

2010

# Appellate Review of Social Facts in Constitutional Rights Cases

Caitlin E. Borgmann  
*CUNY School of Law*

[How does access to this work benefit you? Let us know!](#)

Follow this and additional works at: [http://academicworks.cuny.edu/cl\\_pubs](http://academicworks.cuny.edu/cl_pubs)

 Part of the [Constitutional Law Commons](#)

---

## Recommended Citation

Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 Cal. L. Rev. 1185 (2013).

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact [AcademicWorks@cuny.edu](mailto:AcademicWorks@cuny.edu).

# California Law Review

---

VOL. 101

OCTOBER 2013

No. 5

---

Copyright © 2013 by California Law Review, Inc., a California Nonprofit Corporation

## Appellate Review of Social Facts in Constitutional Rights Cases

Caitlin E. Borgmann\*

*There is great confusion among scholars and courts about whether and when appellate courts may, or must, defer to trial courts' findings of social fact in constitutional rights cases. The Supreme Court has never directly decided the question and indeed has addressed it only once, in passing. A common assumption, promoted by scholars and adopted as binding by some circuits, is that the deferential, "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a)(6) does not apply to social facts. This Article challenges that assumption. There is nothing in the text of the rule that supports this conclusion. Moreover, except in certain readily identifiable circumstances, it makes sense for appellate courts to defer to trial courts' findings of social fact. Federal bench trials are better suited than the appellate process to vetting social facts when laws are challenged as violating constitutional rights. When key social facts are missing from the trial record, a remand for further factfinding at the trial level will often be workable and appropriate. Since a court's findings of social fact can determine whether constitutional rights claims succeed or fail, it is crucial to achieve a*

---

Copyright © 2013 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the author are solely responsible for the content of their publications.

\* Professor of Law, CUNY School of Law; B.A., Yale University; J.D., New York University School of Law. I am grateful for the comments of, or discussions with, Albert Borgmann, David Faigman, John Lovi, and Suja Thomas, as well as participants at a CUNY Law School faculty forum, the 2011 Loyola Annual Constitutional Law Colloquium, and the 2012 Law and Society Annual Conference. Thanks also to Olivia Carrano for her excellent research assistance.

*clearer understanding of the roles and respective authority of appellate and trial courts in factfinding in constitutional rights cases. This Article sorts out the tangle of rules and precedents concerning appellate review of trial court factfinding in the constitutional rights context. It then proposes a framework for assessing whether and when appellate courts should defer to trial courts' findings of social fact in constitutional rights cases.*

Introduction.....	1186
I. Current Appellate Treatment of Social Facts .....	1191
A. Separating Fact from Fact.....	1191
B. Federal Rule of Civil Procedure 52(a)(6) and Its Exceptions .....	1199
1. The “Clearly Erroneous” Standard .....	1199
2. The Social Facts Exception.....	1202
3. The Constitutional Fact Doctrine.....	1206
II. Rethinking the Exclusion of Social Facts from Rule 52(a)(6).....	1210
A. Efficiency and Stability .....	1211
B. Institutional Competence .....	1212
C. The Judiciary As Rights Protector .....	1220
D. Appellate Court Authority over Lawmaking.....	1221
1. Social Facts in the Development of Law .....	1222
2. The Generalized Nature of Social Facts .....	1224
3. Mixed Questions of Law and Fact.....	1225
E. Social Facts as Singular Facts.....	1226
III. A Framework for Appellate Review of Social Facts.....	1229
A. Promoting Constitutional Values.....	1230
B. Rule 52(a)(6) and Social Facts.....	1235
1. Ultimate Facts and “Thick” Social Facts .....	1236
2. Applying the “Clearly Erroneous” Standard to Social Facts .....	1239
C. Lower Court Conflicts and Divided Expert Opinion .....	1244
Conclusion .....	1248

## INTRODUCTION

When legislation or governmental policies are challenged in federal court as violating individual constitutional rights,<sup>1</sup> federal district court judges may

---

1. Constitutional rights claims can arise in a variety of litigation contexts. This Article focuses on challenges to governmental laws or policies on the grounds that they violate individual constitutional rights. In this Article, references to “constitutional rights cases” are shorthand for this kind of claim.

Of course, laws and policies may be claimed constitutionally invalid for reasons other than that they violate individual rights. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked power under the Commerce Clause or Fourteenth Amendment to enact private enforcement provisions of the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress lacked power under the Fourteenth Amendment’s Enforcement Clause

issue written findings of fact after preliminary injunction hearings or bench trials, which often occur before the law or policy goes into effect.<sup>2</sup> The facts relevant to these kinds of cases are “social” facts, also commonly referred to as “legislative” facts.<sup>3</sup> Case-specific or “adjudicative” facts are the “who, what, when, where, how, and why” facts specific to the litigants in a given case.<sup>4</sup> In contrast, social facts are general facts, often predictive in nature, that have significance for society more broadly and that often form the basis of judicial rulemaking. An example of an issue of social fact is whether violent video games cause aggression in children.<sup>5</sup>

Social facts have not always played an important role in determining a law’s constitutionality. The Supreme Court traditionally deferred to legislatures by assuming the factual premises underlying challenged laws, whether or not these facts actually existed or actually motivated the legislature.<sup>6</sup> In some cases, the Court did the opposite and simply disregarded the social facts that established the basis for legislation. This was especially true of the economic legislation the Court often invalidated in the *Lochner* era.<sup>7</sup>

However, the demise of the *Lochner* era brought an end to the court’s tendency to assume or disregard the factual bases for challenged laws.<sup>8</sup> Social facts are now an intrinsic part of both defending a law (by justifying its social value) and attacking it (by showing its harmful effects). Indeed, the importance of weighing social facts in determining whether laws are constitutional is now so well accepted as to be taken for granted.<sup>9</sup>

---

to enact the Religious Freedom Restoration Act). Much of this Article’s analysis may be relevant to these contexts as well. Whether and when this is so is beyond the scope of the Article.

2. See *infra* text accompanying notes 65–68.

3. Social facts are also the kinds of facts that legislatures “find” as part of the legislative process. The Supreme Court generally uses the term “legislative fact” to refer specifically to a legislature’s finding of social fact. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2770 (2011) (Breyer, J., dissenting) (referring to “elected legislature’s” factual conclusions regarding dangers of video games as “legislative facts”); see also *infra* notes 41, 51. Because courts also find “legislative facts,” the term can therefore be confusing. To avoid this confusion, I refer to legislative facts as “social facts” and to adjudicative facts as “case-specific facts.” See *infra* Part I.

4. 2 WEINSTEIN’S FEDERAL EVIDENCE § 201.02 (Mar. 2013); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

5. See, e.g., *Brown*, 131 S. Ct. 2729.

6. See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (stating that “if any state of facts reasonably can be conceived that would sustain [a challenged statute], the existence of that state of facts at the time the law was enacted must be assumed.”).

7. See Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 642–43, 667 (1966); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 407 (1942) (discussing how “judicial decisions making direct and extensive use of legislative facts” remained exceptional in 1942, but had increased vastly since 1937).

8. See Davis, *supra* note 7, at 407.

9. See Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 120–21 (1997) (noting that, whether or not they adhere to the fact or law distinction, most scholars today recognize the influence of social legislative facts on constitutional decision making); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 115–16

Although trial courts now regularly issue written findings of social fact after bench trials addressing a law's constitutionality, the Supreme Court has not resolved the question of how appellate courts should treat these findings of fact. Normally, facts found by a federal district judge are protected on appeal by Federal Rule of Civil Procedure 52(a)(6), which requires that appellate courts defer to federal trial judges' findings of fact unless those findings are "clearly erroneous."<sup>10</sup> Although nothing in the rule exempts social facts from its scope, it is widely believed that social facts are not subject to the rule and that appellate courts should review them independently.<sup>11</sup> Remarkably, considering the importance of social facts to constitutional rights litigation, the Supreme Court has neither answered the question definitively nor addressed it in any detail. In fact, it was not until 1986, in *Lockhart v. McCree*, that the Court first overtly suggested, in dicta, that Rule 52(a)(6) may not apply to findings of "legislative fact."<sup>12</sup> The Court has not revisited the issue since *Lockhart*.

Despite the lack of relevant Supreme Court precedent, some federal courts of appeals have decisively held that social facts are subject to independent or de novo appellate review.<sup>13</sup> The Supreme Court sometimes appears to follow such a rule tacitly, although it does not do so consistently.<sup>14</sup> I term the exclusion of social facts from the scope of Rule 52(a)(6) the "social facts exception." De novo review of social facts is also sometimes defended under a close cousin to the social facts exception known as the "constitutional fact doctrine." This doctrine holds that, in order to retain authority over constitutional interpretation, appellate courts must review independently all factual determinations that are dispositive of the ultimate constitutional question in a case (such as whether a statement was made with "actual malice").<sup>15</sup> The Supreme Court has traditionally applied the doctrine only to case-specific (i.e.,

---

(1988) (recounting but critiquing this phenomenon); see also Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75 (1960) (characterizing the proposition that judges make constitutional law on basis of facts as "hardly earth-shaking").

