgment over historical facts when based on documentary evidence,¹⁷⁴ undisputed testimonial evidence,¹⁷⁵ stipulated evidence, or inferences and deductions made from historical facts.¹⁷⁶ As illuminated in the previous Section, appellate courts justify *de novo* review on the grounds that the form (documentary) and/or character (disputed/undisputed) of the evidence, coupled with the absence of witness demeanor and credibility determinations, make appellate courts just as capable of fact finding.¹⁷⁷

2. *Mixed Statement of Law and Fact*

Mixed statements of law and fact are those which have embedded not only “pure” factual elements, but also indicia of legal principles. The Supreme Court has 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 sat-

conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.” See Note, *supra* note 60, at 514 (quoting FED. R. CIV. P. 52 advisory committee’s note); see also *Comm’r v. Duberstein*, 363 U.S. 278, 291 (1960) (the clearly erroneous standard applies to factual inferences from undisputed facts); *Rawl v. United States*, 778 F.2d 1009 (4th Cir. 1985); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 8 (2d Cir. 1978) (the “clearly erroneous” standard is to be applied only to findings of historical fact and the “inferences therefrom”); *Stafos v. Jarvis*, 477 F.2d 369 (10th Cir. 1975), *cert. denied*, 414 U.S. 944 (1973) (describing the clearly erroneous standard as inapplicable to both questions of law and those of mixed law and fact).

174. See, e.g., *First Nat’l Bank v. Am. States Ins. Co.*, 1998 U.S. App. LEXIS 335, at *15 (10th Cir. 1998) (“This case was resolved by the district court on stipulated facts and documentary evidence so that we can review *de novo*.”).

175. See, e.g., *id.*; *Marrs-Winn Co. v. Giberson Elec., Inc.*, 103 F.3d 584, 589 (7th Cir. 1996) (deciding to use primarily a *de novo* review standard “because most of the evidence was presented by stipulation, the testimony was essentially undisputed, and the bankruptcy court’s decision rested solely on legal conclusions”).

176. See, e.g., *Yorke v. Thomas Iseri Produce Co.*, 418 F.2d 811, 814 (7th Cir. 1969) (“[W]hen factual determination is primarily a matter of drawing inferences from undisputed facts or determining legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved.”); *Soles v. Franzblau*, 352 F.2d 47, 50 (3d Cir. 1965) (holding that the rule that findings of fact may not be set aside unless clearly erroneous was not relevant where the “ultimate findings of fact were predicated upon inferences drawn from evidence as to which there was no disagreement”); *Mayo v. Pioneer Bank & Trust Co.*, 297 F.2d 392, 395 (5th Cir. 1961) (“Under Rule 52(a) . . . the trial judge’s findings of fact are conclusive unless clearly erroneous, but when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved.”).

177. See, e.g., *Gudgel v. Comm’r*, 273 F.2d 206, 210 (6th Cir. 1959) (“[I]n many cases . . . the Court of Appeals is as well qualified as the District Judge, or the Tax Court, to draw inferences and conclusions from undisputed facts without subjecting them to the test of the ‘clearly erroneous’ rule.”).

isfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”¹⁷⁸

Ultimate, constitutional, and legislative facts can be viewed as specific forms of mixed statements of law and fact. However, more often than not, appellate courts characterize trial court findings as “mixed questions of law and fact” without distinguishing the type of fact at issue. A significant reason for this failure is the skill and care (or lack thereof) exhibited by judges at both levels when articulating factual findings. Assuming the legitimacy of parsing Rule 52(a) facts into types, articulating the fact type is important, as it offers important insight into the rationale for the appellate court’s standard of review as well as the degree of scrutiny the appellate court should give to the evidence.

(a) *Ultimate Facts*

A mixed statement of law and fact may be an “ultimate fact,” such that when fact is applied to a legal standard, it directly triggers a legal consequence.¹⁷⁹ When articulated, an ultimate fact “must be sufficient in itself, without inference or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case.”¹⁸⁰ Ultimate facts may in turn be those which trigger a constitutional determination, a legislative judgment, or a judgment that a statutory, regulatory, or common law rule was violated. An example of a mixed statement of law and fact involving a common law or statutory principle is a determination that the applicable standard of care was not exercised—an “ultimate” fact going to a finding of negligence. Depending on the nature of the legal norm triggered, appellate courts will apply a standard of review ranging from clear error to *de novo*.

Courts have drawn further distinctions by separating ultimate facts from subsidiary facts for purposes of applying a particular standard of review. “Subsidiary facts” might best be described as

178. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

179. Judge Weinstein, for example, sees the term as synonymous with “operative fact,” “material fact,” and “consequential fact.” JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS 401.4 (Joseph M. McLaughlin ed. 2001).

180. *Burr v. Des Moines R.R. & Navigation Co.*, 68 U.S. 99, 102 (1863) (“The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case.”); see also *Pullman-Standard*, 456 U.S. at 286 n.16 (“a ‘fact that is of consequence to the determination of the action’ ”); WEINSTEIN & BERGER, *supra* note 179, at 401[03] n.1 (1982) (quoting FED. R. EVID. 401).

those which serve as premises for the ultimate fact. To elaborate upon the recent example, the subsidiary facts in a negligence matter might be that (1) the plaintiff was stopped at a light, (2) the light was red, and (3) the defendant struck the plaintiff's car. The underlying facts may also establish that the defendant was (4) in his car, (5) traveling at ten miles per hour, (6) looking down to adjust his car stereo, and (7) when the defendant looked up, he was twenty-five feet from the plaintiff's vehicle. Those subsidiary facts might lead to the conclusion that the defendant "failed to exercise ordinary care." On appeal, some appellate courts will not separate those subsidiary facts from the ultimate fact, concluding that all facts found—ultimate and subsidiary—should be reviewed only for clear error.¹⁸¹ Others have undertaken the task of separating the subsidiary facts from the ultimate fact, reviewing the former for clear error and the latter *de novo*.¹⁸²

(b) *Constitutional Facts*

A constitutional fact is precisely what the term implies—one "fundamental to the existence of a constitutional right."¹⁸³ Whether a fact is classified as a "constitutional" one depends on whether the fact, if established, demonstrates the presence or absence of a constitutional right or obligation.¹⁸⁴ Conversely, a constitutional fact is one which does not turn upon questions of whether a statutory, common law, or regulatory power has been exceeded or proscribed.¹⁸⁵ For example, a determination as to whether a journalist defamed a plaintiff with ac-

181. *E.g.*, *Pullman-Standard*, 456 U.S. at 287 ("[Rule 52(a)] does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."); see also *Geisler v. Folsom*, 735 F.2d 991, 995 (6th Cir. 1984) ("In *Pullman-Standard v. Swint* the Supreme Court made it clear that Rule 52(a) makes no distinction between so-called 'ultimate' and 'subsidiary' facts. A reviewing court is bound by all findings of fact in a case heard by a district court without a jury, or with an advisory jury, unless they are clearly erroneous."); *Comm'r v. Spermacet Whaling & Shipping Co.*, 281 F.2d 646, 650 (6th Cir. 1960) ("The fact that the ultimate finding is a conclusion drawn from undisputed or established subsidiary facts does not change such a finding from one of fact to a conclusion of law. Being a finding of fact it is not to be set aside unless clearly erroneous."); Charles L. Brieant, *Findings by the Court, Judgment on Partial Findings*, in 9 MOORE'S FEDERAL PRACTICE § 52.05[3] (Daniel R Coquillette et al. eds., 3d ed. 2006).

182. *See, e.g.*, *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 447 (11th Cir. 1982) ("The government urges us to treat the question of whether a contract exists as a matter of fact, which we can set aside only upon finding that the district court's determination was clearly erroneous. This proposition fails to recognize the difference between subsidiary facts and ultimate facts In drawing conclusions from subsidiary facts the ability of the trial court to apply the law properly becomes more significant than its peculiar advantage in judging the weight of the evidence. Thus, it is logical for the reviewing court to treat ultimate facts as matters of law that it may determine independently.")

183. *Louis*, *supra* note 169, at 995 n.13.

184. Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1434-35 (2001).

185. *Christie*, *supra* note 99, at 26; *Larson*, *supra* note 169, at 187.

tual malice involves an assessment of historical facts which answer the constitutional fact, such as whether the defendant may use the First Amendment to shield his conduct.¹⁸⁶ The constitutional nature of the facts leading to the presence or absence of actual malice infers that the ultimate ruling has far-reaching implications—not only for the litigants, but as precedent taking its place in future constitutional jurisprudence. Not surprisingly, adjudication of constitutional facts is often the most public and even divisive determination a court will render.

The constitutional fact doctrine emerged out of jurisdictional fact doctrine in the 1920s with administrative agency decision cases involving due process and takings issues.¹⁸⁷ The constitutional fact doctrine gained force when it was first applied to a criminal case, *Near v. Minnesota*.¹⁸⁸ It has since been extended explicitly to First Amendment cases, beginning with *New York Times v. Sullivan*,¹⁸⁹ when the actual malice concept was first given constitutional fact dimensions.¹⁹⁰

Since *New York Times*, the doctrine has been expanded in First Amendment jurisprudence, most recently with the Supreme Court's decision in *Bose Corporation v. Consumers Union of United States, Inc.*¹⁹¹ The decision fortified the *New York Times* rule by holding that the presence or absence of "actual malice" in libel cases was a constitutional fact warranting *de novo* review.¹⁹² The Supreme Court has

186. See, e.g., *United States v. Torkington*, 874 F.2d 1441 (11th Cir. 1989).

187. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (discussing the scope of review of U.S. Employees' Compensation Commission's findings of fact); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (discussing the scope of review of Bureau of Immigration deportation decisions under the Chinese Exclusion Act); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (discussing the scope of judicial review of Public Service Commission of Pennsylvania's decision regarding water company's rates); Christie, *supra* note 99, at 20-26; Larson, *supra* note 169, at 190-99.

188. 283 U.S. 697 (1931); see also Monaghan, *supra* note 96, at 247-63.

189. 376 U.S. 254 (1964); see also Monaghan, *supra* note 96, at 240-41.

190. Monaghan, *supra* note 96, at 238.

191. 466 U.S. 485 (1984); Monaghan, *supra* note 96, at 239-47.

