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APPELLATE DEFERENCE IN THE AGE OF FACTS

KENJI YOSHINO*

ABSTRACT

This Article explores the question of how much appellate deference is due to “legislative” facts, or broad social facts about the world, established by the district courts. While it is axiomatic that “adjudicative” facts—which are the “whodunit” facts specific to a case—receive clear error deference on appeal, the Supreme Court has yet to address the degree of deference due to legislative facts. While the dominant view among appellate courts is that legislative facts should only receive de novo review, the practice of the courts has in actuality been much more fitful and inconsistent. The standard may be unsettled in part because the two extant alternatives—clear error and de novo review—both raise serious concerns. This Article proposes an intermediate “significant weight” standard, in which the deference accorded to a finding below corresponds to the degree of adversarial testing to which the finding was subjected.

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INTRODUCTION

We live in the age of facts. Courtesy of the digital revolution, more people can access more facts with more ease than ever before in human history.¹ The great democratization of fact-finding has granted us the capacity to make more informed decisions about myriad topics—to be, if not experts, better-educated laity. Alongside the culture of fact, however, we have seen the rise of what might be termed the culture of facticity. In this culture of contrivance, we seem increasingly entitled not just to our own opinions, but also to our own facts, and increasingly encouraged to believe that facts are not stubborn things, but rather pliant or even complaisant ones.

These cultures of fact and facticity have inevitable ramifications for the law. In this Article, I bite off a piece of one fact-related conundrum that is not new,² but increasingly urgent. I concern myself with how broad facts about the world should be established and reviewed by judges in an adversarial system. While it may at times seem I am chewing more than I have bitten off, my hope is that the Article will open onto a suite of questions—from the question of how courts know, to how law knows, to how we, as human beings, know.

Within our federal system, district courts have a special fact-finding capacity. According to conventional wisdom, their institutional competence means their findings of fact are reviewed for clear error, while their findings of law are reviewed *de novo*. Yet this tidy maxim does not adequately describe current realities. We can see this best by returning to Kenneth Culp Davis's path-marking 1942 article, which distinguished "adjudicative facts" from "legislative

1. See, e.g., WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2016: DIGITAL DIVIDENDS 6 (2016), <http://www.worldbank.org/en/publication/wdr2016> [<https://perma.cc/E6DU-XC5Y>] ("Digital technologies have dramatically expanded the information base, lowered information costs, and created information goods. This has facilitated searching, matching, and sharing of information and contributed to greater organization and collaboration among economic agents—influencing how firms operate, people seek opportunities, and citizens interact with their governments.").

2. See, e.g., Peggy C. Davis, "There is a Book Out ...": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1542-43 (1987) (describing the "dramatic and broad effect" that judicial acceptance of disputed legislative facts has had on the development of law, particularly in the area of child custody law).

facts.”³ Adjudicative facts are “facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were.”⁴ These facts have also been called “case-specific”⁵ or “historical”⁶ or even “whodunit”⁷ facts. Legislative facts—sometimes described as “social”⁸ facts—are, on the other hand, “facts which are utilized for informing a court’s legislative judgment on questions of law and policy.”⁹ An adjudicative fact might provide the answer to whether a driver exceeded the speed limit, whether a signature was forged, or whether a person read a contract before signing it. Cognate legislative facts might clarify whether underage drivers are more likely to speed, whether forged signatures are easy to detect, or whether people generally sign standardized contracts without reading them. To be clear, calling these “legislative” facts is a hopeless (but hopelessly entrenched) misnomer. As used in this Article and in this literature, legislative facts are found by the courts, not by the legislature—the adjective does not denominate the *source* of the fact, but rather the *function* of the fact in the judicial process.

Armed with this distinction, we see that appellate courts generally grant clear error deference only to adjudicative facts.¹⁰ The consensus among appellate courts is that legislative facts are reviewed *de novo*. However, the Supreme Court has never gone beyond dictum on this point, and its own practice has been inconsistent. Part I maps the disarray.

In Part II, I examine proposed resolutions of this uncertainty. In considering fixes, courts and commentators have largely restricted their debate to which of two extant standards—*de novo* or clear

3. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

4. *Id.* at 402.

5. See, e.g., Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1193 (2013).

6. See, e.g., *Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1036 (7th Cir. 1982).

7. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1255 (2012).

8. Borgmann, *supra* note 5, at 1187.

9. Davis, *supra* note 3, at 404.

10. Importantly, the courts sometimes do not grant clear error deference even to adjudicative facts, as when the “constitutional facts” doctrine is implicated. See *infra* notes 170-80 and accompanying text.

error review—is more appropriate for legislative facts. Yet these standards were developed for the law/fact distinction, not for the fact/fact distinction. I contend that neither de novo review nor clear error review is appropriate.

Part III proposes a new intermediate standard of review. This “significant weight” standard would accord a floating level of deference to the district court’s fact-finding with regard to legislative facts. The degree of deference would correspond to the degree of adversarial testing (broadly construed) to which the legislative facts had been subjected.

I. THE STATUS QUO

Trial courts issue findings of fact and conclusions of law.¹¹ Under Federal Rule of Civil Procedure 52(a)(6), “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”¹² Rule 52 makes no distinction between the kinds of facts in question.¹³ Conclusions of law, in contrast, are reviewed de novo—the district court receives no deference.¹⁴

A. *The Supreme Court, in Decision and Dictum*

To understand how clear error deference works in the general case, consider the Supreme Court’s 1985 decision in *Anderson v. City of Bessemer City*.¹⁵ In that case, the district court found that the plaintiff had been denied a position with the city because of her sex.¹⁶ The court of appeals reversed because it disagreed with many of the lower court’s findings.¹⁷ The Supreme Court reinstated the

11. See FED. R. CIV. P. 52. The critical question of how jury findings are treated on appeal is beyond the scope of this Article.

12. *Id.* 52(a)(6).

13. See *id.* 52.

14. See *United States v. Clarke*, 134 S. Ct. 2361, 2369 (2014) (holding that on questions of law, “the Court of Appeals has no cause to defer to the District Court”).

15. 470 U.S. 564 (1985).

16. *Id.* at 568.

17. *Id.* at 571.

district court's ruling, noting that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."¹⁸ Clear error deference required more than simple disagreement with the trial court's findings.¹⁹ "A finding is 'clearly erroneous,'" the Court had observed in 1948, "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."²⁰

Though the Court had no reason to term it so, the trial court's core finding in *Anderson* was manifestly an adjudicative fact, as it pertained to an action specific to the plaintiff in the case.²¹ It is not obvious that the Court intended *Anderson*'s clear error deference to extend to legislative facts. Indeed, during the next Term, the Court suggested in dictum in *Lockhart v. McCree* that legislative facts should *not* receive clear error deference on appeal.²² The Court in *Lockhart* addressed the constitutionality of a jury from which prospective jurors with a categorical objection to the death penalty had been excluded.²³ On habeas, the district court had found "that 'death qualification' produced juries that 'were more prone to convict' capital defendants than 'non-death-qualified' juries."²⁴ Finding that the "death qualification" violated the "fair-cross-section and impartiality requirements of the Sixth and the Fourteenth Amendments," the court granted habeas relief, and the Eighth Circuit affirmed.²⁵ In reversing, the Court included a footnote stating:

McCree argues that the "factual" findings of the District Court and the Eighth Circuit on the effects of "death qualification" may be reviewed by this Court only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). Because we do not ultimately base our decision today on the invalidity of the lower courts' "factual" findings, we need not decide the "standard

18. *Id.* at 574.