10. FED. R. CIV. P. 52(a)(6). "Clearly erroneous" review requires the appellate court accord some deference to the trial court's factfinding. This standard of review contrasts with de novo, or independent, review. See *infra* note 100 (discussing standards of review).

11. See, e.g., *United States v. Singleton*, 29 F.3d 733, 740 (1st Cir. 1994); *Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion).

12. 476 U.S. 162, 168 n.3 (1986); see *infra* text accompanying notes 124–25.

13. See, e.g., *Singleton*, 29 F.3d at 740 (1st Cir. 1994); *Dunagin*, 718 F.2d at 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion).

14. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 134, 162–64 (2007) (noting that "[t]hree United States District Courts heard extensive evidence describing the [relevant abortion] procedures" and referring to their "exhaustive opinions in [the Court's] own discussion of abortion procedures," but dismissing the significance of agreement among these courts on the safety advantages of intact D&E procedure); *id.* at 177–79 & n.5 (Ginsburg, J., dissenting) (summarizing the district courts' consistent findings on intact D&E safety advantages and criticizing the majority for failing to defer); see also *infra* text accompanying notes 132–36.

15. See *infra* Part I.B.3.

not social) facts, but commentators have suggested that it does, or should, apply to social facts as well.<sup>16</sup> Although the social facts exception and the constitutional fact doctrine are distinct doctrines, scholars sometimes blur this distinction.<sup>17</sup>

Legal scholars often repeat as dogma the proposition that social facts are not subject to Rule 52(a)(6).<sup>18</sup> Indeed, virtually none have directly questioned the wisdom of the exception.<sup>19</sup> But many judges and legal commentators remain confused about the finality of federal district courts' findings of social fact.<sup>20</sup> In the wake of *Perry v. Schwarzenegger*,<sup>21</sup> in which a federal district judge struck down California's ban on same-sex marriages, legal commentators made starkly contrasting predictions about the likely treatment of the trial court's findings of fact on appeal. Some declared that Judge Vaughn Walker's numerous findings would insulate the decision on appeal because the "clearly erroneous" standard would apply,<sup>22</sup> while others maintained that the nature of the facts found made it unlikely that the Ninth Circuit would defer.<sup>23</sup> On appeal, the Ninth Circuit panel seemed uncertain about how the facts should be treated, although it ultimately sidestepped the question.<sup>24</sup>

---

16. *See id.*

17. *See, e.g.*, Bryan Adamson, *Critical Error: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1, 16–17 & n.71 (2009); *see also infra* note 23.

18. *See, e.g.*, Adamson, *supra* note 17, at 17 n.71.

19. *But see* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 45–46 (2009); *see also* Brianne J. Gorod, *The Adversarial Myth: Appellate Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011) (mentioning Rule 52(a)(6) only briefly, but criticizing appellate extra-record factfinding and suggesting reforms).

20. *See, e.g.*, *McPherson v. Rankin*, 786 F.2d 1233, 1237 (5th Cir. 1986) ("The precise fit of the clearly erroneous standard of review and our duty to make 'an independent judgment on the facts of the case' . . . is not altogether clear.") (citation omitted), *aff'd*, 483 U.S. 378 (1987).

21. 704 F. Supp. 2d 921 (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).

22. *See, e.g.*, Mark Ambinder, *Prop 8 Overturned: The Facts, Not the Law, Matter*, THE ATLANTIC (Aug. 4, 2010), <http://www.theatlantic.com/politics/archive/2010/08/prop-8-overturned-the-facts-not-the-law-matter/60957/>; Andrew Koppelman, *Power in the Facts*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/roomfordebate/2010/8/4/gay-marriage-and-the-constitution/judge-walkers-factual-findings>; Dahlia Lithwick, *A Brilliant Ruling*, SLATE (Aug. 4, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/08/a\\_brilliant\\_ruling.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/08/a_brilliant_ruling.html).

23. Dave Hoffman, *There Are Facts, and Then There Are Constitutional Facts*, CONCURRING OPINIONS (Aug. 5, 2010, 1:07 AM), <http://www.concurringopinions.com/archives/2010/08/there-are-facts-and-then-there-are-constitutional-facts.html>; *see also* Orin Kerr, *How Much Do the Factual Findings Matter in Perry v. Schwarzenegger?*, THE VOLOKH CONSPIRACY (Aug. 5, 2010, 2:42 AM), <http://www.volokh.com/2010/08/05/how-much-do-the-factual-findings-matter-in-perry-v-schwarzenegger>. Hoffman's post reflects a common confusion or blurring between social (or "legislative") facts and constitutional facts. *See infra* Part II.A. Here he seems to use the term to mean social facts, not constitutional facts in the sense in which the Supreme Court usually uses this term. *Id.*

24. *Perry*, 671 F.3d at 1075–76 (referring to Rule 52(a)(6) but expressing uncertainty as to whether the district judge's findings of social fact were best characterized as "adjudicative" or "legislative" and whether the "clearly erroneous" standard should apply).

I propose a clear-cut solution to all the confusion. Appellate courts should straightforwardly apply Rule 52(a)(6) to social facts. This approach is consistent with the language and intent of the rule.<sup>25</sup> It also reinforces the judiciary's critical role as a protector of constitutional rights against majoritarian oppression.<sup>26</sup> When legislatures "find facts" to support legislation that encroaches on constitutional rights, especially when these rights are controversial or involve a hot-button social issue, this factfinding is often biased and unreliable.<sup>27</sup> Constitutional rights claimants look to the federal courts as a forum for dispassionate, independent review of the relevant social facts.<sup>28</sup>

Trial courts are well positioned to perform this function.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

Appellate courts, on the other hand, do not share these advantages. The absence of formal rules governing factfinding at the appellate level means that appellate courts' "factfinding" is often less a search for the truth than for good rhetorical sound bites to support a court's favored outcome.<sup>32</sup> Moreover, even when an appellate court's objective is the truth, the facts that enter the case at the appellate level are too unreliable and prone to bias to assist effectively in that endeavor.<sup>33</sup> Advocacy groups and others submit amicus briefs at the appellate level that contain all kinds of factual assertions unvetted by the

---

25. See *infra* text accompanying notes 176–85.

26. See *infra* Part II.C.

27. See Borgmann, *supra* note 19; see also *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005) (expressing concern that the legislature, in passing law banning violent video games, failed to consider evidence showing no relationship or a negative relationship between violent video game play and increases in aggressive thoughts and behavior), *aff'd*, 469 F.3d 641 (7th Cir. 2006).

28. See Borgmann, *supra* note 19; see also *infra* Part III.A.

29. See *infra* Parts II.B, III.A.

30. See Borgmann, *supra* note 19.

31. See *id.*

32. See DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 25 (2008); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263 (2012) (discussing Supreme Court's reliance on Internet research and identifying three uses of social facts: "facts that go to the practical consequences of the decisions, facts that are a critical part of the doctrinal inquiry, and facts which are used rhetorically"); see also *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 1007 (2000) (Thomas, J., dissenting) (citing the emotionally-charged congressional testimony of a nurse who was not called to testify at any of the dozen or so trials on "partial-birth abortion" and declaring that "[t]he question whether States have a legitimate interest in banning the procedure does not require additional authority").

33. See *infra* Parts II.B, III.A.

adversary process.<sup>34</sup> In addition, Supreme Court justices and appellate judges freely turn to their own research, including Internet searches.<sup>35</sup> This informal, unscreened factfinding deprives the parties of the opportunity to contest or develop facts “found” by the appellate court.<sup>36</sup> There is no reason to think that this system is better at resolving social fact disputes than the tried-and-true process of a trial.

In short, the pat assumption that social facts should be independently reviewed, while adjudicative facts merit the deference of the “clearly erroneous” standard, does not hold up under scrutiny. A likely reason why the Supreme Court has never definitively declared Rule 52(a)(6) inapplicable to all social factfinding is that such a rule seems too rigid. The Justices surely sense that, at times, deference is appropriate. Yet no court or scholar has articulated a more nuanced rule as to when deference is appropriate and when it is not. That is the goal of this Article.<sup>37</sup> The Article is divided into three parts. Part I lays the groundwork for understanding appellate review of social facts. It first reviews the most common fact classifications and their significance, and next describes the general appellate standard of review for trial judge factfinding, the “clearly erroneous” standard. It then discusses the two main justifications for exempting social facts from this standard: the social facts exception and the constitutional fact doctrine. Part II identifies and interrogates the various rationales underlying the social facts exception and the constitutional fact doctrine and concludes that none is sufficient to justify excluding social facts from Rule 52(a)(6). Finally, Part III proposes a framework for appellate review of social facts that incorporates the “clearly erroneous” standard.