192. 466 U.S. at 510-11 (applying the doctrine of constitutional fact to the trial court's finding of actual malice). Writing for the majority, Justice Stevens rejected Rule 52(a)'s clearly erroneous standard of review, citing the importance of the actual malice principle to First Amendment jurisprudence. *Id.* In his opinion, Justice Stevens noted the obligation of appellate courts to "maintain control of, and clarify legal principles," as well as their duty to "unify precedent." *Id.* Though not explicitly doing so, Justice Stevens' opinion seems to require *de novo* review of every factual element underlying an actual malice finding. Some appellate courts have interpreted *Bose* as not requiring *de novo* review of the subsidiary facts going to the presence or absence of actual malice. See, e.g., *Connaughton v. Harte-Hanks Comm'ns, Inc.*, 842 F.2d 825 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989); Note, *Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases*, 57 FORDHAM L. REV. 579 (1989) (referencing several cases in an "attempt to resolve the ambiguities surrounding the constitutional mandate of independent appellate review of an actual malice determination"). By not clearly answering the question of which factual elements of actual malice would be subject to independ-

also invoked the constitutional fact doctrine when deciding controversies involving the Commerce Clause, Due Process, and the Eighth Amendment, as well as the Fourth Amendment. In those cases, the Court engaged in *de novo* review of controversies presenting the issue of whether a waterway was navigable;¹⁹³ whether a fine, in its amount, constituted cruel and unusual punishment;¹⁹⁴ and whether reasonable suspicion and probable cause existed prior to an interrogation.¹⁹⁵ Despite the apparent historical fact-based nature of these inquiries, the Supreme Court ruled that because a response to those facts directly triggered constitutional rights or obligations, it would engage in *de novo* review.¹⁹⁶

(c) *Legislative Facts*

Legislative facts fall into three distinct categories: facts which govern the process by which a judge or jury decides cases, those which play an adjudicatory function within a settled legal context, and those which are used to make law.¹⁹⁷ The first category of legislative facts informs and guides the trier's reasoning toward a particu-

ent review—the historical facts or the legal inferences made from those facts—the *Bose* decision has given appellate courts permission to fully reweigh the facts underlying a district court's finding on actual malice. For a discussion of the *Bose* case, see, for example, Monaghan, *supra* note 96, at 239-47; Cathy Parker, Note, *Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases?*—*Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984), 60 WASH. L. REV. 503 (1985).

193. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), *superseded by statute as stated in* *Rapanos v. United States*, 126 S. Ct. 2208, 2216 (2006) (regarding the definition of “navigable waters of the United States”).

194. See e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001).

195. See e.g., *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996).

196. For a more extensive discussion of the doctrine, see, for example, Hoffman, *supra* note 184; Larson, *supra* note 169; Monaghan, *supra* note 96; Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988); Frank R. Strong, *The Persistent Doctrine of “Constitutional Fact,”* 46 N.C. L. REV. 223 (1968); Judah A. Shechter, Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483 (1988).

197. See generally A.J. Stephani, *Therapeutic Jurisprudence in the Appellate Arena: Judicial Notice and the Potential of the Legislative Fact Remand*, 24 SEATTLE U. L. REV. 509, 518-19 (2000) (discussing three types of legislative facts: “nonadjudicative facts that are used as part of the judicial reasoning process . . . legislative facts [as] used to set forth an epistemological framework within which to view the ‘evidentiary’ or adjudicated facts of a case” and “‘pure’ legislative facts that ‘help the tribunal to determine the content of law and policy’” (citing Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942)); see also Peggy C. Davis, *There Is a Book Out . . .: An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988) (distinguishing adjudicative from legislative facts and giving examples of legislative facts); Woolhandler, *supra* note 167, at 114-15.

lar conclusion,¹⁹⁸ such as the case in which a judge gives the following jury instruction: “When deciding whether the defendant acted reasonably, you are to do so from the perspective of someone, possessing ordinary skills” The second category, adjudicative-legislative, comprises facts which decide issues in a way that would have “‘no substantive implications beyond the specific case in which [they are] introduced.’”¹⁹⁹ The third category —also referred to collectively as “premise facts”²⁰⁰—includes *nonadjudicative* legislative facts which may not only influence the case-specific outcomes, but seek normative recognition as a guide for future law or policy.²⁰¹ This Section focuses on the second and third type of legislative facts.

Adjudicative and nonadjudicative legislative facts often transcend ordinary factual determinations and can be of a sociological,²⁰² political,²⁰³ economic,²⁰⁴ scientific,²⁰⁵ historical,²⁰⁶ or legislative²⁰⁷ nature.

198. Stephani, *supra* note 197, at 518-19. An example of an adjudicative-legislative fact is data from economic events submitted to demonstrate the inability of a crude oil broker to comply with a contract. *Mainline Inv. Corp. v. Gaines*, 407 F. Supp. 423, 427 (N.D. Tex. 1976).

199. Stephani, *supra* note 197, at 520-21 (quoting John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science Law*, 134 U. PA. L. REV. 477, 491 (1986)).

200. Keeton, *supra* note 197, at 8. Of course, the distinction between adjudicative and nonadjudicative legislative facts can be a fine one. For example, there are numerous instances under which legislative facts introduced by the parties to prove case-specific propositions will take on normative characteristics if used to support new legal norm. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

201. Keeton, *supra* note 197, at 11. Legislative facts “are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” *Id.* at 58 (emphasis omitted). Legislative facts “are facts that ‘inform[] a court’s legislative judgment on questions of law and policy.’” Woolhandler, *supra* note 167, at 111 (quoting Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942)); *see also* Stephani, *supra* note 197, at 519.

202. “Sociological facts” are best described as propositions that are general in nature and describe the status or condition of a subject. The Supreme Court’s take on social science began with the Brandeis Brief in *Muller v. Oregon*, 208 U.S. 412 (1908) (holding, based on sociological studies, that because of “inherent” differences between the sexes, factories could limit women’s work hours). Brenda C. See, *Written in Stone? The Record on Appeal and the Decision Making Process*, 40 GONZ. L. REV. 157, 198 (2004). For another example, *see* *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), where the court of appeals apparently classified the district court’s finding that “sexual orientation is set in at a very early age” as a sociological fact. *Id.* at 265 n.1.

203. *See, e.g.*, *Gafoor v. INS*, 231 F.3d 645, 656 (9th Cir. 2000) (political uprising in Fiji); *Karadzole v. Artukovic*, 247 F.2d 198, 204 (9th Cir. 1957) (struggle for power in Croatia), *vacated and remanded*, 355 U.S. 393 (1958); *Ramos v. Diaz*, 179 F. Supp. 459, 462 (S.D. Fla. 1959) (political “events and occurrences in Cuba”).

204. *See, e.g.*, *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F. Supp. 1504, 1521 (E.D. Cal. 1983) (nonsubstitutability of electric power); *Mainline Inv. Corp. v. Gaines*, 407 F. Supp. 423, 427 (N.D. Tex. 1976).

205. *See, e.g.*, *United States v. Jakobetz*, 955 F.2d 786, 799 (2d Cir. 1992) (theories behind DNA testing); *Laster v. Celotex Corp.*, 587 F. Supp. 542, 543 (S.D. Ohio 1984) (the scientific facts pertaining to asbestosis and mesothelioma); *Commercial Union Ins. Co. v.*

Legislative facts can be introduced into controversies either by the litigants or the judges themselves. To use *Brown v. Board of Education*²⁰⁸ as an example of the former, evidence demonstrating the devastating psychological effect of racial segregation and discrimination upon African-American children's self esteem was introduced by the plaintiffs, and the defendants were given the chance to undermine and contradict that evidence. In other cases, however, judges (at both trial and appellate levels) may engage in their own independent investigation to develop nonadjudicative legislative facts to inform their findings and legal determinations.²⁰⁹

From an evidentiary perspective, the procedural method by which trial judges introduce legislative facts varies. Legislative facts may be introduced through expert testimony, as in *Brown*. Furthermore, Federal Rule of Evidence 201 allows judges to take judicial notice of certain facts so long as they are undisputed and either "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."²¹⁰ Rule 201 speaks explicitly only of judicial notice of *adjudicative* facts and does not explicitly mention legislative facts.²¹¹ Yet legislative facts,

Pittsburgh Corning Corp., 553 F. Supp. 425, 433 (E.D. Pa. 1981) (the etiology of asbestos disease), *rev'd on other grounds*, 789 F.2d 214 (3d Cir. 1986).

206. An example would be the "historical" fact that the Japanese were in control of the Philippine Islands between May 1942 and October 1944, for purposes of determining whether the petitioner was deprived of information regarding its property. *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157, 159 (1950) ("It might be assumed in favor of petitioner's pleadings what is judicially known, that the Japanese were, for all practical purposes, in complete control of the Philippine Islands by May 1942 and continued in control until sometime subsequent to October 1944, when the United States Army returned.")

207. "Legislative" fact here is meant as it is most commonly understood, that is, a statute's or regulation's history or a judicial opinion. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 335 (John W. Strong ed., 5th ed. 1999). Laws of other jurisdictions, special rules, ordinances, and judicial opinions are also termed legislative facts, even though they are treated as adjudicative for purposes of Federal Rule of Evidence 201. 60 AM. JUR. 3d *Proof of Facts* § 10. Such facts have also been classified as judicial notice of law. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, 261, 294 (2d ed. 1994).

208. 347 U.S. 483 (1954).

209. Judges may do so by reviewing research, articles, lecture transcripts, or research submitted by amici. Keeton, *supra* note 197, at 30. See also Federal Rule of Evidence 201(f), which allows the taking of judicial notice "at any stage of the proceeding[s]." *Id.* This has been interpreted to enable even appellate judges to take judicial notice of facts. See, e.g., *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236 (4th Cir. 1989); *United States v. Camp*, 723 F.2d 741 (9th Cir. 1984); *Gov't of Canal Zone v. Burjan*, 596 F.2d 690 (5th Cir. 1979); *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978).