19. *See* *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015).

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

21. *See Anderson*, 470 U.S. at 568.

22. 476 U.S. 162, 168 n.3 (1986).

23. *Id.* at 165.

24. *Id.* at 167 (quoting *Grigsby v. Mabry*, 569 F. Supp. 1273, 1323 (E.D. Ark. 1983)).

25. *Id.* at 167-68.

of review” issue. We are far from persuaded, however, that the “clearly erroneous” standard of Rule 52(a) applies to the kind of “legislative” facts at issue here. The difficulty with applying such a standard to “legislative” facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the Eighth Circuit.²⁶

This footnote is the closest the Court has come to ruling on the issue. As one commentator has stated, “[i]t is unpardonable that the Supreme Court has not established a principled, explicit framework for the judicial reception and evaluation of such facts.”²⁷

Appellate courts both before and after *Lockhart* have taken the “no deference” view. In 1982, Judge Posner discussed this issue when Jewish basketball players challenged an athletic association’s rule that prohibited basketball players from wearing yarmulkes during games.²⁸ In ruling for the plaintiffs, the district court found that insecurely fastened yarmulkes did not pose a significant hazard to basketball players.²⁹ On appeal, Judge Posner wrote for a majority to reject that claim.³⁰ On a petition for rehearing, he acknowledged that the panel had been “accused of having failed to apply the clearly-erroneous rule to the district court’s finding.”³¹ He elaborated: “That rule, however, is designed for the review of findings of ‘historical,’ not ‘legislative,’ fact.”³² Judge Posner offered no citations for this claim.³³

In 1994, the First Circuit took a similar tack, now bolstering its position with a citation to the dictum in *Lockhart*.³⁴ It found that “[t]he clear error standard does not apply, however, when the fact-finding at issue concerns ‘legislative,’ as opposed to ‘historical’ facts.”³⁵ On this ground, it stated that it need not defer to the district court’s finding that the distinction between sentencing for

26. *Id.* at 168 n.3 (citation omitted).

27. Borgmann, *supra* note 5, at 1248.

28. *Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1031 (7th Cir. 1982).

29. *Id.* at 1032.

30. *Id.* at 1035.

31. *Id.* at 1036.

32. *Id.*

33. *See id.*

34. *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994).

35. *Id.*

cocaine base and for cocaine powder was racially discriminatory.³⁶ Other appellate courts have expressed uncertainty about what level of deference to apply, while acknowledging that different levels may be appropriate.³⁷ To my knowledge, no federal court has expressly held that appellate courts must give legislative facts clear error deference.

It might appear, then, that we are just waiting for the Supreme Court to make a latent consensus patent—that findings of legislative facts, like conclusions of law, receive no deference. Indeed, a leading monograph has flatly asserted that “appellate courts revisit legislative fact questions *de novo*.”³⁸

B. The Supreme Court, in Practice

As a matter of practice, however, the Supreme Court has not consistently adhered to the view that legislative facts should be reviewed *de novo*. This incongruity can be seen across the ideological spectrum.

1. Justice Alito Supports Clear Error Deference for a Legislative Fact

Writing for a majority of the Court in 2015 in *Glossip v. Gross*, Justice Alito determined that Oklahoma’s use of a three-drug protocol to execute prisoners did not violate the Eighth Amendment’s bar on cruel and unusual punishments.³⁹ As Justice Scalia put it, the case had a “Groundhog Day” quality—the Court had upheld a three-drug lethal injection protocol in the 2008 case of *Baze v. Rees*.⁴⁰ In the *Baze* protocol, the first drug, a barbiturate, rendered the prisoner unconscious; the second drug paralyzed him; and the third drug stopped his heart.⁴¹

36. *Id.*

37. *See, e.g.,* *Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir. 2012) (noting this distinction but declining to opine on its validity due to its irrelevance to the case at hand).

38. DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 45 (2008).

39. 135 S. Ct. 2726, 2739 (2015).

40. *Id.* at 2746 (Scalia, J., concurring); *see also* *Baze v. Rees*, 553 U.S. 35 (2008).

41. *Baze*, 553 U.S. at 44.

In the aftermath of that case, death penalty abolitionists successfully lobbied pharmaceutical companies to withdraw the first drug in the *Baze* protocol—sodium thiopental.⁴² States substituted a different barbiturate—pentobarbital.⁴³ The abolitionists again convinced the manufacturer of the drug to make it unavailable for executions.⁴⁴ The states pivoted to yet another drug—midazolam.⁴⁵ In *Glossip*, the Court addressed whether midazolam was an adequate substitute for the sodium thiopental approved in *Baze*.⁴⁶ The *Glossip* petitioners observed that unlike sodium thiopental and pentobarbital, which are barbiturates, midazolam is a sedative (a benzodiazepine in the same class as Valium or Xanax).⁴⁷ As such, they argued, it did not consistently render the prisoner insensate.⁴⁸ On habeas, the district court held a three-day hearing.⁴⁹ It found that the 500-milligram dose of midazolam used “would make it a virtual certainty that any individual [would] be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs.”⁵⁰ The Tenth Circuit affirmed.⁵¹

Justice Alito’s majority opinion affirmed the Tenth Circuit on two grounds, only one of which is relevant here.⁵² The Court observed that “[t]he District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution.”⁵³ Justice Alito offered four justifications for why such deference would be appropriate. First, he observed the high degree of deference required by clear error review, which

42. *Glossip*, 135 S. Ct. at 2733.

43. *Id.*

44. *Id.*

45. *Id.* at 2734.

46. *Id.* at 2731.

47. *Id.* at 2783 (Sotomayor, J., dissenting).

48. *Id.* at 2731 (majority opinion).

49. *Id.* at 2735.

50. *Id.* at 2736 (quoting Transcript of Court’s Ruling, *Warner v. Gross*, No. CIV-14-0665-F, 2014 WL 7671680 (Dec. 22, 2014), in *Joint Appendix* at 43, 77, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955)).

51. *Id.*

52. *Id.* at 2737-38. Justice Alito also observed that *Baze* required the petitioners to show that “any risk of harm was substantial when compared to a known and available alternative method of execution.” *Id.* at 2738. He found that the petitioners had failed to carry that burden. *Id.*

53. *Id.* at 2739.

does not permit an appellate court “to overturn a finding ‘simply because [we are] convinced that [we] would have decided the case differently.’”⁵⁴ Second, he contended that the petitioners bore the burden of persuasion.⁵⁵ Third, he noted that other lower courts had reached the same conclusion.⁵⁶ Finally, he maintained that “challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts.”⁵⁷ He elaborated that “federal courts should not ‘embroil [themselves] in ongoing scientific controversies beyond their expertise.’”⁵⁸

Justice Alito invoked *Anderson* for the propriety of clear error deference.⁵⁹ Yet *Anderson*, as noted, applied that deference to an adjudicative fact.⁶⁰ The central finding of fact in *Glossip*—that midazolam was a knockout drug—was, in contrast, a legislative fact.⁶¹ The issue was not whether midazolam had successfully rendered a particular prisoner unconscious, but whether it generally rendered “any individual” unconscious.⁶² Nevertheless, Justice Alito’s majority opinion stated that this finding drew clear error deference.⁶³ That view appeared to be unanimous. Justice Sotomayor, in her vigorous dissent for four Justices, agreed that clear error deference applied.⁶⁴

2. Justice Alito Rejects Clear Error Deference for Legislative Facts

Two years earlier, however, Justice Alito had opined that it would be absurd for an appellate court to accord clear error deference to a district court’s findings of legislative facts. In 2013, the Supreme

54. *Id.* (alterations in original) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

55. *Id.*

56. *Id.* at 2739-40.