## I.

### CURRENT APPELLATE TREATMENT OF SOCIAL FACTS

#### *A. Separating Fact from Fact*

Given the importance of facts to litigation in general and to constitutional litigation in particular, it is surprising how rarely the Supreme Court has

---

34. See, e.g., Gorod, *supra* note 19, at 4–5, 7–8.

35. See, e.g., Larsen, *supra* note 32, at 1260–61.

36. See *infra* text accompanying notes 207–13.

37. This Article’s primary focus is on what happens when a trial court has already created a trial record and issued findings of social fact in a constitutional rights case. At this point, the appellate court must decide how to deal with this factual record. See John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1, 5 (1993). The Article argues that trial courts possess significant structural advantages over appellate courts in examining constitutional social facts. But there is clearly a limit to what facts can be developed through this time-consuming and resource-intensive mechanism. Judicial economy and common sense dictate, and constitutional principles allow, a certain amount of extra-record factfinding on very general social facts that are not hotly contested and not pivotal to the outcome. See *infra* notes 232–36. Where exactly these boundaries lie is not fully developed in this Article, which focuses on the more difficult issues presented by contested social facts.



discussed the different types of facts and their treatment. The term “constitutional fact”—a subject of great interest among legal scholars<sup>38</sup>—appears in fewer than twenty reported Supreme Court opinions.<sup>39</sup> The term “legislative fact” has been mentioned in only about two dozen reported Supreme Court opinions<sup>40</sup> and generally does not denote a particular kind of fact but rather identifies its source.<sup>41</sup> These shorthand references have typically lacked extensive discussion or explanation.

Many scholars have jumped in to fill the gaps left by the Court’s failure to address the categories and treatment of different kinds of facts. A common vocabulary of fact classifications has developed, but different scholars and judges use the same terms in widely diverging ways.<sup>42</sup> Perhaps the most recognized classification divides facts into “adjudicative” and “legislative” facts, terms Kenneth Culp Davis coined in a 1942 article.<sup>43</sup> According to Davis, “adjudicative facts” are “facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were.”<sup>44</sup> Courts and scholars now commonly use the term “adjudicative facts” to refer to the “who, what, when, where, how” facts particular to the litigants in a case.<sup>45</sup>

38. See, e.g., FAIGMAN, *supra* note 32; Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957); Monaghan, *supra* note 4, at 235.

39. A recent search for the phrase “constitutional fact” in Westlaw’s Supreme Court opinions database yielded eighteen documents. Not all of these are majority opinions, and sometimes the term appears only as part of the title of a cited secondary authority. See, e.g., *Thompson v. Keohane*, 516 U.S. 99, 115 (1995) (citing Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 273–76 (1985)). In contrast, the same query in Westlaw’s law journal database yielded 1,112 documents.

40. A recent search for the phrase “legislative fact” yielded 26 documents in Westlaw’s Supreme Court opinions database, as contrasted with 1,780 documents in the law journal database.

41. The Supreme Court has generally used the term “legislative fact” to mean a fact found or considered by a legislature or an administrative agency. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

42. A striking example of this is Bryan Adamson’s taxonomy. Adamson uses the term “adjudicative-legislative fact” to refer to “[l]egislative facts [that also] serve an adjudicatory function within a particular legal controversy.” Adamson, *supra* note 17, at 14–15. Adamson’s overlapping definition contrasts with Kenneth C. Davis’s sharp demarcation between legislative and adjudicative facts, which is reflected in Federal Rule of Evidence 201’s admonition that it “governs judicial notice of an adjudicative fact only, not a legislative fact.” FED. R. EVID. 201(a). Adamson asserts that while “Rule 201 speaks explicitly only of judicial notice of *adjudicative* facts and does not explicitly mention legislative facts[,] . . . [l]egislative facts, particularly those which decide case-specific outcomes, are in one sense ‘adjudicative,’ and they can be judicially noticed.” Bryan Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1061–62 (2007); see also Adamson, *supra* note 17, at 15 n.60 (“Federal Rule of Evidence 201 allows for judicial notice of a legislative fact.”).

43. Davis, *supra* note 7, at 402–03; see Karst, *supra* note 9, at 77 n.9 (stating that the phrase “legislative fact” “virtually belongs to Professor Kenneth C. Davis”).

44. Davis, *supra* note 7, at 402–03.

45. See, e.g., WEINSTEIN, *supra* note 4, § 201.02 (“‘Adjudicative facts’ are simply the facts of a particular case that ordinarily go to the jury. They concern the issues of who did what, where, when, how, and with what motive or intent. They relate to the parties, their activities, their properties, and their businesses.”); Monaghan, *supra* note 4, at 235 (describing “adjudicative facts” as “who, when, what, and where” facts).

In a case concerning employment discrimination, a question of adjudicative fact might be whether the plaintiff was actually qualified for the job. Such facts are also sometimes referred to as “historical”<sup>46</sup> or “case-specific”<sup>47</sup> facts.

By “legislative facts,” Davis means “facts which are utilized for informing a court’s legislative judgment on questions of law and policy.”<sup>48</sup> As examples, Davis offers the following factual conclusions from a labor dispute case: a finding that “the object of collective bargaining has long been an agreement evidenced by a signed contract or statement in writing,” facts “[c]oncerning the growth and extent of signed agreements,” and a finding that “refusals to sign written contracts ‘have proved fruitful sources of dissatisfaction and disagreement’” in labor relations.<sup>49</sup> Davis points out that, for these statements, the Court “did not limit itself to the record” but instead relied upon a variety of extra-record sources, including textbooks, articles, and publications of the National Labor Relations Board.<sup>50</sup>

Notwithstanding its widespread use, Davis’s terminology is problematic for several reasons. First, the term “legislative fact” is ambiguous in that it is sometimes used to mean facts found by a legislative body.<sup>51</sup> Second, Davis’s terms assume a clearer distinction between the two types of fact than always exists.<sup>52</sup> Third, the terminology is question begging, in that the labels presuppose the distinct treatment Davis argues each type of fact should receive.<sup>53</sup>

I use the terms “social fact” and “case-specific fact” as the rough equivalents of Davis’s “legislative fact” and “adjudicative fact.” Social facts are general facts about the world, often based on social scientific evidence and often encompassing predictions that underlie policymaking in legislative and other contexts.<sup>54</sup> Social facts also inform courts’ judgments as to whether laws

46. See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45 (1977).

47. See, e.g., FAIGMAN, *supra* note 32, at 46.

48. Davis, *supra* note 7, at 404; see also *Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1036 (7th Cir. 1982) (“legislative facts” are “those general considerations that move a lawmaking or rule making body to adopt a rule”).

49. Davis, *supra* note 7, at 405 (quoting *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941)).

50. *Id.*

51. See, e.g., sources cited *supra* note 41; Borgmann, *supra* note 19, at 3 n.8 (using the term in this manner). In the broader sense in which Kenneth Culp Davis uses the term, “legislative facts” may be found by legislatures, but they may also be found by administrative bodies or courts. See, e.g., Peggy C. Davis, ‘*There Is a Book Out . . .*’: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1600 (1987) (using “legislative fact-finding” to refer to a court’s findings of “legislative facts”).

52. See *infra* text accompanying notes 55–56.

53. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485 (1986); see also FAIGMAN, *supra* note 32, at 146 (identifying “a degree of circularity” in Davis’s taxonomy, in that “[t]he very same fact might be described as adjudicative, because it was part of a jury’s deliberations, and legislative, because a lawmaker used it to form or interpret the law”); see *infra* text accompanying notes 284–87.

54. See HOROWITZ, *supra* note 46, at 45 (defining “social facts” as “the recurrent patterns of behavior on which policy must be based”); THOMAS B. MARVELL, *APPELLATE COURTS AND*

or policies are constitutional. One example of a question of social fact might be whether certain employment screening tests tend to exclude members of a constitutionally protected class. Another example is whether children are harmed when raised by gay or lesbian parents, an inquiry that may move a legislature to adopt a law protecting or banning same-sex marriages, or prompt a court to find that such marriages are or are not protected by the Constitution.

As the label suggests, case-specific facts are those facts particular to the parties and controversies before the court. Of course, the line separating case-specific and social facts is somewhat fluid.<sup>55</sup> Some case-specific facts are simply narrower versions of social facts. For example, a statement of social fact might be, “Generally the D&E abortion is the safest method of abortion in the second trimester of pregnancy.”<sup>56</sup> A version of the same social fact statement, framed in a more case-specific way, would be, “A D&E abortion is the safest method of abortion for Plaintiff Jane Doe.” Social facts are sometimes framed in ways that fall in between these two extremes—for example, “The safest method of second-trimester abortion performed in the state of Virginia is the D&E abortion.”