210. FED. R. EVID. 201(b).

211. Keeton, *supra* note 197, at 10; MUELLER & KIRKPATRICK, *supra* note 207, at 555; *but see* FED. R. EVID. 201 advisory committee's note (envisioning facts subject to "judicial notice" in a much broader sense). Advisory Committee Comments to Rule 201 seem to envision facts subject to "judicial notice" in a broader sense. For purposes of Rule 201, "whether a fact is adjudicative or legislative depends not on the nature of the fact . . . but rather the use made of it (that is, whether it is a fact germane to what happened in the

particularly those which decide case-specific outcomes, are in one sense “adjudicative,” and they can be judicially noticed.²¹²

As adjudicative and nonadjudicative legislative facts presume no preexisting legal norm,²¹³ like constitutional facts, they carry profound implications. Once again, *Brown* provides a clear illustration. In *Brown*, the socioscientific facts were not, in the strictest sense, historical facts. They were, however, adjudicative-legislative facts of a sociological nature. That social science data proved famously compelling and was decisive in the appellants’ ultimate victory against the appellee school districts. Moreover, the socioscientific factual conclusion that racial segregation and discrimination have a demonstrated adverse impact on African Americans was a basis for overturning *Plessy v. Ferguson*,²¹⁴ and it became a normative policy proposition that would go on to influence subsequent challenges to racial segregation in other aspects of life.

A strict reading of Rule 52(a) would allow for review of any legislative fact only for clear error. However, facts classified as legislative are never reviewed on that basis. The standard of review possible appears to depend upon its purpose (adjudicative or nonadjudicative), its subtype (for example, scientific or historical), and the method by which it is introduced.

To use *Brown* again as an example: the trial judge’s rejection of the socioscientific facts introduced by the plaintiffs’ experts would have been reviewed with the highest deference if Rule 52(a) were strictly applied. Theoretically, had those facts been rejected after a proffer for judicial notice under Rule 201, review would turn upon whether the trial court abused its discretion—an even more deferential standard.²¹⁵ Viewed as a normative proposition, the trial court’s rejection of the fact that segregation and discrimination

case, or a fact useful in formulating common law policy or interpreting a statute.” *United States v. Bellow*, 194 F.3d 18, 22 (1st Cir. 1999).

212. Compare *Laster v. Celotex Corp.*, 587 F. Supp. 542, 543 (S.D. Ohio 1984) (the scientific “facts pertaining to whether asbestosis and mesothelioma are caused by exposure to asbestos are ‘adjudicative facts’ under Rule 201”), with *United States v. Jakobetz*, 955 F.2d 786, 799 (2d Cir. 1992) (theories behind DNA testing), and *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, 553 F. Supp. 425, 433 (E.D. Pa. 1981) (“The etiology of asbestos disease is not an adjudicative fact for this claim.”), *rev’d on other grounds*, 789 F.2d 214 (3d Cir. 1986); see also MUELLER & KIRKPATRICK, *supra* note 207, at 290-91.

213. *Woolhandler*, *supra* note 167, at 114 (legislative facts “do not presume a pre-existing legal norm because by definition such facts are used to create law”).

214. 163 U.S. 537 (1896).

215. Judicial notice is subject to review for abuse of discretion. See, e.g., *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 933 (8th Cir. 2004); *United States v. Mitchell*, 365 F.3d 215, 251-253 (3d Cir. 2004); *United States v. Collier*, 68 Fed. Appx. 676, 682 (6th Cir. 2003); *United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999); *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997); *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994).

imposes psychological harm on African-American children could have been reviewed *de novo* as a case-specific legislative-adjudicative fact or independently found by the Supreme Court as a nonadjudicative legislative fact.²¹⁶

VI. SPECIFIC CONCERNS ABOUT CONSTITUTIONAL AND LEGISLATIVE FACTS

As mentioned earlier, judgments upon constitutional and legislative facts (even the judgment as to whether they are present or absent) have far-reaching social, moral, and/or political ramifications. Consequently, specific issues regarding constitutional and legislative facts warrant elaboration.

A. *Constitutional Fact Review*

Plainly, the constitutional fact doctrine allows appellate courts to encroach upon the trial court's province of fact finding. Constitutional facts are facts nonetheless, and independent review then violates the allocation of authority and responsibility principles Rule 52(a) sets forth. Moreover, the doctrine has contributed to what critics view as an expansion of what can be called a constitutional fact.²¹⁷ Those commentators see this expansion going so far as to create new rights and obligations under the Constitution where none formerly existed.

A second source of concern assumes the legitimacy of the constitutional fact doctrine. While the nature of constitutional facts suggests that such facts be reviewed under a heightened standard, commentators wonder whether *de novo* review is imperative in all cases in which constitutional facts arise.²¹⁸ Traditional *de novo* appellate re-

216. Appellate scrutiny of legislative facts may vary depending upon the reliability and verifiability of the fact itself. For example, historical data accounting for a political uprising to support an asylum claim may be seen as noncontroversial and not open to reasonable dispute. On the other hand, social science data offered to demonstrate conviction-proneness of jurors in capital murder trials should not enjoy clear error deference, due in part to methodological weaknesses. *See, e.g.,* Lockhart v. McCree, 476 U.S. 162, 168-69 n.3 (1986) (noting that two courts of appeals reached different conclusions from the same social science evidence offered; "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.").

217. *See* Strong, *supra* note 196, at 279-82 (need to limit the expansion of the doctrine); *see also* Christie, *supra* note 99, at 26 (Interpreting Dickinson, Christie says that constitutionality depends on "reasonableness," and since reasonableness encompasses "many, if not most of the factual determinations that must be given made in a given case, then there is no limit to judicial re-examination."). *But see* Pine, *supra* note 196, at 703 (offering a methodology for determining an act/omission's constitutionality); *see also* Monaghan, *supra* note 96, at 275; Schecter, *supra* note 196, at 1511 (independent review of constitutional facts should be determined on a flexible basis).

218. Strong, *supra* note 196, at 264; *see also* Monaghan, *supra* note 96, at 263; Schecter, *supra* note 196, at 1511.

view is limited to those instances when it is important not to only declare law, but to expand upon legal norms. However, not all constitutional facts trigger the need to elaborate upon legal norms or establish a new legal norm.²¹⁹ *De novo* review, then, should be undertaken only when the application of law involves a significant measure of “norm elaboration” or the need “to ‘say what the law is.’”²²⁰

The most overwhelming concern related to the constitutional fact doctrine also assumes its validity, but questions why the Supreme Court has refused to apply it in certain cases in which race and discrimination are at issue. While “preserving precious liberties” in cases involving the First, Fourth, Fifth, and Eighth Amendments, the Supreme Court has not invoked the doctrine in Fourteenth Amendment equal protection cases where discriminatory intent based on race was placed squarely into controversy. Thus, in cases involving preemptory challenges,²²¹ racial gerrymandering,²²² and school segregation,²²³ the Supreme Court has held fast to the Rule 52(a) clearly erroneous standard. The Supreme Court has also held that clear error applies when reviewing determinations on discriminatory intent in Title VII cases.²²⁴

Put bluntly, it is difficult to discern a principled reason why this inconsistency exists. Using *Concrete Works* and *Easley* as examples, “discrimination” and “strong basis in evidence” are two legal concepts at issue. With each, the core questions (Because of race? How pervasive was past discrimination?) are evidentiary. Yet the historical

219. See Monaghan, *supra* note 96, at 264 (offering a middle ground where *de novo* review is mandated only when law application in the case requires elaboration upon the legal norm elaboration, not if the case is one “simply” of norm reiteration).

220. *Id.*

221. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 367 (1991) (findings of voluntariness or actual malice involve legal, as well as factual, elements); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Akins v. Texas*, 325 U.S. 398, 402 (1945) (stating that the finding that grand jury selection that excluded Latinos was not made with discriminatory intent would be reviewed with “great respect to the conclusions of the state judiciary”).

222. *Easley v. Cromartie*, 532 U.S. 234 (2001); *Rogers v. Lodge*, 458 U.S. 613, 620-23 (1982) (at large elections alleged to dilute African-American voting in violation of the Equal Protection Clause, finding reviewed for clear error); *Rural W. Tenn. African-Am. Affairs Council, Inc. v. Sundquist*, 209 F.3d 835, 838 (6th Cir. 2000) (whether Voting Rights Act Section 2 violation occurred in 1994 reapportionment was a question of fact to be reviewed for clear error) (adopting *Thornburg v. Gingles*, 468 U.S. 30, 50-51 (1986)); *Cousin v. McWherter*, 46 F.3d 568, 574 (6th Cir. 1995) (whether dilution of African-American vote in county at-large judicial election process intentionally discriminated on the basis of race was a question of fact).

223. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979) (the question as to whether the school board intentionally operated a dual, segregated school system reviewed for clear error by court of appeals).

224. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273 (1986) (district court finding that company’s seniority system intentionally discriminated against African-American employees reviewed for clear error); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (in Title VII sex discrimination case, a “finding of intentional discrimination is a finding of fact, and therefore is entitled to appropriate deference”).

facts serve to inform the “ultimate” question, and the response (without inference or comparison) directly triggers the constitutional right or obligation.

In *Bose*, the Supreme Court ruled that a decision as to whether a libel was committed with actual malice must be reviewed *de novo*, including all subsidiary facts going to intent to demonstrating its presence or absence. Why the question as to whether a journalist acted with “actual malice” is a “precious liberty” worthy of preservation through independent appellate review, yet the rights and obligations attendant to race discrimination and remedial affirmative action measures are reviewed with the highest deference raises a distressing double standard.²²⁵ To accord determinations on consequential matters of race and rights less scrutiny than speech diminishes the value of a most vital component of constitutional protections.²²⁶

B. Legislative Fact Review

Legislative facts, with their various subclasses, equally evade Rule 52(a)’s clear error standard. While such facts are found to establish or extend legal norms, doctrinal and reliability concerns abide in their acceptance and use. Rules of evidence do not adequately account for their introduction and acceptance. In addition, inconsistent regard for or weight given to legislative facts serves to undermine Rule 52(a)’s purpose, raising both systemic and procedural tensions.