57. *Id.* at 2740.

58. *Id.* (alteration in original) (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)). This statement is a bit confounding, because the tribunal in which the facts were established was also, of course, a federal court.

59. *See supra* note 54 and accompanying text.

60. *See supra* text accompanying notes 15-21.

61. *See Glossip*, 135 S. Ct. at 2732.

62. *See id.* at 2740-41.

63. *Id.*

64. *Id.* at 2786 (Sotomayor, J., dissenting).

Court handed down two cases relating to same-sex marriage on the same day—*United States v. Windsor*⁶⁵ and *Hollingsworth v. Perry*.⁶⁶ In *Windsor*, the Court struck down the federal Defense of Marriage Act, which denied federal benefits to same-sex couples validly married under state law.⁶⁷ In *Hollingsworth*, the Court confronted the more basic question—whether state bans on same-sex marriage were constitutional.⁶⁸ The *Hollingsworth* Court determined that the case was not justiciable, as the petitioner lacked standing.⁶⁹ It therefore did not reach the merits, leaving the district court opinion as the final disposition.⁷⁰ That district court had invalidated California’s ban on same-sex marriage after holding a twelve-day trial⁷¹ and issuing eighty findings of fact.⁷²

In an unusual move, Justice Alito employed his *Windsor* dissent to castigate the trial in *Hollingsworth*. He stated that *Hollingsworth* involved whether the Court should adopt a traditional “conjugal” view of marriage (which would exclude same-sex couples) or a more novel “consent-based” view of marriage (which would include them).⁷³ He said that resolving the debate between these two conceptions lay beyond the competence of the judiciary, which should not “decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.”⁷⁴ He then observed:

The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in *Hollingsworth v. Perry*. In that case, the trial judge, after receiving testimony from some expert witnesses, purported to make “findings of fact” on such questions as why marriage came

65. 133 S. Ct. 2675 (2013).

66. 133 S. Ct. 2652 (2013).

67. *Windsor*, 133 S. Ct. at 2682.

68. *Hollingsworth*, 133 S. Ct. at 2659.

69. *Id.*

70. *Id.* (“Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.”).

71. *Id.* at 2660.

72. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953-91 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

73. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

74. *Id.*

to be, what marriage is, and the effect legalizing same-sex marriage would have on opposite-sex marriage.

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom.

And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge's findings—including those on major philosophical questions and predictions about the future—unless they are “clearly erroneous.” Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.⁷⁵

As in *Glossip*, Justice Alito expressed concern about whether the question presented lay within the competence of the judiciary.⁷⁶ Yet that uncertainty made him take diametrically opposed positions in the two cases. In *Glossip*, the uncertainty led him to defer to the lower court.⁷⁷ In *Hollingsworth*, by contrast, the uncertainty led him to state that such deference could not be taken seriously.⁷⁸

Of course, the facts found in *Glossip* and *Hollingsworth* are intuitively different. *Glossip* presented a narrow scientific question: does midazolam render prisoners unconscious?⁷⁹ *Hollingsworth* presented a broad sociological question: what is marriage?⁸⁰ Nevertheless, for the purposes of legal rules of deference, the two findings have three crucial commonalities. First, even though one might be broader than the other, both related to legislative facts. Second, under the law governing each case, the answers were potentially outcome determinative.⁸¹ The district courts therefore

75. *Id.* at 2718 n.7 (citations omitted).

76. *See id.* at 2718.

77. *See supra* notes 53-58 and accompanying text.

78. *See supra* notes 74-75 and accompanying text.

79. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

80. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

81. As the material quoted above suggests, Justice Alito did not appear to believe that the district court's factual determinations in *Hollingsworth* were necessary, much less relevant, to the legal questions posed. *See supra* note 75 and accompanying text. This position is puzzling. It has been established through a line of canonical cases that the “right to marry,” while unenumerated in the Constitution, is nonetheless a fundamental right. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 99-100 (1987) (invoking the fundamental right to marry in striking down regulations limiting inmates' ability to marry); *Zablocki v. Redhail*, 434 U.S. 372, 386

had to provide them. Finally, both district courts opted to do so using the traditional fact-finding procedures that have been deemed to be their comparative institutional competence—hearing dueling experts subjected to voir dire and cross-examination. In short, these were legislative facts that the district courts had to determine, and which they determined to the best of their institutional competence. Nevertheless, in one case clear error deference was deemed to be appropriate,⁸² while in the other, it was deemed to be ludicrous.⁸³

3. Justice Ginsburg Supports Clear Error Deference for a Legislative Fact

In the interests of fair play, let me observe that inconsistent postures of deference with regard to district court findings of legislative facts are not the special bugbear of the conservative wing of the Court. In *Gonzales v. Carhart*, the Court upheld a federal ban on partial-birth abortions.⁸⁴ The Court observed that Congress had found the practice of performing partial-birth abortions to be “never medically necessary.”⁸⁵ In dissent, Justice Ginsburg observed that this Congressional finding had been contradicted by the district court below—as well as two other district courts.⁸⁶ She wrote: “The trial courts concluded, in contrast to Congress’ findings, that ‘significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure.’”⁸⁷ She elaborated that “[t]he District Courts’ findings merit this Court’s

(1978) (striking down a requirement that certain citizens get court approval before exercising the fundamental right to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that anti-miscegenation statutes were unconstitutional infringements of the right to marry under the Due Process clause). Justice Alito did not suggest any retreat from that view. In considering whether that right permitted same-sex couples to marry, any court would *have* to subscribe to a view about the nature of marriage. To exclude same-sex couples from marriage while declining to answer the question would be to settle the issue by fiat without taking any accountability for doing so.

82. *See supra* notes 53-58 and accompanying text.

83. *See supra* notes 74-75 and accompanying text.

84. 550 U.S. 124, 141 (2007).

85. *Id.*

86. *Id.* at 179 (Ginsburg, J., dissenting).