The concept of a “social fact” is quite capacious. Some legal theorists, for example, hold the view that all law is a social fact.<sup>57</sup> It is therefore helpful to subdivide social facts into two categories, which I refer to as “constitutive social facts” and “dispositive social facts.”<sup>58</sup> Constitutive social facts are facts that constitute or establish legal rules.<sup>59</sup> Dispositive social facts, in contrast, are the plainly empirical questions courts must resolve before determining a law’s constitutionality: Does a particular protocol for lethal injection cause intense

---

LAWYERS 184 (1978) (same). In recognition of social facts’ function in shaping public policy, Professor Robert E. Keeton calls them “premise facts.” Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8 (1988).

55. See, e.g., Woolhandler, *supra* note 9, at 114 (“The line between adjudicative and legislative facts is indistinct . . . because decision makers use even the most particularized facts to make legal rules.”).

56. *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 804 (E.D. Va. 1998); see also *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 297 n.9 (1978) (addressing whether exposure to asbestos causes lung cancer).

57. See, e.g., Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (“[T]he concepts ‘law’ and ‘fact’ do not denote distinct ontological categories; rather, legal questions are part of the more general category of factual questions.”); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008) (“There is no analytic dichotomy between law and fact. Law is a social fact . . .”).

58. See Borgmann, *supra* note 19, at 5. David Faigman employs two similar categories, doctrinal facts and reviewable facts. FAIGMAN, *supra* note 32, at 46 (“Constitutional doctrinal facts are advanced to substantiate a particular interpretation of the Constitution.”); *id.* at 170 (“Reviewable facts are general in nature and transcend particular disputes.”). The term “reviewable facts” presumably reflects Faigman’s view that appellate courts should review such facts independently rather than applying Rule 52(a)(6)’s “clearly erroneous” standard.

59. See Allen & Pardo, *supra* note 57, at 1790–97.

pain?<sup>60</sup> Have there been documented cases of voter fraud in a state?<sup>61</sup> Do violent video games cause aggression?<sup>62</sup>

My focus in this Article is on dispositive social facts, and references to “social facts” herein are to these facts. When parties challenge laws or governmental policies as unconstitutional, they generally seek prospective, injunctive relief. In such cases, case-specific facts are generally not as relevant as the broader factual issues entailing predictions of a law’s effects on society or certain groups within it, and the social conditions that demonstrate the law’s importance to the public welfare.<sup>63</sup> Dispositive social facts are also the ones that have sown the most confusion in both case law and legal scholarship.<sup>64</sup>

The uncertainty over judicial treatment of dispositive social facts is reflected in the absence of any agreed-upon system for introducing and evaluating such facts. Dispositive social facts in constitutional rights cases, to the extent they are the subject of formal factfinding, are generally found by district court judges following preliminary injunction hearings<sup>65</sup> or bench trials.<sup>66</sup> At the trial level, judges tend to screen the facts for admissibility following the Federal Rules of Evidence, especially in bench trials, and they issue findings of fact as called for by Federal Rule of Civil Procedure 52(a).<sup>67</sup> District judges follow these protocols in spite of some commentators’ assertions that the protocols do not apply to social facts.<sup>68</sup>

But social facts also enter into constitutional litigation from multiple other sources, unlike case-specific facts, which are (theoretically) limited to the evidence that the parties’ lawyers introduce at the trial level.<sup>69</sup> Social facts may come from the trial court record, but they may also stem from a wide range of other sources. As David Faigman points out,

Proof of reviewable [social] facts comes to a court’s attention in many ways. It is proffered through expert testimony, embedded in record

---

60. See *Baze v. Rees*, 553 U.S. 35 (2008).

61. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

62. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

63. See *Davis*, *supra* note 7, at 404.

64. See FAIGMAN, *supra* note 32, at 151 (“By far the most difficult situation is presented by constitutional reviewable [i.e., social] facts, a category that includes the vast majority of facts in constitutional cases.”).

65. FED. R. CIV. P. 65.

66. FAIGMAN, *supra* note 32, at 45. Of course, in federal criminal trials and in civil trials involving damages claims, a right to a jury trial is guaranteed by the Sixth and Seventh Amendments, respectively. However, the facts that juries find are generally case-specific facts. *Id.* at 121 (noting that even these facts “will very often lie outside the jury’s proper function” because of the courts’ “elevated responsibility to oversee jury fact-finding in constitutional cases”).

67. See FED. R. CIV. P. 52(a)(1), (2) (requiring written findings of fact for both trials and interlocutory hearings).

68. See *infra* notes 146–49 and accompanying text.

69. This is not to say that reviewing courts always refrain from making their own case-specific findings of fact. See, e.g., *Scott v. Harris*, 550 U.S. 372, 378–80 (2007) (substituting lower courts’ interpretation of videotaped evidence with its own).

transcripts of legislative or administrative agency hearings, argued in the briefs and memoranda of the parties and amici, and discovered through independent judicial research. Moreover, reviewable facts are introduced and analyzed at every level of court. Historically, there has been no practice or tradition that reviewable facts originate first at trial, meet any particular threshold admissibility requirements, or otherwise survive the rigors of the adversarial process.<sup>70</sup>

This Article questions the appropriateness of this haphazard approach.

Some commentators have questioned whether constitutional rights should depend on social facts at all.<sup>71</sup> There may well be merit to the idea that constitutional rights should not hinge on the latest expert opinion on hot-button social issues. And certainly, the Supreme Court has sometimes relied on social science evidence when the need for it was debatable. Two of the Supreme Court's most famous constitutional rights decisions purported to rely on such evidence.

In *Brown v. Board of Education*, the Supreme Court asserted that racial segregation promotes a sense of inferiority in black children that inhibits their learning.<sup>72</sup> The Court defended the claim as “amply supported by modern authority” and, in a famous footnote, cited several psychological studies including Kenneth Clark’s “doll” study.<sup>73</sup> In *Roe v. Wade*, the Court recounted a long litany of social and historical evidence about public attitudes toward and legal regulation of abortion as well as the comparative safety of abortion and childbirth.<sup>74</sup> In both decisions, the social science “evidence” likely did not influence the establishment of constitutional doctrine but instead served as neutral-sounding cover for Justices acutely aware of wading into a contentious

---

70. FAIGMAN, *supra* note 32, at 170.

71. See, e.g., Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 168 (1955) (warning of the “potential danger” that the Court’s citation of social science in invalidating racial segregation could set a precedent in equal protection cases that “complaining parties [must offer] competent proof that they would sustain or had sustained some permanent (psychological or other kind of) damage”); Libby Adler, *Just the Facts: The Perils of Expert Testimony and Findings of Fact in Gay Rights Litigation*, 7 UNBOUND: HARV. J. LEGAL LEFT 1 (2011) (making similar arguments with respect to lesbian and gay rights).

72. 347 U.S. 483, 494–95 & n.11 (1954); see Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 803–09 (2002) (recounting debate over Court’s use of this evidence).

73. See Cahn, *supra* note 71, at 161–65 (describing and critiquing Clark’s study).

74. 410 U.S. 113, 129–52 (1973). Commentators have criticized *Roe* for including this evidence. See, e.g., Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1211–13 (1975). To the extent much of this evidence concerns the history of the legal regulation of abortion, it is not so clear that this falls outside of the proper purview of an appellate court. See Larsen, *supra* note 32, at 1260. *But cf.* FAIGMAN, *supra* note 32, at 89–91 (describing cases in which the Supreme Court made claims of historical “fact” that were “ideologically driven, not empirically demonstrated”). As for the facts concerning the medical safety of abortion and childbirth, it is not clear whether Texas contested these facts.

social debate.<sup>75</sup> While there are certainly cases that turn on social scientific evidence, courts may risk their legitimacy when they use such evidence as a veneer for a decision that turns instead on moral values, “common sense,” or other non-scientific considerations.<sup>76</sup>

Other than in constitutional cases in which social science evidence plays a more rhetorical than determinative role, courts will inevitably consider social facts when deciding whether a law is constitutional, because they must evaluate the state’s asserted justifications for passing the law.<sup>77</sup> The government must try to justify a deprivation of rights as rationally related to a legitimate interest,<sup>78</sup> or substantially related to an important purpose,<sup>79</sup> or narrowly tailored to meet a compelling interest,<sup>80</sup> or whatever the relevant standard requires. These justifications invariably consist of factual claims: that advertising on vehicles is distracting to other drivers,<sup>81</sup> or that capital punishment will have a deterrent effect.<sup>82</sup> Overcoming the government’s justification necessarily entails attacking the factual assertions. Courts must also examine social facts in assessing the predicted effects of a law, such as whether and how an abortion restriction will affect women’s access to the procedure.<sup>83</sup>

“Constitutional fact” is another category of facts often discussed in connection with constitutional rights. Like the terms “legislative fact” and “adjudicative fact,” the term “constitutional fact” is used commonly but with

---

75. See FAIGMAN, *supra* note 32, at 155 (arguing that, for Justices seeking to avoid controversy, “[s]cience possesses the mien of neutrality, rather than the stink of judicial activism”); Cahn, *supra* note 71, at 157–58 (praising the social and constitutional importance of *Brown* but remarking on danger that Court’s citation of “flimsy” social science evidence might foster false impression that “the outcome, either entirely or in major part, was caused by the testimony and opinions of the scientists”).