1. Legislative Fact Finding, Separation of Powers, and Judicial Competency

Critics of judicial reception of legislative facts see it as a clear violation of the Separation of Powers doctrine. Under that doctrine, Congress has been granted broad discretion in choosing which policies to pursue and which laws to make. Moreover, legislatures

225. At first blush, the majority in *Easley* could be seen as trying to push the question of race and intent into constitutional fact/*de novo* territory when it refers to the “constitutionally critical” nature of the question. *Easley*, 532 U.S. at 240. Weighing against that conclusion, however, is the fact that the majority made no express case for treating race and intent as a constitutional fact and its lack of citation to precedent. Had the majority explicitly characterized the race and intent determination as one of constitutional fact, *de novo* review would have certainly yielded the same result.

226. See *Pullman-Standard v. Swint*, 624 F.2d 525, 533 n.6 (5th Cir. 1980), *rev’d*, 456 U.S. 273 (1982) (while “discrimination vel non is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case. . . . As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. . . . In reviewing the district court’s findings, therefore, we will proceed to make an independent determination of appellant’s allegations of discrimination”); see also *Larson*, *supra* note 169, at 209 (who feels that *de novo* review of a fact case may be warranted wherever constitutional facts might arise or in “constitutional rights” cases). As this issue begs further analysis, particularly from positive law and critical race perspectives, it will be the subject of an upcoming treatment by this author.

have greater institutional experience and capacity to collect and analyze evidence used in making policy determinations or developing new legal norms.

Conversely, courts are at an institutional disadvantage with regard to capably and competently finding legislative facts. The comparative amount of human and financial resources allocated to the federal court system does not allow for the extensive fact finding some consider appropriate to craft broadly applicable legal norms. Moreover, legislative fact finding by a court is dictated by the issues presented in cases before the court. The selection of the law to be made—even the question of whether law on a particular issue should be made at all—is a matter which should arguably be subject to the debate and scrutiny of legislative processes.²²⁷ Of special concern are cases in which judges engage in independent inquiry to advance policy norms or declare law, as those acts appear most to resemble legislative functions.²²⁸ Thus, legislative facts found by appellate courts—whether adjudicative or nonadjudicative—are seen as abrogating congressional authority and distorting the democratic functions of government.

2. *Fundamental Deficiencies of Legislative Fact Finding*

The nature of scientific inquiry itself is another reason critics urge against legislative facts in the judicial process. Research serving as a basis for legislative fact finding carries inherent problems, as it can be methodologically and statistically infirm. Contributing to the infirmity is that such facts are intrinsically value-laden, as every research inquiry is a product of selective problem identification and evidence assessment. The value bias is compounded when adjudicative-legislative facts are derived by litigants through expert testimony or otherwise.²²⁹ The adversarial system has developed incentives for counterpresentation of legislative facts, and when a given

227. Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2316 (1998) (noting “the comparative legitimacy of lawmaking” as between the judicial and legislative branch due to the latter’s “superior institutional capacity to collect evidence”).

228. See, e.g., discussions surrounding the Supreme Court’s decision of *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the majority made reference to international laws, policies, and customs to advance the argument that Texas sodomy law should be found unconstitutional; see also Davis, *supra* note 197, at 1602; Woolhandler, *supra* note 167, at 122 (noting that reformists must address the legitimacy issue with this regular reception of legislative facts, as courts are already attacked for “arrogating” the role of lawmakers); Note, *supra* note 227, at 2314.

229. See William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1286 (1998).

set of legislative facts prevails as normative propositions, the soundness of that policy or law must be called into serious question.²³⁰

C. Summary

The expansive nature of appellate review through the use of constitutional, legislative, and other nonhistorical facts has brought about critical systemic tensions. In congress with the malleable nature and the circumvention or avoidance of Rule 52(a), appellate courts introduce a critical procedural determination into their judgment by classifying facts. The question becomes whether a standard of review determination is based upon principle or whether Rule 52(a) is urged, rejected, or circumvented by fact typology because of a judge's ideological bias. Revisiting *Concrete Works*, *Easley*, and *Equality Foundation* may provide some answers.

VII. RULE 52(A) AND FACT TYPOLOGY AS IDEOLOGICAL WEAPONS? *CONCRETE WORKS, EASLEY, AND EQUALITY FOUNDATION* REVISITED

A. In *Concrete Works*, Was Justice Scalia Advocating Clear Error Review on Principle or Because of Ideological Bias Against Affirmative Action Programs?

Justice Scalia's argument for clear error in his 2003 *Concrete Works* dissent, more than anything, reflects his skepticism towards affirmative action programs. What made Justice Scalia's standard of review argument suspect is its timing. If there were a genuine issue as to whether a strong basis in evidence conclusion was reviewable for clear error only, then that procedural mistake was ripe for correction in the 1994 *Concrete Works* appeal. At that time, the Tenth Circuit first announced that *de novo* should be the standard of review.²³¹ Yet petition for certiorari of that decision was denied unanimously,

230. For example, many questions abound regarding the introduction, use, and appellate review of sociological facts. Some of those questions involve the nature of sociological inquiry. Commentators have noted the inherent problem that social scientists have yet to offer theories that predict human behavior with certainty; that these theories are value-laden, subject to fluctuating data; and that the legal process lacks a standard by which to measure its relevance or to effectively evaluate and use them. David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1040 (1989); see also Stephani, *supra* note 197, at 518 ("[T]he court's untrammelled freedom in the law-ascertaining process and sometimes on the ground that a requirement of indisputability seems inappropriate . . . where the facts are often generalized and statistical and where their use is more nearly argumentative, or as a help to value-judgments, than conclusive or demonstrative.") (citation omitted); Woolhandler, *supra* note 167, at 123.

231. *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1995) ("Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance is a question of law.").

with no opinion from Justice Scalia correcting what he later saw as a dispositive procedural error.²³²

Three years later, a split among the circuits arose as to the applicable standard of review on the “strong basis in evidence” determination. In 1997 the Eleventh Circuit issued a ruling in *Engineering Contractors Ass’n of South Florida v. Metropolitan Dade County* which noted that such a determination is to be reviewed for clear error and affirmed the unconstitutionality of Miami-Dade County’s set-aside program.²³³ Supreme Court certiorari was unanimously denied, with no attempt by Justice Scalia to reconcile the emergent conflict with *Concrete Works*.²³⁴ A year earlier, in *Contractors Ass’n of Eastern Pennsylvania v. City of Philadelphia*,²³⁵ the First Circuit had struck down Philadelphia’s minority set-aside program and engaged in *de novo* review. Certiorari was denied there as well, with no effort by Justice Scalia to correct the standard of review determination.²³⁶ Thus, on three occasions before his *Concrete Works* dissent, Justice Scalia had an opportunity to express disagreement as to the proper standard of review, but did not. The only case in which Justice Scalia criticized the appellate standard of review was the one that *upheld* a minority set-aside program: *Concrete Works*. Justice Scalia’s argument for clear error review comes across as either (1) post-hoc justification or (2) a proxy through which to strike Denver’s minority set-aside program.

Lending force to this observation is the effort Justice Scalia exerts reexamining the trial court evidence to demonstrate that Denver’s program was constitutionally infirm. To demonstrate a “strong basis in evidence” for the program, the Tenth Circuit held that Denver was not required to “*prove* the existence of past discrimination” as the district court had thought; Denver could meet its burden by a proffer of “strong evidence from which an inference of past and present discrimination could be drawn.”²³⁷ Justice Scalia felt that the district court got the law right. He vigorously defended the district court’s articulation of the law and extensively reviewed the evidence supporting its conclusion. In doing so, however, Justice Scalia espoused a view not

232. *City & County of Denver v. Concrete Works*, 514 U.S. 1004 (1995).

233. *Eng’g Contractors Ass’n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 903, 929 (11th Cir. 1997).

234. *Metro. Dade County v. Eng’g Contractors Ass’n of S. Fla.*, 523 U.S. 1004 (1998) (denying certiorari).

235. 91 F.3d 586 (1st Cir. 1996).

236. *City of Philadelphia v. Contractors Ass’n of E. Pa.*, 519 U.S. 1113 (1997) (denying certiorari).

237. *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 970 (10th Cir. 2003).

shared by seven of his fellow Justices and imposed upon Denver a burden of proof never established by Supreme Court precedent.²³⁸

B. Did the Easley Majority Give Heightened Scrutiny to the District Court Decision Because of Its Solicitude Toward Minority Voting Interests?

The majority's approach in *Easley* marked perhaps the clearest example of how Rule 52(a) is circumvented to overturn a decision which the majority opposes. The justifications for heightened clear error (that is, that the "trial was not long," that there was no intermediate review, the voluminous documentary evidence, and the absence of credibility or demeanor determinations)²³⁹ find no basis whatsoever in Rule 52(a). If such conditions were to control Rule 52(a) applicability, then appellate review would hardly be consistent—and certainly not predictable. In this regard, Justice Thomas's dissenting opinion is most compelling and correct.

By sidestepping Rule 52(a) to engage in that extensive review however, the majority was able to reach and redecide an issue which represented a fundamental ideological divide on the Supreme Court: the degree to which the law should reinforce assumptions about African Americans and voting behavior. From its review of the evidence, the majority found "undisputed evidence that racial identification is highly correlated with [Democratic] political affiliation in North Carolina."²⁴⁰ That finding was determinative in showing that *politics*, not race, was the predominant motive in drawing the majority-minority Twelfth Congressional District.

238. Justice Scalia felt that "[t]he Tenth Circuit interpreted the 'strong basis in evidence' requirement in a miserly manner and ignored *Croson's* requirement that the government *prove* that it is remedying identified discrimination." *Concrete Works of Colo., Inc. v. City and County of Denver*, 540 U.S. 1027, 1030 (2003) (Scalia, J., dissenting). Yet *Croson* made no such requirement. In *City of Richmond v. J.A. Croson, Co.*, the Supreme Court stated that in meeting the burden to show a "strong basis in evidence of past discrimination, . . . the inference of discriminatory exclusion can arise from statistical disparities." 488 U.S. 469, 500 (1989). In *Wygant v. Jackson Board of Education*, another Supreme Court case on point, the plurality opinion stated that "the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." 476 U.S. 267, 277 (1986) (O'Connor, J., concurring in part and concurring in the judgment, and White, J., concurring in the judgment). And while Justice Scalia relied upon *Shaw v. Hunt* for his position as well, that case distinguished the need to identify past or present discrimination with some specificity from the required demonstration of a "strong basis in evidence" that remedial action was necessary. See 517 U.S. 899, 909-10 (1996) (First, the discrimination must be "identified discrimination." Second, the institution that makes the racial distinction must have had a "strong basis in evidence" to conclude that remedial action was necessary, "before it embarks on an affirmative-action program." (citations omitted)).