87. *Id.* (alteration in original) (quoting *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1033 (N.D. Cal. 2004)).

respect,” appending a citation to Federal Rule of Civil Procedures 52(a) as well as to *Salve Regina College v. Russell*.⁸⁸

Justice Ginsburg was more cautious or opaque than Justice Alito in *Glossip*, eschewing any reference to “clear error deference,” and favoring instead the formulation that the findings below “merit[ed] this Court’s respect.”⁸⁹ Yet the citations illuminated her meaning. Rule 52(a), as seen above, sets forth the clear error standard.⁹⁰ Similarly, the cited matter in *Salve Regina* elaborates on that standard in unmistakable terms. The *Salve Regina* Court observed: “In deference to the unchallenged superiority of the district court’s factfinding ability, Rule 52(a) commands that a trial court’s findings of fact ‘shall not be set aside unless clearly erroneous.’”⁹¹

4. Justice Ginsburg Rejects Clear Error Deference for Legislative Facts

In *United States v. Virginia*, by contrast, Justice Ginsburg apparently declined to accord clear error deference to a district court finding.⁹² Writing for the Court, Justice Ginsburg struck down the Virginia Military Institute’s bar on admitting women. In doing so, the Court rejected the findings of the district court. As Justice Ginsburg acknowledged: “In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made ‘findings’ on ‘gender-based developmental differences.’ These ‘findings’ restate the opinions of Virginia’s expert witnesses, opinions about typically male or typically female ‘tendencies.’”⁹³

In a sharp dissent, Justice Scalia expatiated on the perceived lack of deference given to the district court. He noted that the majority “rejects (contrary to our established practice) the factual findings of two courts below.”⁹⁴ He further criticized the majority for dismissing the lower courts’ findings “on the ground that ‘[the] findings’ restate

88. *Id.* (quoting *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991)) (citing FED. R. CIV. P. 52(a)).

89. *See id.*

90. *See supra* note 12 and accompanying text.

91. *Salve Regina Coll.*, 499 U.S. at 233 (quoting FED. R. CIV. P. 52(a)).

92. 518 U.S. 515 (1996).

93. *Id.* at 541 (internal citations omitted).

94. *Id.* at 566 (Scalia, J., dissenting).

the opinions of Virginia’s expert witnesses.”⁹⁵ He reflected that it was “remarkable to criticize the District Court on the ground that its findings rest on the evidence (*i.e.*, the testimony of Virginia’s witnesses)” given that this “is what findings are supposed to do.”⁹⁶ He found this objection particularly noteworthy given that the evidence in that court was “virtually uncontradicted.”⁹⁷

Again, Justice Ginsburg’s majority opinion made no reference to the applicable standard of review. Justice Scalia did not let this pass without comment: “The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices’ own view of the world.”⁹⁸ “It is not too much to say,” Justice Scalia concluded, “that this approach to the litigation has rendered the trial a sham.”⁹⁹

Justice Scalia, then, assumed that Justice Ginsburg owed the district court clear error deference and that she had shirked that obligation. Yet Justice Ginsburg never conceded that she owed the district court such deference. To the contrary, her scare quotes around the district court’s “findings” parallel the similar quotation marks around “findings” used by Justice Alito in *Windsor* when discussing *Hollingsworth*,¹⁰⁰ or, for that matter, by the Court in *Lockhart*.¹⁰¹ It appears more likely that she felt she did not need to defer to the broad “findings” of the district court.¹⁰²

95. *Id.* at 585 (alteration in original) (quoting *id.* at 541 (majority opinion)).

96. *Id.* at 585.

97. *Id.* at 576 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1415 (W.D. Va. 1991)).

98. *Id.* at 585.

99. *Id.* at 586.

100. *See supra* note 75 and accompanying text.

101. *See supra* note 26 and accompanying text.

102. There is a third alternative here. Justice Ginsburg may have deemed the district court’s factual determinations irrelevant because of the stringency of the intermediate scrutiny standard. However, she did not formally raise the standard in *Virginia* to strict scrutiny. It is at least arguable that a traditional application of intermediate scrutiny would have required her to reject the findings of the district court.

II. AN UNPALATABLE CHOICE

Faced with such inconsistencies, scholars have staked out positions claiming that either *de novo*¹⁰³ or clear error deference¹⁰⁴ should apply across the board. As I will show, however, the application of either standard to legislative facts raises serious concerns.

A. The Problem with De Novo Review

The problems with *de novo* review are various: such deference ignores the institutional competence of the district courts; it fails, relatedly, to acknowledge the limitations of appellate fact-finding; and it creates perverse incentives for both district and appellate courts.

1. De Novo Review Flouts the Institutional Competence of the District Courts

It is well settled that district courts have particular institutional competence to find facts, as reflected in Rule 52(a).¹⁰⁵ As Borgmann observes:

Constitutional rights claimants look to the federal courts as a forum for dispassionate, independent review of the relevant social facts.

Trial courts are well positioned to perform this function. Trial judges are able to observe and even question expert witnesses as they testify, helping them judge the credibility of expert testimony and assisting in the process of learning about often complex and unfamiliar topics. Moreover, evidence at trial—even when it relates to social facts—is generally subjected to a screening process, including rules of admissibility, that helps to ensure the integrity of the facts in the record.¹⁰⁶

103. See, e.g., John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 514 (1986) (arguing that *de novo* review should apply to legislative facts).

104. See, e.g., Borgmann, *supra* note 5, at 1190 (arguing that clear error review should apply to all legislative facts).

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

106. See Borgmann, *supra* note 5, at 1190 (footnotes omitted).

In other words, the relative institutional competence of district court judges to engage in fact-finding is well established with regard to adjudicative facts.¹⁰⁷ And Rule 52(a), at least, gives us no reason to believe that the fact-finding processes used to discern adjudicative facts will not also serve as the best means of discerning legislative facts.¹⁰⁸

To be sure, there are dissenting views. In a co-written article, John Monahan and Laurens Walker have argued that trials are ill-suited to the task of establishing legislative facts.¹⁰⁹ Their main claim is “that written briefs are a superior medium to verbal testimony for communicating technical social science information.”¹¹⁰ This is because the expert “has less time to frame a precise answer and less opportunity to refer to the primary data when responding verbally than when writing a book or an article.”¹¹¹ And although Monahan and Walker acknowledge that bypassing trials would lead to the loss of demeanor evidence, they argue that such evidence is less probative with regard to legislative facts. “The sweating, shifty-eyed witness to a criminal’s alibi may indeed be less credible than is the calm and self-assured witness,” they colorfully contend, “but observable nervousness on the part of an expert presenting social science data is more likely to reflect unfamiliarity with courtroom procedures than it is to indicate that the underlying data are invalid.”¹¹² In addition, Monahan and Walker suggest that because “the appeal process often takes years, the testimony of an expert witness may be out-of-date by the time the court of last review decides the case.”¹¹³ Given this reality, “[i]t is much more expeditious for the parties to submit updated briefs than it is to remand a case for additional expert testimony.”¹¹⁴

Such objections, however, seem overstated. Even if expert witnesses are more comfortable writing books or briefs, their comfort is not being sacrificed solely for the pleasure of the court.

107. *See id.*

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

109. Monahan & Walker, *supra* note 103, at 495.

110. *Id.* at 496.

111. *Id.*

112. *Id.* at 497.

113. *Id.*

114. *Id.*

Rather, subjection to cross-examination from opposing counsel and questioning from the bench is more likely to force them to confront the weaknesses in the substance of their testimony.¹¹⁵ Similarly, even if one concedes for the sake of argument that expert demeanor evidence is less important with regard to experts, the ability to assess demeanor is but one of many credibility determinations. Pre-trial depositions and voir dire, for instance, are powerful ways to determine if an expert is truly an expert on the subject at hand, or, even if well-credentialed, is making an extramural statement. Finally, the objection focusing on the time-consuming nature of trials seems beside the point, as experts (and opposing experts) can both testify at trial *and* notify appellate courts that their testimony (or their opponents' testimony) is out of date in a later brief.