76. See, e.g., Cahn, *supra* note 71, at 157–58 (asserting that detrimental effects of segregation are a matter of common sense rather than science); see also FAIGMAN, *supra* note 32, at 165; Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J. L. & POL’Y 15, 55 (2008).

77. See, e.g., Alfange, *supra* note 7, at 644; Miller & Barron, *supra* note 74, 1234–35 n.120.

78. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–14 & n.6 (1993). The burden of proof is normally borne by the challenger, not the government, in a rational basis case. *Id.* Nevertheless, the government is often called upon to present a factual justification for legislation subject to rational basis review, especially where the Court recognizes an important right is at stake but is reluctant to give it “suspect classification” status. See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–38 (1973). I have argued elsewhere that requiring such a factual justification even under rational basis review is an important way to ensure constitutional accountability among legislative bodies. See Borgmann, *supra* note 19, at 10–11, 37–38; Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 564 (2009).

79. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

80. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997).

81. See *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

82. See *Gregg v. Georgia*, 428 U.S. 153, 184 n.31 (1976).

83. See *infra* note 243 and accompanying text.

little consistency.<sup>84</sup> At its most general, the term “constitutional fact” refers to the full range of facts that may arise in constitutional cases.<sup>85</sup> David Faigman categorizes “constitutional facts” into “doctrinal,” “reviewable,” and “case-specific” facts.<sup>86</sup> Indeed, as Faigman’s taxonomy recognizes, the full panoply of facts can crop up in constitutional rights cases.<sup>87</sup> A somewhat narrower definition identifies a “constitutional fact” as one that “embod[ies] explicit and implicit principles of the Constitution.”<sup>88</sup> In his famous 1942 article distinguishing “adjudicative” from “legislative” facts, Kenneth Culp Davis implies that constitutional facts are simply a subcategory of “legislative” facts.<sup>89</sup>

Courts and scholars have sometimes employed a still more circumscribed conception of “constitutional facts” that refers to facts in constitutional cases that serve as “ultimate facts.”<sup>90</sup> Ultimate facts are also commonly referred to as mixed questions of law and fact.<sup>91</sup> In an often-cited article, Henry Monaghan uses the term “constitutional fact” in this manner, to mean facts that are determinative of whether a constitutional violation has occurred.<sup>92</sup> For example, in Monaghan’s usage, whether the defendant in a defamation case acted with “actual malice” is a question of constitutional fact.<sup>93</sup> Although it appears to be a question of fact and not law, an affirmative answer decides the constitutional question. This is the case-specific type of ultimate fact to which the Supreme Court has most often referred on those few occasions when it has expressly invoked the term “constitutional fact.”<sup>94</sup> Although the Supreme Court’s usage is generally limited to case-specific facts, ultimate constitutional facts can also appear in the form of social facts. An example of such a constitutional fact is the finding that a state abortion restriction imposes an “undue burden” on women seeking abortions.<sup>95</sup> Because appellate courts exercise de novo review over questions of law, many commentators argue,

---

84. See, e.g., Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1434–35 (2001) (describing two distinct uses of the term “constitutional fact”).

85. See, e.g., Davis, *supra* note 7, at 403 (“Often referred to as ‘social and economic data,’ constitutional facts are those which assist a court in forming a judgment on a question of constitutional law.”).

86. FAIGMAN, *supra* note 32, at 46–49.

87. *Id.*

88. See Adamson, *supra* note 17, at 13; see also *id.* at 3 (“Constitutional facts are those which incorporate or directly compel the application of constitutional principles.”).

89. See Davis, *supra* note 7, at 404–05.

90. See *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975) (describing an “ultimate fact” as “a question of fact [that] is, at the same time, the ultimate issue for resolution in th[e] case”).

91. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982).

92. See Monaghan, *supra* note 4, at 230 & n.16.

93. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501–02 (1984).

94. See *infra* Part I.B.3.

95. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (adopting and explaining undue burden standard).

appellate courts must review ultimate constitutional facts independently.<sup>96</sup> The Supreme Court has adopted this view at least with respect to certain types of constitutional claims.<sup>97</sup>

*B. Federal Rule of Civil Procedure 52(a)(6) and Its Exceptions*

*1. The “Clearly Erroneous” Standard*

It is generally understood that federal appellate courts must conduct an independent or de novo review of any issues of law, while deferring to a trial court’s findings of fact unless they are “clearly erroneous.”<sup>98</sup> The requirement for appellate deference to the district judge’s factfinding after bench trials or preliminary injunction hearings is found in Federal Rule of Civil Procedure 52(a)(6), which was originally adopted in 1935.<sup>99</sup> This rule provides, “Findings 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.”<sup>100</sup>

The Supreme Court has not provided detailed guidance as to what makes a finding “clearly erroneous,” but the standard is understood to require significant deference to the trial judge. According to the Court, “[a] finding is ‘clearly erroneous’ 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.”<sup>101</sup> On the other hand, the Court has stated that

---

96. See, e.g., Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat et al. as Amici Curiae in Support of Respondents at 3, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-1382).

97. See *infra* Part II.B.3.

98. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991).

99. FED. R. CIV. P. 52(a)(6). Whether appellate courts should defer to jury factfinding in constitutional rights cases is a complicated question. Scholars have made compelling arguments both for and against appellate deference in such cases. Compare Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007) (arguing generally for appellate court deference to jury factfinding), with FAIGMAN, *supra* note 32, at 122 (arguing that, in constitutional rights cases, appellate courts should not defer to jury factfinding because the “jury’s role [in representing the community] clashes with the countermajoritarian values guaranteed by the Constitution”). Jury factfinding is generally limited to case-specific facts. See *supra* note 45. This Article addresses only appellate review of a trial judge’s findings of social fact.

100. FED. R. CIV. P. 52(a)(6). Other appellate standards of review include independent or de novo review, the wholly non-deferential standard applied to questions of law, *Salve Regina Coll.*, 499 U.S. at 231–32, and “abuse of discretion,” the deferential standard of review applied to a district court’s evidentiary rulings, including a decision to admit or exclude scientific evidence, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 146 (1997). See generally STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* 15.01–15.12 (2d ed. 1992) (cataloging and explaining various standards of review). Some commentators distinguish between de novo and independent appellate review, claiming that the former merely permits a court to conduct a plenary review of the facts, whereas the latter, in cases of constitutional fact, demands it. See, e.g., Adamson, *supra* note 17, at 24. I use the terms “de novo” and “independent” review interchangeably, since neither requires deference to the trial court.

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



appellate courts should let factual determinations stand if they are “plausible in light of the record viewed in its entirety.”<sup>102</sup> Both courts and commentators have criticized the “clearly erroneous” standard as murky and malleable,<sup>103</sup> but there is no question that the rule was intended to endow trial judges with general authority over factfinding.<sup>104</sup> George Christie has described this grant of authority over factfinding as “the transference . . . of some of the attributes of the jury to trial courts sitting without juries.”<sup>105</sup>

The trial judge’s opportunity to assess a witness’s demeanor is one obvious reason for the deference Rule 52(a)(6) requires. In light of this structural advantage, and the rule’s express reference to witness credibility, appellate courts were once divided over whether the “clearly erroneous” standard applies to documentary evidence and findings deduced or inferred from undisputed evidence, where demeanor assessments are not relevant.<sup>106</sup>

The Supreme Court has emphasized, however, that the “clearly erroneous” standard applies even where witness credibility is not at issue:

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. . . . This is so even when the district court’s findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.<sup>107</sup>

Moreover, the Court has clarified that the “clearly erroneous” standard applies to *all* facts and “does not make exceptions or purport to exclude certain categories of factual findings . . . [or] divide facts into categories.”<sup>108</sup> In 1985, the rule was amended to clarify that it applies not just to oral testimony but also to documentary and “other” evidence.<sup>109</sup>

---

102. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982))).