239. *Easley v. Cromartie*, 532 U.S. 234, 235 (2001).

240. *Id.* at 243.

Justice Thomas took umbrage at the assumption underlying that conclusion, which he characterized as a “ ‘stereotype’ about African-American voting behavior.”²⁴¹ In his urge to defer to the district court’s conclusion, Justice Thomas expressed a theme that has coursed through his opinions regarding race and rights: the law’s accommodation of assumptive racial behavior. Furthermore, he has openly insisted that the law be construed in a manner to provoke minority assimilation; in the case of voting rights this can be accomplished through influence and coalition-building.²⁴² Thus, to Justice Thomas, the Twelfth Congressional District, in the way it was drawn, reflected what he viewed as an unnecessary, outmoded, and even harmful protection of minority interests. To Justice Thomas, the district configuration also perpetuated an antiassimilation ideology, one which the district court rejected and the Supreme Court should have as well through clear error review.

C. Was the Sixth Circuit in Equality Foundation Correct in Its Characterization of the District Court’s Factual Findings or Did It Apply De Novo Review Because It Was Ideologically Opposed to the Trial Court Decision?

The *Equality Foundation* litigation represents the instance in which the trial court fails to articulate factual findings in a way which shields appellate review. It also represents the instance in which the undisciplined application of fact typology signals the possibility of ideological bias. For purposes of this discussion, it is helpful to extract a few representative findings as articulated by the district court and place them into a typology.

[Finding of Fact #5] [sic] Sexual behavior is not necessarily a good predictor of a person’s sexual orientation. [sociological fact]

[Finding of Fact #13] Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation. [historical fact]

241. *Id.* at 257.

242. *See, e.g.,* Georgia v. Ashcroft, 539 U.S. 461 (2003) (redefining the “effective exercise of the electoral franchise” for purposes of a retrogression analysis). In sanctioning substantive rather than descriptive representation, the Court held that states need not create congressional districts which make it certain, but simply “likely . . . that minority voters will be able to elect candidates of their choice.” *Id.* at 482. The Court stated that minority groups should be expected to “pull, haul, and trade to find common political ground” through influence and coalition districts. *Id.* at 481-82; *see also* Holder v. Hall, 512 U.S. 874, 901 (1994) (Thomas, J., concurring) (ascribing to the substantive representation philosophy whereby “minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as ‘effective’ as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections.”).

[Finding of Fact #15] Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic. [sociological fact]

[Finding of Fact #19] No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead [sic] to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved. [law-legislative fact]

[Finding of Fact #20] The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible. [historical fact]²⁴³

243. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 264 (6th Cir. 1995), *cert. granted, judgment vacated* by 518 U.S. 1001 (1996). Here are the district court's findings in full, with an attempt to place them within the typology:

1. Homosexuals comprise between 5 and 13% of the population. [sociological fact]
2. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender. [socioscientific fact]
5. [sic] Sexual behavior is not necessarily a good predictor of a person's sexual orientation. [socioscientific fact]
6. Gender non-conformity such as cross-dressing is not indicative of homosexuality. [socioscientific fact]
8. [sic] Sexual orientation is set in at a very early age—3 to 5 years—and is not only involuntary, but is unamenable [sic] to change. [socioscientific fact]
9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society. [historical fact]
10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals. [socioscientific fact]
11. There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency towards child molestation. [socioscientific fact]
12. Homosexuality is not a mental illness. [scientific fact]
13. Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation. [historical fact]
14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals. [socioscientific fact]
15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic. [sociological fact]
16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation. [historical fact]
17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless. [sociopolitical fact]

If one accepts the validity of fact classification, many of those found by the trial court can fairly be characterized as sociological or adjudicative-legislative facts. For example, the trial court's finding that "[g]ays, lesbians and bisexuals are an identifiable group based on their sexual orientation" is a fact of constitutional dimensions, as it immediately compels an equal protection analysis. The socioscientific fact that "[s]exual behavior is not necessarily a good predictor of a person's sexual orientation" upends the premise of *Bowers v. Hardwick*,²⁴⁴ which conflated sexual orientation and sexual conduct to find that antisodomy criminal statutes violate no constitutionally protected rights of gays and lesbians. By seeking to establish new policy or extend legal norms, those facts viewed by an appellate court would not be shielded by Rule 52(a) deference.

The Sixth Circuit, however, did not explicitly place the factual findings in specific categories, painting them all with only a broad brush of plenary review. Moreover, the Sixth Circuit gave no consideration to the possibility that some findings, such as "[t]he amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible," should have been reviewed for clear error. Similarly, the district court's finding that "[n]o Federal laws prohibit discrimination based on sexual orientation" was a statement on the status of the law,

18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favorable legislation. [sociopolitical fact]

19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead [sic] to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved. [law-legislative fact]

20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible. [historical fact]

21. The inclusion of protection for homosexuals does not detract form [sic] the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions. [historical fact]

22. Amending the city Charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation. [political fact]

23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals. [historical fact]

Id. at 265.

244. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

which also should have been accorded clear error deference.²⁴⁵ The evidence emphasized, along with the Sixth Circuit's failure to clearly discern the rationale for its pivotal *de novo* review decision, contributed to the ideologically driven tone of the rest of the opinion.

At the opinion's outset, the Sixth Circuit characterized the trial court's findings of fact as " 'ostensible,' " then cited cases to support its typological framework.²⁴⁶ Calling the finding that homosexuals belong to a quasi-suspect class " 'novel,' " the court invoked *Bowers*, ascribing to its flawed logic that since "homosexuals generally are not identifiable 'on sight' " they cannot be classed into a constitutionally recognized group."²⁴⁷ Furthermore, the Sixth Circuit adopted the antirights rhetoric of the Amendment proponents by wrongly insisting that Issue 3 imposed "no *punishment or disability* upon persons belonging to that group but rather merely remove[d] previously legislated *special* protection against discrimination from that segment of the population."²⁴⁸ Later, the court stated that the "only effect of the Amendment upon Cincinnati citizens was to render futile the lobbying of Council for *preferential* enactments for homosexuals qua homosexuals . . . the realization of their *political agenda* is not constitutionally guaranteed . . ." ²⁴⁹

The district court did fail to announce its factual findings in a way to shield *de novo* review. Without question, the trial judge could have articulated those findings with greater care and clarity.²⁵⁰ Even if he

245. One could even contend that, depending upon the source of this proffer (such as through judicial notice or extra-judicial findings), an abuse of discretion standard should have been applied to the finding regarding federal laws and sexual orientation.

246. *Equal. Found.*, 54 F.3d at 265; *see also* N.Y. Times v. Sullivan, 376 U.S. 254, 284 n.26 (1964) (constitutional predicates such as "actual malice"); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 n.16 (1984); Powell v. Texas, 392 U.S. 514, 521-22 (1968); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685-89 (1989); Paul Revere Ins. Co. v. Brock, 28 F.3d 551, 553 (6th Cir. 1994) (mixed questions of law and fact); Whitney v. Brown, 882 F.2d 1068, 1071 (6th Cir. 1989) (constitutional facts and ultimate facts).

247. *Equal. Found.*, 54 F.3d at 266-67.

248. *Id.* at 267.

249. *Id.* at 270.

250. For example, it can immediately be seen how Finding of Fact #15, "[g]ays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic," drips with constitutional implications. Compare Justice Phyllis Hamilton's opinion in *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), in which two Planned Parenthood agencies and others sought to enjoin the enforcement of Congress's Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.S. § 1531. *Planned Parenthood*, 320 F. Supp. 2d 957. In finding the ban unconstitutional, Justice Hamilton set forth very specific witness backgrounds and qualifications, and expert backgrounds and qualifications, as well as factual findings. *Id.* Note the qualitative difference of the facts as articulated by Justice Hamilton and those of Justice Speigel in *Equality Foundation*:

1. Like the Nebraska statute in *Stenberg*, the Act bans abortions performed at any time during a pregnancy, regardless of gestational age or fetal viability. In fact, Congress rejected alternatives and amendments to the Act that would

had, the outcome may have been the same. Nonetheless, the Sixth Circuit was equally obligated to articulate and justify *its* characterization of the district court's findings with clarity and precision. Coupled with its explicit use of ideologically inflammatory rhetoric, the Sixth Circuit's opinion left the impression that any standard of review applied was incidental to the outcome it sought.²⁵¹

have limited its applicability to viable fetuses. See 149 Cong. Rec. S3600 (daily ed. March 12, 2003) (statement of Sen. Feinstein); 149 Cong. Rec. H4939 (daily ed. June 4, 2003) (statement of Rep Greenwood); 149 Cong. Rec. H4948 (daily ed. June 4, 2003) (statement of Rep. Baldwin).

2. In performing all D&Es, including D&Es by disarticulation, and inductions, physicians "deliberately and intentionally" extract the fetus from the woman's uterus and through her vagina. Tr. Vol. 1 at 76:19-21 (Paul); Tr. Vol. 2 at 200:23-201:4 (Sheehan); Tr. Vol. 3 at 422:3-12 (Doe); Tr. Vol. 5 at 822:0-823:12 (Westhoff). Extraction of the fetus from the uterus, if brought through the cervix and vagina (as opposed to through an incision in the woman's abdomen), is called a "vaginal delivery." Tr. Vol. 1 at 75:20-76:5 (Paul); Tr. Vol. 3 at 421:6-11 (Doe); Tr. Vol. 5 at 822:20-823:12 (Westhoff).

3. The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D&E or induction, and may be considered a "living fetus." Tr. Vol.1 at 67:3-11; 76:6-18 (Paul); Tr. Vol. 2 at 201:5-8 (Sheehan); Tr. Vol. 3 at 421:12-18 (Doe); Tr. Vol 5 at 822:20-823:12 (Westhoff); Tr. Vol. 11 at 1783:15-1786:3 (Chasen).