2. De Novo Review Ignores the Dangers of Appellate Fact-Finding

Moreover, the trial court's fact-finding capacity should not be compared to some Platonic ideal of truth-seeking, but to the alternatives at hand. If legislative facts are not found through the adversarial processes of the district courts, how will they be found? The dominant answers appear to be that judges will find these facts on their own or rely on amicus briefs. Yet both of these routes are comparatively problematic.

In a 2012 article, Allison Orr Larsen discusses the phenomenon of in-house judicial fact-finding at the United States Supreme Court.¹¹⁶ Looking at the 120 "most salient" cases (defined according to two social science indices) decided between 2000 and 2010, Larsen found that 56 percent of them contained findings of legislative fact citing to authorities discovered "in house."¹¹⁷ By "in house," Larsen means "outside the record, not presented by the parties, and even beyond the scope of the numerous amicus briefs filed."¹¹⁸ Such independent fact-finding occurred across the ideological spectrum.

115. One is reminded of Wigmore's famous aperçu that cross-examination is "the greatest legal engine ever invented for the discovery of truth." 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn ed., rev. ed. 1974).

116. See generally Larsen, *supra* note 7, at 1255.

117. *Id.* at 1274.

118. *Id.*

Chief Justice John Roberts relied on a book by an investigative journalist to assert that “benign skills—like negotiation—can be used to engage in terrorism.”¹¹⁹ Justice Stevens cited data from the National Oceanic and Atmospheric Administration website to document a rise in the level of carbon dioxide in the atmosphere.¹²⁰ Justice Thomas relied on data from *Educational Digest* to underscore the “increasingly alarming crisis” of prescription drug abuse.¹²¹ And Justice Breyer invoked statistics from a journal on pediatrics to note a lack of consensus across regions about gun safety.¹²²

As Larsen persuasively argues, the immunity of such in-house fact-finding to contestation makes it prone to bias and error.¹²³ Given that such fact-finding occurs without the knowledge, much less the participation, of the parties, the checks of the adversarial process are gone.¹²⁴ She provides the example of *Sykes v. United States*, where the Court confronted the question of whether vehicular flight contained an inherent risk of violence.¹²⁵ Although the parties served up their own statistics and studies, Justice Kennedy and Justice Thomas “set forth new statistics for how many crashes in Pennsylvania and California were caused by police chases.”¹²⁶ Justice Scalia, in dissent, accused the majority of “un-tested judicial factfinding.”¹²⁷

Building on the point that some of the Justices have explicitly acknowledged their reliance on the Internet,¹²⁸ Larsen further notes that the risks of error can rise in that realm. She discusses the phenomenon of the “filter bubble,” in which search engines like Google can tailor search results to the searcher.¹²⁹ “A search for ‘global warming,’” she writes, “may reveal different results for different users depending on which websites are bookmarked, which

119. *Id.* (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010)).

120. *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007)).

121. *Id.* at 1275 (quoting *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 394 (2009) (Thomas, J., concurring in part and dissenting in part)).

122. *Id.* at 1274-75 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 944 (2010) (Breyer, J., dissenting)).

123. *Id.* at 1291.

124. *See id.* at 1294-95.

125. *Id.* at 1266 (citing *Sykes v. United States*, 564 U.S. 1 (2011)).

126. *Id.* at 1292.

127. *Id.* at 1267 (quoting *Sykes*, 564 U.S. at 32 (Scalia, J., dissenting)).

128. *Id.* at 1260-62.

129. *Id.* at 1293-94.

political blogs are visited, or even what groups the users belong to on Facebook.”¹³⁰ In this way, the innate dangers of what might be termed “Googleprudence” may be exacerbated by technical amplifications of confirmation bias.

The other obvious path through which courts might obtain facts is through amicus briefs. In a 2014 article, Larsen sends up this practice as well.¹³¹ She notes that the number of amicus briefs submitted to the Supreme Court swelled by 800 percent between the late 1940s and the late 1990s.¹³² Many of these briefs are submitted by respected experts and professional bodies, with rigorous and careful citation to reliable sources. Yet others contain what Larsen describes as “eleventh-hour, untested, advocacy-motivated claims of factual expertise.”¹³³

Larsen provides some troubling instances in which the Justices have relied on such amicus briefs. Again, this reliance transcends ideology. Justice Breyer, in a 2013 copyright decision, stated that “library collections contain at least 200 million books published abroad.”¹³⁴ He cited to an amicus brief by the American Library Association,¹³⁵ which in turn cited a blog post.¹³⁶ Yet the blog post in question was published after the suit was filed, and the blog was discontinued after the Supreme Court decided the case.¹³⁷ In 2007, Justice Kennedy cited an amicus brief for the proposition that women can experience “[s]evere depression and loss of esteem” after an abortion.¹³⁸ The expert cited was not a medical doctor, but an

130. *Id.*

131. See generally Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014).

132. *Id.* at 1775 (citing Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749 (2000)).

133. *Id.* at 1757.

134. *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1364 (2013).

135. *Id.*

136. Brief of Amici Curiae the Am. Library Ass’n et al. in Support of Petitioner at 12, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (No. 11-697), 2012 WL 2641851, at *12 (citing Ed O’Neill, *How Many “Foreign” Books Are in US Libraries?*, METALOGUE (June 24, 2010, 8:29 AM), <http://worldcat.org/arcviewer/3/OCC/2010/11/24/H1290613808919/viewer/file69.html>).

137. Larsen, *supra* note 131, at 1792.

138. *Id.* at 1796 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007)).

electrical engineer who received his PhD from an unaccredited university.¹³⁹

3. De Novo Review Creates Bad Incentives for the District Courts

A de novo standard of review also creates perverse incentives for the district courts. Currently, trial courts can—but need not—engage in adversarial testing of legislative facts. The Federal Rules of Evidence afford them this choice. Under Rule 201, courts may take judicial notice of a fact only if it is “not subject to reasonable dispute.”¹⁴⁰ However, the rule “governs judicial notice of an adjudicative fact only, not a legislative fact.”¹⁴¹ The advisory committee’s note to the rule underscores that judges “may make an independent search for persuasive data” in determining domestic law, and that this standard also “govern[s] judicial access to legislative facts.”¹⁴²

The impetus behind the differential treatment of adjudicative and legislative facts under the rule is attributed to the idea that legislative facts are, by definition, disputed.¹⁴³ Yet in allowing judges to take judicial notice of legislative facts, the Rules of Evidence give judges unfettered discretion in this area. Adjudicative facts can be judicially noticed only if uncontroversial; if they are controversial and material, they must be subjected to the adversarial process.¹⁴⁴ Legislative facts, in contrast, can be judicially noticed at will.¹⁴⁵ This leads to a paradox: the facts that are (by definition) case-specific are subjected to more adversarial testing than the facts that are (by definition) case-spanning and therefore likely to be more consequential.