103. *See, e.g., U.S. Gypsum Co.*, 333 U.S. at 395; Adamson, *supra* note 42, at 1051 (“‘clearly erroneous’ . . . has proven to be the most fugitive of terms to define”); Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 645 (1988) (“[T]he ‘clearly erroneous’ phrase has no intrinsic meaning. It is elastic, capacious, malleable, and above all variable.”). This Article attempts to ameliorate this problem by providing more specific factors to help courts determine whether a trial court’s findings of social fact are clearly erroneous. *See infra* Part III.B.2.

104. *See, e.g., Salve Regina Coll.*, 499 U.S. at 233; Adamson, *supra* note 42, at 1043.

105. George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 52 (1992).

106. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 764–65 (1957).

107. *Anderson*, 470 U.S. at 573–74 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). The Court did note, however, that “even greater deference” is owed to a trial judge’s credibility determinations. *Id.* at 575.

108. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

109. FED. R. CIV. P. 52(a)(6) advisory committee’s note.

The United States Court of Appeals for the Second Circuit summarized the basic division of responsibility between district courts and courts of appeals in *Landell v. Sorrell*:

[O]ur system of judicial review provides plaintiffs the opportunity to present competing evidence [challenging the legislature’s factfinding], assigns to the District Court the responsibility for making findings of fact . . . after weighing the evidence, and leaves to the Court of Appeals the independent responsibility to assess *the legal significance* of these factual findings.<sup>110</sup>

Rule 52(a)(6) allocates courts’ roles and authority based on three values: efficiency, stability, and institutional competence. The note to the rule expressly references the first two of these. It states that “recognizing that the trial court, not the appellate tribunal, should be the finder of the facts” promotes the “public interest in . . . stability and judicial economy,” as well as “the legitimacy of the district courts in the eyes of litigants.”<sup>111</sup> It would be tremendously inefficient if litigants were forced to litigate factual issues not only at trial but again at the intermediate appellate level and before the Supreme Court.<sup>112</sup> Moreover, having the factual issues determined by a trial court leaves appellate courts free to focus on legal issues.<sup>113</sup> Duplicative factfinding is unlikely to increase accuracy.<sup>114</sup> At the same time, de novo fact review would likely multiply appeals and undermine public confidence in trial courts’ decisions,<sup>115</sup> which would be problematic given that, “[u]nder any feasible or conceivable system, our trial courts must always have the last word in the great bulk of cases.”<sup>116</sup> Independent appellate review would also create uncertainty, since factfinding procedures at the appellate level are not nearly as well defined and routine as in the district courts.<sup>117</sup>

---

110. *Landell v. Sorrell*, 382 F.3d 91, 114 (2d Cir. 2004) (emphasis added), *rev’d on other grounds*, 548 U.S. 230 (2006). The Court of Appeals in *Landell* nevertheless went on to conduct an “independent review” of whether the evidence supported the trial court’s findings, although it relied for this review on the legislative and trial record. *Id.* at 116–19, 124. Given the potentially competing rights of voters and speakers at issue in *Landell*, some level of closer appellate scrutiny, if not necessarily de novo review, may have been appropriate. See Borgmann, *supra* note 19, at 39; *infra* note 384. Moreover, the case demonstrates that “independent review” does not necessarily entail the need to go beyond the trial record to engage in extra-record “factfinding” at the appellate level. See *infra* Part III.B.2.

111. FED. R. CIV. P. 52(a) advisory committee’s note.

112. See *Anderson*, 470 U.S. at 575.

113. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (“With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.”).

114. *Anderson*, 470 U.S. at 575.

115. *Pendergrass v. N.Y. Life Ins. Co.*, 181 F.2d 136, 138 (8th Cir. 1950); see also Wright, *supra* note 106, at 779 (citing *Pendergrass*).

116. Wright, *supra* note 106, at 781.

117. See Gorod, *supra* note 19, at 43–46.

In addition to promoting efficiency and stability, Rule 52(a)(6) recognizes trial courts' superior factfinding competence.<sup>118</sup> Trial judges have the advantage of hearing the witnesses' courtroom testimony, of having sustained exposure to the case, and of making "the initial sifting of the entire record and [putting] it into logical sequence."<sup>119</sup> This way of experiencing the facts differs from that of appellate courts, where "lawyers . . . pick[] . . . out bits and pieces of the record to attack or defend a particular finding."<sup>120</sup>

Notwithstanding Rule 52(a)(6) and its underlying rationales, the Supreme Court has stated or implied that appellate courts in certain contexts must disregard the "clearly erroneous" standard and instead exercise independent review over trial court factfinding.<sup>121</sup> Two of the most significant examples are the social facts exception and the constitutional fact doctrine.

## 2. *The Social Facts Exception*

In light of the Supreme Court's explications in cases like *Anderson v. Bessemer City* and *Pullman-Standard v. Swint*, as well as the 1985 rule amendment, it might seem clear that Rule 52(a)(6) applies to all types of district court factual findings.<sup>122</sup> However, in practice, the Supreme Court's and appellate courts' application of the rule is hardly this lucid.<sup>123</sup> In particular, the Supreme Court itself seems uncertain of the rule's relevance to social facts.

The Court has suggested, but never directly ruled, that the "clearly erroneous" standard does not apply to trial court findings of social fact. This suggestion appeared in a footnote in *Lockhart v. McCree*,<sup>124</sup> in which the Supreme Court held that the Constitution does not prohibit the removal for cause of prospective jurors who strongly oppose the death penalty.<sup>125</sup> The trial court had issued findings of social fact concluding that such removal produces

118. *Salve Regina Coll.*, 499 U.S. at 233 (noting the rule's "deference to the unchallenged superiority of the district court's factfinding ability"); *Anderson*, 470 U.S. at 574 (noting that "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise").

119. Wright, *supra* note 106, at 782.

120. *Id.*; see *infra* Part II.B.

121. See generally Adamson, *supra* note 42 (discussing appellate courts' uneven application of Rule 52(a)); Cooper, *supra* note 103, at 655 (discussing malleability of "clearly erroneous" standard).

122. See *supra* text accompanying notes 107–09.

123. For example, notwithstanding the rule's express language including documentary evidence within its scope, "[s]ome 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." Adamson, *supra* note 42, at 1049; see also *id.* at 1054–62 (documenting many other contexts in which appellate courts have found their way around strictly applying the Rule 52(a)(6) standard of review to trial court factfinding); 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. REV. 409 (1981) (describing instances in which courts have avoided application of the clearly erroneous rule).

124. 476 U.S. 162, 168–69 n.3 (1986).

125. *Id.* at 173.

juries more prone to convict capital defendants than juries that have not been “death qualified” in this way.<sup>126</sup> The Supreme Court disclaimed the need to determine these facts’ validity, asserting that they had no bearing on its decision, but added:

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 . . . has reached a conclusion contrary to that of the Eighth Circuit.<sup>127</sup>

Although it denied that social facts were important to its holding, the Court undertook a close and critical examination of the studies the defendant relied upon, explaining why it was not persuaded that this evidence supported his claim that death qualification results in juries predisposed to convict.<sup>128</sup>

Beyond this brief suggestion in *Lockhart* that a social facts exception may be warranted, the Supreme Court has often seemed to assume such an exception in its treatment of social facts, engaging in de novo and extra-record fact review at will.<sup>129</sup> The Court typically offers no elucidation of why social facts should be treated differently. Indeed, the Court generally does not even refer to Rule 52(a)(6) or expressly acknowledge applying a different standard.<sup>130</sup>

On the other hand, Justices on both ends of the political spectrum have at times advocated applying Rule 52(a)(6) to certain findings of social fact, criticizing their colleagues for failing to defer to the district court.<sup>131</sup> Justice

---

126. *Id.* at 168.

127. *Id.* at 168–69 n.3.

128. *See id.* at 168–73; *see also infra* text accompanying notes 404–07 (criticizing the Court’s approach in *Lockhart*).

129. *See Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion) (“The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. *E.g.*, *Barefoot v. Estelle*, 463 U.S. 880, [899] n. 7, 103 S.Ct. 3383, 3397 n. 7, 77 L.Ed.2d 1090 (1983) (validity of predictions of violent behavior); *New York v. Ferber*, 458 U.S. 747, [757] n. 9, 102 S.Ct. 3348, 3355 n. 9, 73 L.Ed.2d 1113 (1982) (the effect upon the child used as a subject for pornographic materials); *Ballew v. Georgia*, 435 U.S. 223, 231 n. 10, 233 n. 11, 98 S.Ct. 1029, 1034 n. 10, 1035 n. 11, 55 L.Ed.2d 234 (1978) (effect of the size of jury upon deliberation and verdict); *Gregg v. Georgia*, 428 U.S. 153, 184 n. 31, 96 S.Ct. 2909, 2930 n. 31, 49 L.Ed.2d 859 (1976) (the deterrent effect of capital punishment); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 n. 8, 93 S.Ct. 2628, 2635 n. 8, 37 L.Ed.2d 446 (1973) (the relation between obscenity and socially deleterious behavior); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494 n. 11, 74 S.Ct. 686, 692 n. 11, 98 L.Ed. 873 (1954) (the effect of segregation upon minority children).”).