4. Plaintiffs' and the government's experts agree that in any D&E or induction, a living fetus may be extracted in a breech presentation until some "part of the fetal trunk past the navel is outside the body of the mother." Tr. Vol. 6 at 945:17-21 (Bowes); Tr. Vol. 8 at 1283:17-20 (Shadigian); Lockwood Depo 235:16-24; Tr. Vol. 1 at 77:9-78:13 (Paul); Tr. Vol. 1 at 99:16-2; 201:9-16 (Sheehan); Tr. Vol.2 at 281:22-282:3 (Drey); Tr. Vol.3 at 405:4-12; 422:3-19 (Doe); Tr. Vol 4 at 521:2-15; 551:19-552:4 (Broekhuizen); Tr. Vols. 4 & 5 at 678:23-679:14; 784:3-786:18 (Creinin); Tr. Vol. 5 at 822:20-823:12 (Westhoff); Tr. Vol. 11 at 1783:15-1786:3 (Chasen).

Planned Parenthood, 320 F. Supp. 2d at 971-72.

251. See *Equal. Found.*, 54 F.3d at 265. Proceedings subsequent to the Supreme Court decision *Romer v. Evans*, 517 U.S. 620 (1996), lend additional insight into and heightened suspicion toward the Sixth Circuit's approach in *Equality Foundation*. In another example of Justice Scalia providing templates for lower courts to later adopt whether he is in the majority or minority, his dissent from the Supreme Court's decision to vacate and remand in light of *Romer* was explicitly adopted by the Sixth Circuit on remand. *Equal. Found. v. City of Cincinnati*, 518 U.S. 1001 (1996). He distinguished *Equality Foundation* from *Romer* on the grounds that "the lowest 'electoral subunit' did not wish to 'accord homosexuals special protection' in *Equality Foundation*," where in *Romer*, Colorado's Issue 2 involved a state constitutional amendment. *Id.*

On remand, the Sixth Circuit once again upheld the charter amendment's constitutionality, expanding on the argument regarding the power of municipalities to enact certain types of legislation. *Equal. Found.*, 128 F.3d 289 (6th Cir. 1997). It stood by its earlier ruling, but now on the grounds that a "local measure adopted by direct franchise, designed in part to preserve community values and character, which does not impinge upon any fundamental right or interest of any suspect or quasi-suspect class, carries a formidable presumption of legitimacy and is thus entitled to the highest degree of deference from the courts." *Id.* at 297. The *en banc* petition for rehearing was denied, with six dissenting judges. *Equal. Found. of E. Cincinnati v. Cincinnati*, 1998 U.S App. LEXIS 1765 (6th Cir. Feb. 5, 1998). Justice Gilman, in dissent, wrote:

On remand, the panel sought to distinguish *Romer* on a number of grounds, each of which ultimately had its genesis in the rationale proffered by the dissenting justices in the order remanding this case for further consideration. As a

D. Summary

Concrete Works, *Easley*, and *Equality Foundation* represent three examples of the manner in which Rule 52(a) can be urged, circumvented, or avoided. In *Concrete Works* and *Easley*, the debate over the applicable standard acted as a filter for ideological tensions involving affirmative action, race, and voting. Moreover, the arguments given urging or rejecting Rule 52(a) applicability were procedurally, if not intellectually, infirm. In *Equality Foundation*, while the Sixth Circuit was not wrong to articulate a fact typology for the district court's findings, its manner in doing so failed to demonstrate an appreciation of the importance of giving transparency to its choice of standard of review.

It must be acknowledged that under most circumstances on appeal, choice of the applicable standard of review is not made by one judge. To the contrary, the choice of applicable standard arises out of either argument proffered by the appellants or appellees and consensus amongst two or more judges. While those circumstances may mitigate an argument of ideological bias, they do not entirely do away with the possibility of ideological bias that is shared between judicial colleagues. Consequently, it is important to examine the competing interests at play when selecting the standard of review from an institutional perspective.

VIII. BALANCING THE INTERESTS SERVED BY RULE 52(A) AND FACT TYPOLOGY

Through the terms "findings of fact," "documentary evidence," and "clear error," appellate courts have broad flexibility in determining whether Rule 52(a) should apply. Moreover, appellate court fact typology enables courts to circumvent or avoid Rule 52(a). The inconsistent application of constitutional fact doctrine and the infirmities of legislative fact finding have special impact upon Rule 52(a)'s function as a decisional mechanism for trial and appellate courts. It is important to ask: what jurisprudential interests are served or harmed by appellate court treatment of Rule 52(a) and fact typology?

To maintain institutional credibility, jurists strive for decisional legitimacy, administrative efficiency, and comity. Decisional legitimacy depends in part upon rules such as 52(a) being consistently applied. Efficiencies are maximized by eliminating redundancy, clearly allocating decision making responsibilities, and establishing adjudicative finality. Comity is furthered through a regard for the respec-

majority of the Supreme Court obviously did not share the views of the dissent, using the dissent's rationale is itself suspect.
Id. at *11 (citation omitted).

tive responsibilities and authority between the trial and appellate courts and the competence engendered within their roles. System legitimacy, efficiency, and comity are each impacted by appellate interpretation of Rule 52(a) and fact typology. However, the indispensable values of decisional rule legitimacy, efficiency, and comity must be balanced against the importance of substantive legal norm legitimacy through doctrinal coherence and the protection of substantive rights by correcting trial court error.

A. Appellate Interpretation of Rule 52(a) and Its Use of Fact Typology Protect Substantive Rights by Correcting Error and Legitimizing Legal Norms Through Doctrinal Coherence

It is asserted that the critical role of appellate courts is to correct trial court error so that “justice is done.” Rule 52(a), with its operative terms subject to varying interpretation and application, gives appellate courts discretion in assessing when factual error has occurred to correct circumstances in which justice has *not* been done. Through Rule 52(a) interpretation and fact typology, appellate courts protect substantive rights while legitimizing substantive norms.

1. Appellate Court Interpretation of Rule 52(a) and Fact Typology Should Seek to Correct Trial Court Error to Protect Substantive Rights

One believing that, above all, appellate courts have the responsibility to protect litigants against trial court error views Rule 52(a) ambiguities and fact typology as essential. Indeed, Rule 52(a) implicitly recognizes that appellate courts have a “legitimacy advantage” given their experience and authority in considering whether the law has been appropriately articulated and applied. If facts found by the trial court lead to erroneous application of the law, substantive rights are at risk. Thus, to fulfill their responsibility as a “check” on the lower courts, appellate courts should have the flexibility Rule 52(a) and fact typology allows.

Despite the near impossibility of articulating with precision when “clear error” has occurred, appellate courts are nevertheless sufficiently guided in their review of trial court findings. The “definite and firm clear conviction that a mistake was made” principle calls for appellate exercise of the most sober judgment. That principle adequately ensures that appellate courts engage in fact review in a manner which respects the trial court’s authority, competence, and systemic efficiencies. Through the “definite and firm conviction” principle, Rule 52(a)’s legitimacy as a procedural norm is preserved.

Appellate review of documentary evidence should also remain flexible to correct error and protect substantive interests. Where wit-

ness demeanor or credibility is not in issue or where documentary evidence is not in dispute, appellate courts should have the authority to determine, on a case-by-case basis, instances in which they should exercise heightened review.²⁵² Heightened review on a case-by-case basis also allows appellate courts to carefully consider any possible adverse impacts upon administrative efficiency or comity between courts.

Furthermore, contrary to some concerns, advancements in technology may not lead to expanded appellate review of documentary evidence. First, even with advancements which make review of trial court processes more efficient, it still takes a great deal of time and effort. Second, based on current surveys, appellate judges are still reluctant to make credibility and demeanor determinations viewed on videotape (appreciating the importance of “close experience” needed to make such judgments).²⁵³ In addition, there is a recognition that even the most technologically equipped courtroom may fail to capture by video important events, attendants, or occurrences: the audience; all jurors; a fleeting expression by a judge, juror, lawyer, or litigant; or verbal and nonverbal behavior (such a witness’s leg, behind the stand, shaking as he testifies). Importantly, some appellate judges recognize values of decisional finality and administrative efficiency—jurisprudential interests which video or digital documentation as a justification for heightened review do nothing to advance.²⁵⁴

2. Appellate Court Interpretation of Rule 52(a) and Fact Typology Provide Doctrinal Coherence

Appellate court responsibility to give coherence to legal norms also requires the flexibility Rule 52(a) interpretation and fact typology affords.²⁵⁵ While Rule 52(a) provides important guidance as to the degree of deference to be accorded factual findings, certain facts *are* qualitatively distinct. As was the case in *Equality Foundation*, a trial court may articulate findings of fact in a manner which ventures into lawmaking. Appellate courts must be able to discern constitutional, legislative, ultimate, or otherwise mixed findings of fact which purport to act as normative propositions. Such facts must be rejected, modified, or otherwise given their proper place within the context of existing legal doctrine. In this regard, a strict reading of

252. MOORE, *supra* note 106, at ¶ 52.04 (Rule as written supports broader review of findings based on nondemeanor testimony).

253. See Chua, *supra* note 133, at 611; Lederer, *supra* note 136, at 260.

254. See Lederer, *supra* note 136, at 261; Owen & Mather, *supra* note 137, at 413.

255. In the authority conferred upon appellate court articulation of the law, it is said that appellate courts enjoy a legitimacy advantage over trial courts. Monaghan, *supra* note 96, at 263.

Rule 52(a) does not adequately ensure that appellate courts are ultimately responsible to say what the law is.

Nor would a strict reading of Rule 52(a) enhance the administrative efficiencies or comity created by giving appellate courts the authority to give legal norms consistency. For example, it is quite possible that two district judges within the same circuit would come to vastly different conclusions on the evidence presented in *Equality Foundation*. Conferring the deference suggested by Rule 52(a) could theoretically result in conflicting laws within each circuit. Such an outcome would likely lead to an increase in appeals to resolve intracircuit conflicts.²⁵⁶ Thus, appellate interpretation of Rule 52(a) and its use of fact typology give doctrinal coherence to legal norms, preserve system resources, and promote intracircuit comity.