One way to fix this, of course, would be to apply the same evidentiary standard to both adjudicative and legislative facts. Yet given the relatively larger number of legislative facts potentially implicated in a case, it seems utopian to require that all material

139. *Id.*

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

141. *Id.* 201(a).

142. *Id.* 201 advisory committee’s note to 1972 proposed rules.

143. *See id.*

144. *See id.* 201(b).

145. *Cf. id.* 201(a).

and disputed legislative facts be submitted to trial. For this reason alone, the current status quo of giving the district judge a choice as to whether to put legislative facts to an adversarial test seems wise.

However, a *de novo* standard of review skews the choice of whether district courts will subject legislative facts to the rigors of adversarial testing. In such a system, a trial court could engage in a meticulous full-dress trial of legislative facts. Yet on appeal, the reviewing court could supplant those findings with facts found through its own research or through an amicus brief. That reality, in turn, will discourage district courts from holding trials. As Justice Scalia observed in *United States v. Virginia*, the majority's apparent disregard for district court findings "makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial."¹⁴⁶

One potential counter is that such trials would still occur because they would be helpful in the same way that well-reasoned analysis of issues of law by a district court is helpful. After all, *de novo* review does not mean that the reviewing court cannot *read* the opinion of the court below. Yet given the enormous resources—financial, temporal, and managerial—required to go to trial, it is reasonable to expect that *de novo* review of legislative facts will keep many district courts from going to trial. This may be particularly likely given the general trend of decline in trials, which appear to be going the way of the dodo.¹⁴⁷ In the 1930s, about 20 percent of civil cases filed in federal courts were resolved at trial; in the 2000s, the figure had plummeted to less than 2 percent.¹⁴⁸

4. De Novo Review Creates Bad Incentives for the Appellate Courts

De novo review of legislative facts also incentivizes all courts below the Supreme Court to rely solely or primarily on adjudicative facts. A district court that bases its holding solely on adjudicative facts is less likely to be reversed.¹⁴⁹ Similarly, a court of appeals that

146. 518 U.S. 515, 585 (1996) (Scalia, J., dissenting).

147. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

148. *Id.*

149. The Ninth Circuit has held that district courts have the ability (and the function) to

affirms solely on adjudicative facts found by the district court is, in turn, less likely to be reversed.

A judicial minimalist might celebrate this incentive to the extent that it operates as a canon of avoidance. Consider the canon of interpretation that encourages courts to avoid constitutional issues if a case can be decided on statutory grounds.¹⁵⁰ The idea is to steer courts away from “big law” unless and until they have to confront it. The mapping of clear error/de novo review onto adjudicative/legislative facts may serve an analogous function. It may steer courts away from “big facts” unless and until they have to confront them.

However, there are at least two problems with this analysis. First, the canon of construction can be taken too far. In *Perry v. Brown*, the Ninth Circuit confronted the painstakingly detailed findings of fact of the district court in that case.¹⁵¹ It acknowledged a difference between legislative and adjudicative facts, noting ambiguity about what level of scrutiny should apply to each category of fact.¹⁵² Writing for a majority of the panel, Judge Reinhardt explained:

Plaintiffs and Proponents dispute whether the district court’s findings of fact concern the types of “facts”—so-called “adjudicative facts”—that are capable of being “found” by a court through the clash of proofs presented in adjudication, as opposed to “legislative facts,” which are generally not capable of being found in that fashion.¹⁵³

Judge Reinhardt acknowledged that it was “debatable whether some of the district court’s findings of fact concerning matters of history or social science are more appropriately characterized as ‘legislative facts’ or as ‘adjudicative facts.’”¹⁵⁴ However, he observed that the panel did not need to “resolve what standard of review should apply

“find” adjudicative facts during trial, whereas they typically cannot do so for legislative facts. See *Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir. 2012). Because findings of adjudicative fact are proper for district courts to make, courts of appeals may substitute such findings with their own only in rare, egregious circumstances.

150. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

151. *Perry*, 671 F.3d at 1075.

152. *Id.*

153. *Id.*

154. *Id.*

to any such findings” given that “the only findings to which [the Court gave] any deferential weight” were adjudicative facts.¹⁵⁵ The Ninth Circuit panel quoted *Lockhart*, in which the Court did not decide “the ‘standard of review’ issue”—whether “the ‘clearly erroneous’ standard of Rule 52(a) applies to the kind of ‘legislative’ facts at issue”—because it did not base its decision “on the [validity or] invalidity of the lower courts’ ‘factual’ findings.”¹⁵⁶

To decide the case solely on adjudicative facts, however, the Ninth Circuit bent governing law out of recognition. It argued that *Romer v. Evans*, decided by the Supreme Court in 1996, disposed of the central issue in *Perry*.¹⁵⁷ *Romer* concerned a Colorado state constitutional amendment that forbade the state or any of its subdivisions from protecting lesbians, gays, or bisexuals from discrimination.¹⁵⁸ The Court struck down the amendment as a violation of the Equal Protection Clause, noting that “[i]t is not within our constitutional tradition to enact laws of this sort.”¹⁵⁹ What the Court meant by laws “of this sort” were laws that are “at once too narrow and too broad.”¹⁶⁰ Amendment 2 “identifie[d] persons by a single trait and then denie[d] them protection across the board.”¹⁶¹

As pernicious as California’s ban on same-sex marriage was, it did not function in this manner. Judge Reinhardt acknowledged this point.¹⁶² He nevertheless concluded that “Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect.”¹⁶³

Given the status quo, this was doubtless good strategy for Judge Reinhardt. It was a minimalist resolution of the case that avoided the larger issue of whether same-sex couples had the right to marry

155. *Id.* These findings included matters like the messaging to voters around Proposition 8. *Id.*

156. *Id.* at 1076 (alteration in original) (quoting *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986)).

157. *Id.* at 1081 (construing *Romer v. Evans*, 517 U.S. 620 (1996)).

158. *Romer*, 517 U.S. at 624.

159. *Id.* at 633.

160. *Id.*

161. *Id.*

162. *Perry*, 671 F.3d at 1081.

163. *Id.*

nationally. Viewed through our lens, it was also a decision that avoided the more controversial aspects of the trial by relying on only the more anodyne adjudicative facts established below. Yet it was a strategy that exacted a cost. For those who interpret *Romer* as a case that turned on the *breadth* of the harm imposed by a law, Judge Reinhardt's interpretation that *narrow* harms were "even more suspect" might give pause, given that "broad" and "narrow" are antonyms.¹⁶⁴

A separate problem with this canon of avoidance is that it does not apply to the Supreme Court. There is no real incentive for the Supreme Court to avoid determining a case on legislative facts, as its decisions are not reviewed. De novo review of legislative facts contributes to a system in which appellate reliance on legislative facts is avoided until we reach the Supreme Court.¹⁶⁵ But in this scenario, legislative facts come into the Supreme Court with minimal vetting below. Again, the most consequential facts are subject to the least amount of testing.

B. The Problem with Clear Error Review

At this point, the other extreme—clear error review for legislative facts—begins to look more attractive. Yet here, too, lie dragons. I consider two.