130. *See* cases cited *supra* note 129.

131. *See, e.g.*, *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 179 (2007) (Ginsburg, J., dissenting) (criticizing majority for failure to defer to district court factfinding on “partial-birth abortion,” and suggesting district courts’ findings merit the Court’s respect); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 493–94, 497 (2006) (Roberts, C.J., concurring in part and dissenting in part) (criticizing the majority for failing to defer to a federal district court panel’s findings regarding vote dilution and whether alternative apportionment would achieve greater minority

Ginsburg's somewhat tentative reference to Rule 52(a)(6) in her dissenting opinion in *Gonzales v. Carhart*<sup>132</sup> is one example.<sup>133</sup> In *Carhart II*, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 ("PBABA").<sup>134</sup> Justice Ginsburg criticized the majority for its failure to defer to the findings of the three federal district courts that had held trials on the ban. The district courts largely agreed in their factual conclusions regarding the safety advantages of the intact D&E procedure (a question of social fact).<sup>135</sup> However, Justice Ginsburg stopped short of stating unequivocally that the "clearly erroneous" standard applied, providing only a "see, e.g.," reference to Rule 52(a)(6) and noting that the district courts' findings "merit this Court's respect" and that "[t]oday's opinion supplies no reason to reject those findings."<sup>136</sup> The Court's unclear treatment of Rule 52(a)(6) and social facts, however, has not deterred several federal courts of appeals from applying the social facts exception and citing *Lockhart* for support, as if it sets forth a definitive rule.<sup>137</sup>

Federal Rule of Evidence 201, which governs "judicial notice of adjudicative facts,"<sup>138</sup> may indirectly contribute to the idea that Rule 52(a)(6) does not apply to social facts. Judicial notice allows a court to rely on case-specific facts without proof from the parties.<sup>139</sup> Rule 201(b) provides that "[t]he

---

representation); *Ferguson v. Charleston*, 532 U.S. 67, 98–99 (2001) (Scalia, J., dissenting) (criticizing the majority, in the context of a Fourth Amendment claim, for its failure to defer under Rule 52(a)(6) to a district court's findings regarding the purpose of a drug-testing program, but suggesting he himself would have overturned "any other finding").

132. *Carhart II*, 550 U.S. at 179. The Court upheld a similar Nebraska ban seven years earlier in *Carhart I*, 530 U.S. 914 (2000).

133. *See also* *United States v. Virginia*, 518 U.S. 515, 566, 585–86 (1996) (Scalia, J., dissenting) (lambasting Court for its failure to defer, "contrary to our established practice," to a finding of "gender-based developmental differences" supporting Virginia's restriction of the 'adversative' [training] method to only a men's [military educational] institution").

134. *Carhart II*, 550 U.S. at 168.

135. *See id.* at 178–79 (Ginsburg, J., dissenting).

136. *See id.* at 179.

137. *See, e.g.*, *United States v. Singletery*, 29 F.3d 733, 740 (1st Cir. 1994) (declining to defer to "the lower court's assessment of the 'evidence' [offered] to demonstrate the irrational and racially discriminatory nature of the adoption of the distinction between cocaine base and cocaine powder offenses"); *Menora v. Ill. High School Ass'n*, 683 F.2d 1030, 1036 (7th Cir. 1982) (reversing the district court's factual determination that insecurely fastened yarmulkes do not pose substantial hazard to basketball players and declaring that "a fact that goes to the reasonableness of a rule or other enactment is a classic example of a legislative fact, to which as we have said the clearly-erroneous standard does not apply"). Other circuit courts have been less emphatic. *See, e.g.*, *Landell v. Sorrell*, 382 F.3d 91, 135 n.24 (appearing to assume that "this Court may ultimately undertake *de novo* review of any legislative facts found by the District Court [and that] appellate courts take judicial notice of legislative facts under appropriate circumstances," but stressing the helpfulness of a complete trial record on complex questions of social fact and that "the types of 'legislative facts' that have been addressed most recently in our caselaw deal with much more straightforward questions, e.g., geography and jurisdiction or the fact that cocaine is derived from coca leaves").

138. FED. R. EVID. 201(a).

139. 29 AM. JUR. 2D, EVIDENCE § 24 (2013).

court may judicially notice a fact that is not subject to reasonable dispute.”<sup>140</sup> Disputable case-specific facts may not be judicially noticed and must be introduced through the adversarial process at trial.<sup>141</sup>

Rule 201 does not apply to social facts.<sup>142</sup> Indeed, no Federal Rule of Evidence directly addresses whether disputable social facts, like disputable case-specific facts, must be tested at trial or can instead be judicially noticed.<sup>143</sup> But the advisory committee note to Rule 201 suggests that district and appellate courts are free to notice social facts at will, without requiring them to be introduced through the adversarial process at trial.<sup>144</sup> The note asserts this despite submitting that social facts are by nature *not* indisputable.<sup>145</sup> The notion that an appellate judge has almost unlimited discretion in how to treat social facts is incompatible with appellate deference to trial court findings of social fact and therefore could account for the widespread assumption that Rule 52(a)(6) does not encompass social facts.

The Rule 201 advisory committee note draws heavily on Kenneth Culp Davis’s distinction between adjudicative and legislative facts to explain why ordinary judicial notice requirements do not apply to social facts. According to Davis, “The rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case.”<sup>146</sup> In particular, Davis suggests that courts should not be bound by judicial notice requirements when considering social facts.<sup>147</sup> Similarly, Edmund Morgan has argued,

In determining the content or applicability of a rule of domestic law, the judge is *unrestricted* in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an *independent search for persuasive data* or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.<sup>148</sup>

---

140. FED. R. EVID. 201(b). Facts that meet this definition are generally facts that are considered common knowledge, or that are verifiable through official records or “publications of established authenticity.” AM. JUR. *supra* note 139, § 26.

141. AM. JUR. *supra* note 139, § 32.

142. This is true of the federal rule, but state rules may allow for judicial notice of both social and case-specific facts. *See id.* §§ 24, 27.

143. *See* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 350 n.299 (1999).

144. FED. R. EVID. 201 advisory committee’s note.

145. *Id.* (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 82 (Roscoe Pound et al. eds., 1964)).

146. Davis, *supra* note 7, at 402.

147. Davis, *supra* note 145, at 82.

148. Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270–71 (1944) (emphasis added).

Echoing Davis's and Morgan's recommendations, the advisory committee note counsels absolute discretion on the part of trial and appellate judges to obtain and use social facts in any manner they choose:

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and *any requirement of formal findings at any level*.<sup>149</sup>

However, allowing judges to judicially notice any relevant social fact without formal factfinding is inconsistent with Rule 52(a)'s requirement that a federal district judge issue findings on disputed facts after a trial and that an appellate court defer to those findings unless clearly erroneous. The advisory committee's discussion of social facts in the context of Rule 201 has no doubt sown confusion and helped perpetuate the idea that a social facts exception to Rule 52(a)(6) has merit because the only way to square the Rule 201 advisory committee note with Rule 52(a) is to assume that Rule 52(a) likewise does not apply to social facts. Nevertheless, the advisory committee note does not establish any binding rule and thus should not compel this result.

### 3. *The Constitutional Fact Doctrine*

A second broad exception to Rule 52(a)(6), and the only one the Supreme Court has expressly acknowledged and developed, is the constitutional fact doctrine.<sup>150</sup> This doctrine holds that, in order to retain authority over constitutional interpretation, appellate courts must review independently all factual determinations that are dispositive of the ultimate constitutional question in a case.<sup>151</sup> Yet the Court's articulation and application of the doctrine has been murky at best.<sup>152</sup> Although its roots lie in the context of administrative law,<sup>153</sup> the constitutional fact doctrine has taken root most

---

149. FED. R. EVID. 201 advisory committee's note (emphasis added). The note adds, somewhat vaguely, that the recommended approach "should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations." *Id.* The note does not elaborate upon what those "appropriate situations" might be.

150. The "constitutional fact" exception applies not only to Rule 52(a)(6) but also to other rules, statutes, or constitutional provisions that call for deference to the factfinding of a lower federal or state court judge or jury. *See, e.g., Miller v. Fenton*, 474 U.S. 104 (1985) (applying the doctrine as an exception to a federal statute granting a presumption of correctness to state court factual determinations in habeas corpus proceedings); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (reviewing a state court judgment entered on a jury verdict and applying the doctrine as an exception to the Seventh Amendment).

151. *See supra* text accompanying notes 90–97.