3. Summary

The recognition that facts as well as documentary evidence can be qualitatively different case to case and the fugitive meaning of clear error are conditions best described as either unavoidable or worth living with. Any detriments to decisional rule legitimacy, efficiency, and comity which arise by appellate courts' treatment of Rule 52(a) are outweighed by the need to correct lower court error, protect substantive rights, and give coherence to and legitimize legal norms. Rights and obligations as they relate to religious expression, speech, privacy, commerce, race, gender, property, and criminal justice merit assurance that trial courts appropriately engage in fact finding "so to preserve the precious liberties established and ordained by the Constitution."²⁵⁷ Rule 52(a) is *fluid*, not *flawed*, and some argue it should remain that way.

B. Appellate Court Interpretation of 52(a) and Fact Typology Impairs Procedural Legitimacy, Efficiency, and Comity

On the other hand, one might argue that appellate court treatment of Rule 52(a) and the use of fact typology ignore the proposition that the trial court should be the finder of the facts, no matter the form, no matter the type.²⁵⁸ Unprincipled regard for Rule 52(a)'s ex-

256. See, e.g., *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (finding that statistical evidence purporting to demonstrate whether Indiana statute requiring face-to-face informed consent should be treated as a legislative fact reviewed *de novo*: "[O]nly treating the matter as one of legislative fact produces the nationally uniform approach," which "constitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges.").

257. *Bose v. Consumers Union*, 466 U.S. 465, 511 (1984).

258. Wright, *supra* note 102, at 770 (stating that the language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence); see also

press terms undermines legitimacy of decisional rules, reduces administrative efficiencies, and diminishes comity.²⁵⁹ Moreover, when appellate courts evade Rule 52(a)'s plain meaning as was done in *Easley* and *Equality Foundation*, substantive legal norms are impaired, as it appears that courts are not applying the law in a principled manner, but manipulating Rule 52(a) to reach predetermined outcomes.

1. Appellate Court Interpretation of 52(a) and Fact Typology Impair Procedural Legitimacy

Appellate courts' approach to a clear error definition delegitimizes the Rule. Though "the definite and firm conviction that a mistake has been committed"²⁶⁰ is the fundamental principle for determining whether a trial court's decision was clearly erroneous, appellate courts fail to offer a consistent approach regarding the quality or weight of the evidence needed to come to such a conviction. The distinctive evidentiary meanings given clear error are not without difference and potentially yield vastly different outcomes in similar cases.

Contributing to the concerns regarding Rule 52(a) is the lack of discipline with which some appellate courts articulate the chosen standard. Indeed, it is common to read opinions in which the standard of review is not articulated at all. In others, courts dispense with the standard in a short, terse sentence. In still other instances, courts fail to provide the underlying rationale to support the use of a particular standard or the doctrinal underpinnings of the fact type applied.²⁶¹

Similarly, appellate courts' approach to documentary evidence delegitimizes Rule 52(a). Some courts apply clear error without exception; others only apply clear error to undisputed documents.²⁶² Some courts will review disputed or undisputed documents *de novo*; others, such as the Supreme Court in *Easley*, will engage in "extensive review for clear error" where the record was "substantially" documentary evidence.²⁶³

WRIGHT & MILLER, *supra* note 110, § 2587, at 740 (demonstrating that language of rule is clear); Note, *supra* note 60, at 536.

259. Free review "impairs the confidence of litigants and the public in the decisions of district courts, and multiplies the number of appeals in such cases." *Lyons v. Bd. of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975).

260. *United States v. U.S. Gypsum*, 333 U.S. 364, 395 (1948).

261. See, e.g., *Equal. Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995); *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984).

262. See discussion *supra* Part V.B.

263. *Id.*

While it can be said that appellate courts are just as capable of making determinations based on documentary evidence as trial courts—whether that evidence is in traditional or more advanced form—that assertion misses the point. Just because appellate courts are capable of making the same determinations based upon documentary evidence as trial courts does not mean they *should*. Rationalizing the departure from Rule 52(a) as the Court did in *Easley* hardly gives predictability as to when the clear error standard will apply, allowing it to be disregarded seemingly at will.

Classifying facts as ultimate, constitutional, or legislative (or some subclassification) does much more than eviscerate Rule 52(a)'s plain meaning. Through fact typology, appellate courts introduce a critical but often obscured extraprocedural determination into their judgment. Nonhistorical facts, which are constitutional or legislative, are often the most controversial and carry the highest social consequence. Yet, as exemplified in *Equality Foundation*, courts fail to appreciate the importance of transparency when invoking fact typology.

Easley and *Concrete Works* raise important questions as to whether and when the constitutional fact doctrine applies, with judgments about the “value” of the constitutional right in question seeming to dictate whether *de novo* review will apply. Both adjudicative and nonadjudicative legislative facts are susceptible to bias and error and may be accepted or rejected based on the credence given to the factual proposition. In sum, extraprocedural determinations, whether based upon ultimate, sociological, constitutional, or legislative facts, erode the legitimacy of Rule 52(a).

2. Appellate Court Interpretation of 52(a) and Fact Typology Impairs Administrative Efficiency

Appellate avoidance or circumvention of Rule 52(a) and fact typology tip the balance of efficiencies between the courts. Heightened review of documentary evidence or evidence which goes to a factual finding somehow outside of Rule 52(a)'s plain language drains appellate court of decisional resources. Consequently, appellate courts may take fewer cases, take longer to render judgments, or sacrifice the quality of review with less time and attention paid. Secondly, free review creates administrative redundancies in the system when appellate judges pore over the same evidence. Finally, expanded review of factual findings impairs finality. Litigants, knowing that they may have a second (or third) bite at the apple, may appeal more frequently²⁶⁴ or even be more reluctant to settle cases. This lowers litigants' incentives to get it right the first time, as well as the trial courts' in-

264. Nangle, *supra* note 13, at 427.

centives for proper and thorough adjudication.²⁶⁵ As Judge Duniway urged, “Rule 52(a) should be construed to encourage appeals that are based on a *conviction* that the trial court’s decision has been unjust; it should not be construed to encourage appeals that are based on the *hope* that the appellate court will second-guess the trial court.”²⁶⁶

3. *Appellate Court Interpretation of 52(a) Fact Typology Impairs Comity Between the Courts*

Circumvention or avoidance of Rule 52(a) impacts comity when heightened review given to trial courts’ factual findings is not based upon mistake or misapplication of the law. If trial judges are more attuned to the wellsprings of human behavior, then there seems to be little reason why all findings of fact should not be given the presumptive weight Rule 52(a) directs, regardless of their quality or nature. The history of Rule 52(a) has allowed trial courts to develop superior competence in their role as fact finder. Encroachment upon trial courts’ traditional role undermines the presumption of competence trial judges possess. Moreover, as Judge Duniway observed, an unprincipled approach to appellate review of factual findings can look a lot like second-guessing, the appellate court exploiting its legitimacy advantage over trial courts.

At bottom, avoidance or circumvention of Rule 52(a) and the use of fact typology evinces a lack of respect for the trial court’s express authority and impairs trial court dignity and morale.²⁶⁷ Admittedly, trial court dignity and morale may not be inherently sufficient bases to argue strict adherence to Rule 52(a) if error has indeed occurred in either the trial court’s application or articulation of the law. But trial court dignity and morale are sufficient considerations to argue against widening appellate review which departs from Rule 52(a) without principle.

4. *Summary*

Appellate courts have exploited Rule 52(a)’s ambiguities and evaded its most unambiguous terms. Furthermore, through the creation of fact typology, appellate courts have given themselves the authority to encroach upon the trial court’s traditional role. There can be little doubt that appellate interpretation of Rule 52(a) and fact typology promotes critical jurisprudential interests in correcting error, protecting substantive rights, and ensuring doctrinal coherence. However, those interests must be balanced against interests in deci-

265. See Cooper, *supra* note 60, at 652.

266. Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962) (emphasis added).

267. Nangle, *supra* note 13, at 427.

sional rule consistency, efficiency, and comity. Regardless of the qualitative differences between “pure” facts and those which articulate ultimate, constitutional, or legislative norms or conditions, Rule 52(a) does not contemplate such categorization. Through effectively narrowing the definition of “facts” subject to clear error deference, inconsistently treating documentary evidence, and offering variant definitions of clear error, appellate courts have done more than simply impair decisional rule legitimacy, administrative efficiency, and comity—they have rendered Rule 52(a) nearly meaningless.

IX. SOLUTIONS

Appellate courts have the inherent power to establish and give coherence to legal norms. As drafted, Rule 52(a) gives appellate courts wide discretion to depart from its plain meaning. That departure is, in part, due to the process of interpretation itself. Moreover, the sometimes subtle distinctions between law and fact demand that appellate courts make fundamental judgments about the character of trial courts’ factual findings. Making such judgments ideally ensures that any legal or policy norm brought to bear in those findings leads to the proper development of those norms and the effective administration of justice.

In applying a particular standard of review, whether a finding rises to an ultimate, constitutional, or legislative fact is precisely where courts must exercise their most careful judgment because of the potential consequences. As demonstrated through *Concrete Works*, *Easley*, and *Equality Foundation*, the judgment as to the character of certain facts can be the subject of profound disagreement. Moreover, as reflected in those cases, Rule 52(a) can act as a filter through which judges channel their ideological dispositions on the substantive legal issues in controversy. Articulating the standard of review judgment in an unprincipled, undisciplined manner not only diminishes Rule 52(a)’s value, but casts doubt upon the soundness of the decision itself.

There is no doubt that Rule 52(a)’s pliant terms and fact typology have jurisprudential value. However, reforms are warranted if Rule 52(a) is to be preserved, its implementation given integrity, and charges of ideological bias mitigated.

A. *Create Bright Lines Where They Can Be Created*

The Rules Advisory Committee on Civil Rules can evaluate and implement warranted changes to Rule 52(a) which might go far in giving clarity and guidance to courts, litigants, and the public.

1. *Refine Approach to Fact Typology*

(a) *Amend Rule 52(a) to Explicitly Address Ultimate, Constitutional, and Legislative Facts from Clear Error Review*

To acknowledge the existence and value of fact typologies, Rule 52(a) should be amended to identify those types and how they should be reviewed. Applying *de novo* review to most ultimate, constitutional, and legislative facts has been well established. However, classifying facts is a largely invisible yet crucial extra-procedural determination.