1. Clear Error Review Offers Too Much Deference to District Court Findings Made Outside Such Courts' Institutional Competence

District courts are given clear error deference because they are drawing on their institutional competence. However, as we have seen, district courts may take judicial notice of legislative facts at will.¹⁶⁶ When the district courts do so, there is no reason to give clear error deference to such facts. When they take judicial notice,

164. Compare *Romer*, 517 U.S. at 633 (stating that Colorado's Amendment 2 denies gay and lesbian couples protections "across the board"), with *Perry*, 671 F.3d at 1081 (explaining that California's Proposition 8's "effect is narrower," which "makes it even more suspect").

165. Note the contrast with the canon of constitutional avoidance, which also applies to the Supreme Court. See *supra* note 150 and accompanying text.

166. See FED. R. EVID. 201(a); *supra* notes 140-45 and accompanying text.

district judges are not exercising any distinctive institutional competence. A district court judge has no more institutional competence in reading a book by an investigative journalist, for instance, than one of his appellate colleagues.

As noted above, I do not think the solution is to deprive the district courts of the unfettered ability to take judicial notice of legislative facts. Yet some check is obviously necessary. Unrestrained by the general rule that it can notice only facts that are “not subject to reasonable dispute,”¹⁶⁷ the district court could take notice of a fact that could be reasonably disputed but which was not clearly erroneous. Such a finding would not have involved any special competence on the part of the district court. It would therefore be overly insulated on appeal by a rule requiring clear error deference.

To test that intuition, consider the earlier discussion of partial-birth abortion. In *Gonzales v. Carhart*, the district court (along with two other courts) found—after taking testimony on the subject—that intact D&E abortions were sometimes medically necessary.¹⁶⁸ Now consider a hypothetical court that found the same fact by taking judicial notice of it. Such a finding could be reasonably disputed, and so could be judicially noticed only by virtue of the fact that it was a legislative fact. Even if one believes that clear error deference should be granted to the lower court in *Gonzales*, it is hard to see why clear error deference—or indeed any deference at all—should be granted in our hypothetical case.

2. Clear Error Deference Can Upend the Hierarchical Structure of the Courts

The deeper problem with clear error deference is that it threatens to invert the pyramid of the federal judiciary. This is sometimes framed as a problem of incapacity.¹⁶⁹ Assume two different district courts in the same judicial circuit come to different conclusions on a close question pertaining to a legislative fact. In this circumstance, an appellate court might find it impossible to give each court clear

167. See FED. R. EVID. 201(b).

168. See 550 U.S. 124, 161-62 (2007).

169. See *Hope Clinic v. Ryan*, 195 F.3d 857, 883-84 (7th Cir. 1999) (en banc) (Posner, J., dissenting) (raising a version of this scenario), *vacated*, 530 U.S. 127 (2000).

error deference. The district courts could hold opposing positions without either being clearly wrong.

This “ought-implies-can” argument against clear error deference seems at once logically elegant and unduly ornate. The core problem with granting clear error deference to district court findings of legislative fact is not that the appellate courts cannot do it, but that they will not do it. Even when district courts do not conflict, appellate courts have expressed reluctance about allowing a single district court to decide a case by determining a dispositive fact—sometimes called an “ultimate” fact.¹⁷⁰ This has given rise to the so-called “constitutional facts” exception to Rule 52(a), in which appellate courts do not give clear error deference to ultimate facts in cases involving constitutional law, even when those facts are adjudicative in nature.¹⁷¹

A classic articulation of the “constitutional facts” exception can be found in *Bose Corp. v. Consumers Union of United States, Inc.*¹⁷² In that case, the district court had found that Consumers Union had published an article about the defendant with “actual malice.”¹⁷³ On appeal, the First Circuit found that under *New York Times v. Sullivan*, reviewing courts in free-speech cases had to examine the “whole record” independently.¹⁷⁴ Accordingly, the court of appeals declined to give clear error deference to the district court’s finding of fact.¹⁷⁵ The Supreme Court affirmed, both with respect to the result and with respect to the standard of review.¹⁷⁶ It found that de novo review of such “ultimate” facts “reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such [independent] review in order to preserve the precious liberties established and ordained by the Constitution.”¹⁷⁷

While “the constitutional fact doctrine has taken root most clearly and firmly in the First Amendment context,”¹⁷⁸ it has not been

170. See Borgmann, *supra* note 5, at 1207.

171. See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229, 253 (1985).

172. 466 U.S. 485 (1984); see Monaghan, *supra* note 171, at 230.

173. *Bose*, 466 U.S. at 487.

174. *Id.* at 492 (construing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

175. See *id.*

176. *Id.* at 511, 513-14.

177. *Id.* at 510-11.

178. Borgmann, *supra* note 5, at 1206-07.

limited to that context. In *Miller v. Fenton*, the Court found that the voluntariness of a confession must be reviewed independently on appeal.¹⁷⁹ By contrast, in *Thornburg v. Gingles*, the Court declared “the clearly-erroneous test” to be “the appropriate standard for appellate review of a finding of vote dilution.”¹⁸⁰ In short, the application of the constitutional facts doctrine has been fitful and uneven.

While the constitutional facts doctrine has largely been applied to adjudicative facts, its logic holds—perhaps even more strongly—with regard to legislative facts. As the Seventh Circuit has observed, “an issue of ‘constitutional fact[.]’ is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”¹⁸¹ By their nature, case-spanning facts (that is, legislative facts) will be more likely to have such far-reaching effects than case-specific ones (that is, adjudicative facts).

A major concern with embracing clear error review for legislative facts is that it could expand the more radical constitutional facts exception. The problem with the clear error standard is that it asks too much of the appellate courts, upending the accepted hierarchy of courts by permitting inferior courts to control appellate ones with regard to all mixed issues of law and fact. Insisting on clear error deference for legislative facts is unlikely to cow the appellate courts into quiescence. To the contrary, it is more likely to encourage them to expand the constitutional facts doctrine far beyond the First Amendment context. After all, the constitutional facts exception to clear error review, unlike the legislative facts exception, has been formally elaborated by the Supreme Court.¹⁸²

III. THE INTERMEDIATE STANDARD OF REVIEW

179. 474 U.S. 104, 112 (1985).

180. 478 U.S. 30, 79 (1986).

181. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002).

182. *See supra* notes 169-77 and accompanying text.

At this point, it might fairly be asked if the Court has left the question of deference due to legislative facts open for a reason. A cynic might observe that the Court does not care much about facts—that instead it reaches its conclusions on ideological or policy grounds and then works backwards to fill in the facts from the sources that support its conclusion. All legislative facts in Supreme Court cases are, on this view, essentially rhetorical in nature. The Supreme Court may have left the standard unclear precisely because it wishes to retain “play in the joints.”¹⁸³ If this is the case, this effort may fill a much-needed gap in the literature.

I prefer to think, however, that the Supreme Court and intermediate appellate courts do take facts seriously, at least in the median case. On the most ideologically freighted issues, many appellate judges may be impervious to facts that cut against their desired holding. Yet that is not the bulk of the work that judges do. In the ordinary case, I believe that appellate judges engage in good faith with the facts below and would adhere to reasonable rules of deference.

For the reasons given above, however, the extant standards are alternatively too permissive (*de novo*) and too restrictive (clear error) to be workable. Judges appear to believe that they must adhere to one standard or the other, as no court, to my knowledge, has proposed an intermediate standard of review. Commentators also seem to fall into the trap of assuming that legislative facts must be treated either just like adjudicative facts or just like law. John Monahan and Laurens Walker, for instance, perceptively note that legislative facts share qualities of both law and fact.¹⁸⁴ Like law, legislative facts “produce principles applicable beyond particular instances.”¹⁸⁵ Like facts, they are descriptive in nature.¹⁸⁶ They observed that because either standard is plausible, the less restrictive one should be adopted, arguing for *de novo* review.¹⁸⁷ Yet it is just as plausible, of course, to say that the hybrid nature of legislative facts suggests the propriety of an intermediate standard.

183. *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (attempting to find a middle ground between two opposing views).

184. Monahan & Walker, *supra* note 103, at 489-90.

185. *Id.* at 490.

186. *See id.* at 489.

187. *Id.* at 478.

A thoughtful approach to this problem was advanced in an amicus brief written in *Hollingsworth v. Perry* by Erwin Chemerinsky and Arthur Miller. This brief stated:

Evidentiary proceedings, and especially trials, subject bare allegations to rigorous review, expert analysis, and cross-examination. They help to avoid the danger that courts will rely on preexisting assumptions that have little factual foundation. Regardless of how one categorizes the different kinds of factual findings trial courts make, judicial resolution of constitutional issues must be informed by facts. In our system, disputes over these facts are best resolved through adversarial proceedings before a trial court judge who can oversee the proper presentation of those facts.

Here, the district court's factual findings address the core questions that this Court must answer.¹⁸⁸

For these reasons, the brief advocated that the findings of the district court deserved “significant weight.”¹⁸⁹ It deliberately eschewed the traditional deference terminology of “clear error deference” and “de novo review.”¹⁹⁰

Strangely, it was this brief that Justice Alito lambasted in his *Windsor* dissent: “And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are ‘clearly erroneous.’”¹⁹¹ He cited only the Chemerinsky and Miller brief, so his critique was manifestly leveled at them.¹⁹² Yet the Chemerinsky and Miller brief did not advocate for clear error deference and studiously avoided the phrase “clear error” throughout in favor of the “significant weight” language.¹⁹³ Of course, in fairness to Justice Alito, the reality that clear error and de novo review are the two existing options might suggest that any case for

188. Amicus Curiae Brief of Constitutional Law and Civil Procedure Professors Erwin Chemerinsky and Arthur Miller in Support of Plaintiffs-Respondents Urging Affirmance at 3, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

189. *Id.* at 2-3.

190. *See generally id.* (omitting the phrases “clear error” and “de novo” throughout).

191. *United States v. Windsor*, 133 S. Ct. 2675, 2718 n.7 (2013) (Alito, J., dissenting).

192. *See id.*

193. *See supra* note 188 and accompanying text.

deference would be a case for clear error deference. But in fairness to Chemerinsky and Miller, the scholars eschewed any reference to extant standards to posit an intermediate form of review, though the genre did not give them the opportunity to elaborate its contours.

I would like to take this opportunity to begin—really, only to begin—that process of elaboration. The “significant weight” standard offers an extremely promising third way for findings of legislative facts, which, as indicated, fall somewhere between conclusions of law and findings of adjudicative facts. But even if we agree that significant weight should be accorded to findings of legislative fact, the harder question of how much weight should be given remains.

I propose that the weight to be afforded to district court findings of legislative fact should vary according to the degree of adversarial testing to which those facts were subjected. I mean “adversarial testing” in both a case-specific and case-spanning sense. In a case-specific sense, I intend it to include proceedings in the district court itself. Trial courts should receive more deference if they use their institutional competence to conduct trials or other evidentiary hearings. In contrast, they should receive no deference if they simply take judicial notice of a legislative fact.

In a case-spanning sense, adversarial testing would take into account what different lower courts had done. As we have seen in the Supreme Court opinions urging deference, much is often made of the fact that lower courts came to the same conclusion with regard to a particular legislative fact. Both Justice Alito in *Glossip v. Gross* and Justice Ginsburg in *Gonzales v. Carhart* noted that multiple courts below had reached a particular conclusion.¹⁹⁴ Conversely, in Supreme Court cases opposing deference, much is made of the fact that lower courts have come to different conclusions. In *Lockhart v. McCree*, the Court underscored that “one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the Eighth Circuit.”¹⁹⁵ Such case-spanning comparisons are themselves a form of adversarial vetting. And the very nature of

194. See *supra* notes 56, 86 and accompanying text.

195. 476 U.S. 162, 168 n.3 (1986).

legislative facts, which recur across cases, lends itself to such cross-case testing. The ostensible vice of legislative facts—that they recur across cases—can here be urged into its nearest virtue.

The significant weight standard, so construed, avoids the problems of de novo review. Unlike de novo review, it honors the special institutional competence of the trial courts.¹⁹⁶ It defers more to fact-finding made according to such competence than to facts found through in-house research or amicus briefs.¹⁹⁷ The significant weight standard would also remove the current lack of incentive for district courts to hold trials.¹⁹⁸ Finally, it might even encourage appellate courts to engage in more such testing.¹⁹⁹ For example, rather than engaging in in-house research, an appellate court might ask the parties to submit briefs with regard to a material fact, or, alternatively, to remand for fact-finding by the district court.

The significant weight standard also avoids or mitigates the problems associated with clear error review. For starters, it would only accord deference when the trial court had engaged in an adversarial process.²⁰⁰ Moreover, it would not allow a single district court's conclusion to control the outcome above.²⁰¹ Instead, the appellate courts could look to agreement or disagreement among the lower courts. And of course, even a consensus would not bind the appellate courts in the same manner as clear error deference.

CONCLUSION

196. *See supra* Part II.A.1.

197. *See supra* Part II.A.2.

198. *See supra* Part II.A.3. The intermediate standard would put the trial court in the familiar posture of “pay me now or pay me later.” The district court could eschew adversarial testing and receive less appellate deference, or embrace adversarial testing and receive more deference. I thank Adam Samaha for pointing out that this standard can be analogized to the so-called “*Chevron Step Zero*,” in which judicial deference to agencies depends in part on the process used by the agency. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 213-15 (2006) (discussing the relationship between agency processes and judicial deference).

199. *See supra* Part II.A.4.

200. *See supra* Part II.B.1.

201. *See supra* Part II.B.2.

One of the great conundrums of preceding generations was the law/fact distinction. In an age of facts, the storied law/fact distinction may be ceding its place to the fact/fact distinction. Putting this discussion in the context of a broader social trend about facts gives rise to a final observation. Unlike many adjudicative facts, legislative facts are likely to touch on more complex and enduring conflicts about the good society. The truth about them may be eternally unsettled. If that is the case, participation will become all the more important. The value of encouraging adversarial vetting may be the opportunity for parties and their constituents—broadly defined—to feel that they have been heard on the issue, even if the determination goes against them. When facts are perceived to be infinitely malleable, the dignitary value of having one's view of the facts heard in court may assume greater importance. In the age of facts, even the most counter-majoritarian branch may need to invite greater citizen participation in how such facts are found, reviewed, and returned to the world.