The mere act of codification will serve an invaluable function. Codification brings fact typology to light. Moreover, attaching a particular standard of review to those subcategories brings transparency to how appellate courts are guided in applying the appropriate standard. Greater transparency also enables trial courts to better articulate factual findings, enhances efficiencies, and minimizes any adverse impact upon the comity between the courts resulting from the current approach to fact classification.

(b) *Give Consistent Reason to the Constitutional Fact Doctrine*

The Supreme Court should treat all constitutional facts the same. While the distinction between “ultimate” facts which trigger a constitutional norm and “pure” adjudicative facts which should enjoy clear error deference might sometimes blur, there are many instances when the distinctions are clear. “Intentional discrimination” and “strong basis in evidence” determinations are constitutional facts and should be subject to *de novo* review. To do so would be to acknowledge the value of the constitutional right and the weight of the constitutional obligations which attend those findings.

Clear error review of those concepts is often justified on the grounds that the determination turns upon assessments and judgments adduced from quintessential evidentiary facts. Perhaps that is so, but evidence determinative of whether intentional discrimination or a strong basis in evidence exists is no less fact-based than evidence of motive in an actual malice claim. If the constitutional fact doctrine is to be applied consistently and if the most vital individual rights and obligations (such as to be free from discrimination) are to be protected through heightened review, then all factual determinations that directly trigger constitutional rights and obligations should be subject to independent review.

(c) *Legislative Facts Should Be Subject to De Novo Review*

Legislative facts articulated through Federal Rule of Evidence 201(a) should remain subject to an abuse of discretion standard, as should legislative facts judicially noticed under Federal Rule of Evi-

dence 201(f).²⁶⁸ Legislative facts established outside of Rules of Evidence, however, should continue to fall under *de novo* review. Such an approach is needed to guard not just the development of coherent law and policy; independent review of legislative facts is critical to the protection of substantive rights by guaranteeing appellate scrutiny of facts whose validity, reliability, and predictability can often be distorted in the adversarial context. Importantly, independent review—and independent legislative fact finding by appellate courts themselves—may ensure fairness in cases where there is an imbalance of resources and access to experts by some parties.²⁶⁹

2. *Remove Documentary Evidence from Rule 52(a) or Keep It in and Adhere to It*

If the documentary evidence/clear error standard is to mean anything as stated in Rule 52(a), appellate courts must adhere to it without qualification—or remove it. Currently, appellate courts will engage in heightened review even when they acknowledge the record consists of documentary evidence, as the Supreme Court did in *Easley*. A choice must be made whether to continue to give express clear error deference to documentary evidence—or not.

Rule 52(a) was amended to allocate the responsibility and authority for making factual findings based on documentary evidence the exclusive province of the trial courts. Thus, the stronger case is that documentary evidence, whether disputed or undisputed, should be reviewed for clear error. While it is true that in some instances documentary evidence gives trial courts no decisional advantage over appellate courts, that rationale seems to be an insufficient justification for departing from Rule 52(a)'s plain meaning. Moreover, free review of factual findings based on documentary evidence increases burdens upon appellate courts, extracting high administrative costs.

268. One author has proposed that judicial notice provisions be fixed so that case-specific legislative facts are taken in a manner that “assures fairness and informed deliberation.” Davis, *supra* note 197, at 1603. Another has proposed that judges, to assure fairness, might do so by giving litigants the opportunity to respond when those legislative facts are reasonably disputed. Keeton, *supra* note 197, at 30-31.

269. Evidentiary rules should be written to clarify the important distinctions between adjudicative legislative facts and nonadjudicative legislative facts. It may be useful to codify the definitions of such legislative facts, explicating that the standard of review will turn upon the purpose, not the nature or source, for the facts proffered or placed into record. Keeton, *supra* note 197, at 32. While these proposals would be valuable, there is one serious question about a distinction between adjudicative and nonadjudicative legislative facts turning on whether the fact has implications beyond the case at bar: the concept of precedent makes it nearly impossible to predetermine whether any legislative fact will have substantive implications beyond the case in which that fact is introduced. *Id.*

The interests of legitimacy, efficiency, and comity outweigh any rationale for departure from Rule 52(a)'s plain meaning.²⁷⁰

B. Separating “Facts” from “Law”

Appellate courts should clarify their approach to review by articulating which factual findings are to be reviewed for clear error from those which should be reviewed *de novo*. This would mean stating the ultimate fact—whether that fact triggers a statutory or common law finding, a constitutional right or obligation, or legislative or policy articulation—with precision. Such an approach is beneficial for several reasons.

First, it demonstrates a regard for trial courts' authority in factual determinations by drawing a clear line delineating those facts which it will give the heightened deference required by Rule 52(a). Second, it offers the reader a window into the appellate court process of classifying facts. Third, it exposes the degree of scrutiny a court is giving particular findings and the reasons why certain findings trigger clear error or heightened review. Whenever possible and necessary to appropriately address “mixed statements of law and fact” of whatever nature, making such distinctions legitimizes the decision and the credibility of the decision makers by bringing the process of fact classification and choice of standard to the surface.

C. In All Circumstances, Lawyers and Trial Judges Should More Carefully Articulate Findings of Fact

For lawyers, the development of factual findings is often a difficult, anxiety-inducing task. Often, lawyers are called upon in the first instance to craft factual findings for the court. This poses a special challenge for lawyers. In crafting proposed findings for the judge to pass upon and/or incorporate into authoritative form, lawyers perform the task defensively, either seeking to ensure or shield against appellate review. As a result, factual findings may inappropriately include terms or phrases which constitute legal judgments.

Judges at times also articulate factual findings in a manner which makes them vulnerable to *de novo* review by failing to make “pure” fact statements. As was evident in *Equality Foundation*, making a pure factual statement can be difficult, particularly given the substantive nature of a case where words such as “discrimination” and “identifiable group” are essential factual conclusions. Without doubt, trial judges want to craft factual findings which compel the ultimate

270. This is not to argue that documentary evidence which contains factual conclusions which trigger ultimate, constitutional, or legislative facts should not be reviewed *de novo*.

legal judgment, if only to minimize the chance of reversal on appeal. To achieve that end, trial judges must take greater care in their construction of factual conclusions and explicitly provide the factual bases upon which those conclusions are reached.

D. *Acknowledge the Fact that Judges Make Law*

Criticisms surrounding judges “legislating from the bench” too often ignore a fundamental fact: *judges make law*. In deciding cases which govern the acts in controversy and future behavior, judges engage in legislative functions. Judges affirm existing legal norms, declare new legal norms, and decide between competing normative propositions. It is the inherent function of their role. That legislative function should be acknowledged by judges and critics alike to take it out of the realm of demagoguery and enable judges to function as they should.

Certainly, judges have an obligation to engage in responsible decision making, mindful of their relationships with other institutions that create the rules by which we are governed. Judges’ acknowledgement that they do legislate may cause them to exercise those duties more responsibly by, for example, better articulating decisional processes such as those which occur when deciding standards of review.²⁷¹

E. *Live with the Outcomes*

In arguing that a particular standard of review must attach to certain types of facts, it is important to consider the weight of that proposition. If one asserts that all facts found by a trial court should be reviewed only for clear error, it could mean that the Supreme Court would not have found the “separate but equal doctrine” unconstitutional in *Brown*. It could also mean that Denver should have no set-aside program, as the district court in *Concrete Works* determined. However, if one believes certain facts should or must be reviewed *de novo*, one would agree with the *Brown* and *Concrete Works* outcomes. Yet it would also mean that the Sixth Circuit was correct in overturning the district court’s finding that the Cincinnati amendment was unconstitutional in *Equality Foundation*.

In short, it is no small thing to create a bright line rule as to how “important” facts should be reviewed on appeal. Out of considering

271. Davis, *supra* note 197, at 1540 (“When courts own up to the possibility of making law in response to social and scientific facts, they are more likely both to hesitate to change or embellish legal rules and to proceed responsibly when changes are called for.”); *see also* Richard B. Cappalli, *Bringing Internet Information to Court: Of “Legislative Facts,”* 75 TEMP. L. REV. 99, 107 (2002) (“[C]ourts have to be acutely aware in which category they are operating when deciding issues before them.”).

the substantive rights at issue, one realizes that (1) from time to time, trial courts protect or undermine important rights and (2) from time to time, appellate courts protect or undermine important rights as well. A “correct” result is in the eye of the beholder.

IX. CONCLUSION

The ambiguities of Rule 52(a)’s text give appellate judges wide discretion to urge, circumvent, or avoid the Rule altogether. “Findings of fact,” “clear error,” and “documentary evidence” have proven to be so fluid in their meaning and application that appellate review can narrow or widen due to their ever-changing interpretation.²⁷² Fact typology, as categories used to classify or reclassify facts, demands that appellate judges make a crucial initial determination, one which is often shrouded. When the use of Rule 52(a) and fact typology is undertaken in an undisciplined, unprincipled manner, standard of review choices may appear to be merely masking ideological predispositions. At minimum, appellate court treatment of Rule 52(a) and fact typology operates as a filter through which judges may channel their ideological predispositions.

The value in Rule 52(a)’s ambiguity and the essential nature of fact typology cannot be understated. Both allow appellate courts needed flexibility to respond to instances in which substantive rights and obligations warrant heightened consideration. Both also allow the more deliberative declaration, extension, or narrowing of legal or policy norms. However, the value added by Rule 52(a) ambiguity and fact typology must be mindful of the potential diminution of jurisprudential values such as procedural legitimacy, the efficient administration of justice, and comity between the courts.

In arguing that Rule 52(a) and fact typology should be more clearly and consistently applied, the overriding concern is for transparency and decisional legitimacy. We live in a time in which the judicial system is under literal and figurative attack. Judicial independence is threatened by the sharp ideological divide which exists on issues before the courts. Judges are accused not only of harboring substantive biases, but also of manipulating or ignoring procedural rules to advance their biases. If Rule 52(a) and fact typology are treated in a principled manner, the possibility or perception of bias can be mitigated and their effectiveness as an ideological weapon dulled.

272. Nangle, *supra* note 13, at 409.