152. *See e.g., Adamson, supra* note 17, at 3 (referring to the "constitutional fact" exception to Rule 52(a)(6) as a "sub rosa exception"); *Christie, supra* note 105, at 55 (observing that the Court's conclusions as to which types of legal issues are encompassed by the constitutional fact doctrine "can only be described as quixotic").

153. *See Monaghan, supra* note 4, at 247–48.

clearly and firmly in the First Amendment context.<sup>154</sup> This contemporary version of the doctrine is concerned with courts' respective spheres of authority within the judicial hierarchy, in particular the desire to assure appellate courts' supremacy in constitutional lawmaking. In these cases, the Court has used the term "constitutional fact" to refer to "ultimate," case-specific facts that are determinative of a First Amendment question.<sup>155</sup> For example, in *Bose Corporation v. Consumers Union of United States, Inc.*, the Court held that appellate courts must independently review findings of fact regarding whether a statement was made with "actual malice."<sup>156</sup> *Bose* applied and elaborated the Court's earlier admonition, reiterated in *New York Times Co. v. Sullivan*,<sup>157</sup> that appellate courts are obligated to examine the "whole record" to ensure the protection of free speech.<sup>158</sup> The *Bose* Court determined that, if the Court is to retain its authority over constitutional lawmaking, the "clearly erroneous" standard cannot apply to facts that define the law of permissible regulation of speech.<sup>159</sup> The Court in *Bose* did not make clear, however, whether its ruling was limited to First Amendment cases.<sup>160</sup>

Beyond the First Amendment context, the Court's application of the constitutional fact doctrine appears vague and ad hoc.<sup>161</sup> Although the Supreme Court has not expressly extended the doctrine to other contexts, some of its opinions suggest the doctrine applies more widely. For example, in *Miller v. Fenton*, the Court held that the voluntariness of a confession, whether decided by a federal district court or a state court, must be determined independently on appeal.<sup>162</sup> The Court acknowledged that, "[u]nder 28 U.S.C. § 2254(d), state-

---

154. See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 567 (1995) ("[O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."); *Rankin v. McPherson*, 483 U.S. 378, 386 (1987) ("[A]ny factual findings subsumed in the [First Amendment] 'public concern' determination are subject to constitutional fact review.").

155. See *supra* text accompanying notes 90–94.

156. 466 U.S. 485, 487 (1984).

157. 376 U.S. 254, 285 (1964) (citing cases).

158. See *Bose*, 466 U.S. at 499 ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" (quoting *Sullivan*, 376 U.S. at 284–86)).

159. See *id.* at 499; see also FAIGMAN, *supra* note 32, at 127 ("The duty to define the Constitution's meaning effectively incorporates the duty to ensure its proper application. This can only be accomplished by some heightened level of review of constitutional case-specific fact-finding.").

160. See *Monaghan*, *supra* note 4, at 243–44 ("[B]y fastening the demand for independent judgment to special first amendment considerations, the Court seemingly bypasse[d] the need to face more systemic considerations.").

161. See FAIGMAN, *supra* note 32, at 127 ("In cases outside free speech, [whether independent review] applies to constitutional case-specific facts is less clear."); *Adamson*, *supra* note 17, at 25 (stating that "[i]ndependent determination on constitutionally significant findings of historical fact has been invoked under constitutional provisions other than the First Amendment" and citing examples, but criticizing Court for not applying the doctrine in redistricting cases).

162. 474 U.S. 104 (1985).



court findings of fact [generally] ‘shall be presumed to be correct’ in a federal habeas corpus proceeding,” and addressed whether a confession’s voluntariness was a question of fact entitled to this presumption. Because voluntariness determines the “ultimate constitutional question” of a confession’s admissibility, the Court held that Congress would not have considered it to be a factual question accorded the presumption of correctness under the statute.<sup>163</sup> The Court did point out, on the other hand, that “subsidiary factual questions, such as whether a drug has the properties of a truth serum, or whether in fact the police engaged in the intimidation tactics alleged by the defendant,” were entitled to the presumption.<sup>164</sup> (Interestingly, the first question is one of social fact, whereas the second is case specific, yet the Court did not differentiate between them.)

In *Miller*, the Court stopped short of establishing a general rule that requires independent review whenever an issue of fact “is dispositive of the ultimate constitutional question.”<sup>165</sup> The Court weighed the conflicting precedents on the question, noting that it has occasionally called for de novo review when a question of fact is so closely tied to a question of law that an appellate court must retain independent authority to decide it.<sup>166</sup> On the other hand, the Court noted that deference to a trial court’s factfinding may be appropriate in certain instances, “notwithstanding the intimate connection between such determinations and . . . constitutional guarantee[s],” where the trial court is better positioned to evaluate the facts, such as where witness credibility or juror bias is at issue.<sup>167</sup>

In certain types of constitutional rights cases, the Supreme Court has expressly adhered to Rule 52(a)(6) rather than applying the constitutional fact doctrine. For example, in cases involving equal protection challenges to redistricting plans, the Court applies the “clearly erroneous” standard.<sup>168</sup> The Court has not given a good explanation for this exception to the exception.<sup>169</sup>

---

163. *Id.* at 105, 112.

164. *Id.* at 112.

165. *Id.* at 113 (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979)).

166. *See id.* at 114 (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984)).

167. *Id.* at 114–15.

168. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (“[T]he clearly-erroneous test of [Federal Rule of Civil Procedure] 52(a) is the appropriate standard for appellate review of a finding of vote dilution”); *see also Rogers v. Lodge*, 458 U.S. 613, 623, 627 (1982). The Court has, however, sometimes declined to defer to district court rulings by deeming their findings clearly erroneous. *See, e.g., Easley v. Cromartie*, 532 U.S. 234 (2001); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 493–94, 497 (2006) (Roberts, C. J., concurring in part and dissenting in part) (criticizing majority for failing to defer to the findings of a federal district court regarding vote dilution and whether alternative apportionment would achieve greater minority representation). Bryan Adamson criticizes the Court for its failure to apply the constitutional fact doctrine in redistricting cases as it does in First Amendment cases. *See generally Adamson, supra* note 17; *cf. Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 176 & n.13 (1983) (acknowledging a general principle of de novo

Supreme Court decisions that expressly invoke the term “constitutional fact” almost invariably refer to case-specific facts,<sup>170</sup> but another version of the doctrine would specifically encompass social facts. Most scholars who have written about the constitutional fact doctrine have, like the Court, focused their attention on case-specific facts.<sup>171</sup> However, some commentators have identified and discussed a broader application of the constitutional fact doctrine. Under this view, appellate courts should independently review all facts, regardless of type, that affect the resolution of cases involving constitutional rights.<sup>172</sup> Social facts in particular fall outside the scope of Rule 52(a)(6), according to this theory, because of their importance in shaping precedent that will affect more than just the parties before the Court.<sup>173</sup> To the extent this argument hinges on the importance of social facts in the creation and development of constitutional law, this expanded version of the theory essentially collapses into the social facts exception.

Two related but distinct rationales underpin the constitutional fact doctrine. Because “constitutional fact” determinations are seen as so closely tied to conclusions of law regarding constitutional interpretation, de novo review is justified on the basis that appellate courts cannot defer on the factual questions without relinquishing independent judgment over the ultimate legal questions.<sup>174</sup> Part of the concern is about appellate courts retaining authority over lawmaking—the issue that all mixed questions of fact and law raise. But there is a more profound principle at work as well, one that recognizes the judiciary’s important role as a protector of rights. According to the Supreme Court, the constitutional fact doctrine “reflects a deeply held conviction that

---

appellate review of constitutional facts but declining to apply it to state court factfinding in cases involving application of the “unitary business principle” of corporate franchise taxation).

169. See generally Adamson, *supra* note 17 (criticizing Court for its inconsistency).

170. See, e.g., Thompson v. Keohane, 516 U.S. 99 (1995) (whether defendant was “in custody” for purposes of determining if *Miranda* warnings were required); Rankin v. McPherson, 483 U.S. 378, 385 n.8 (1987) (whether a statement supporting a presidential assassination attempt was political hyperbole or sincere); Miller, 474 U.S. 104 (whether a confession was voluntary); Bose, 466 U.S. 485 (whether a statement was made with actual malice); Jenkins v. Georgia, 418 U.S. 153, 163–64 (1974) (Brennan, J., concurring) (whether a work is obscene); Kois v. Wisconsin, 408 U.S. 229 (1972) (whether a poem is obscene); Rosenbloom v. Metromedia, 403 U.S. 29 (1971) (whether a statement was made with actual malice); Brooks v. Florida, 389 U.S. 413 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (whether a statement was made with actual malice); Nw. Airlines v. Minnesota, 322 U.S. 292, 299 (1944) (what percentage of a company’s property was used outside of the state during the tax year); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 403–06 (1940) (whether a particular river is navigable); see also Monaghan, *supra* note 4, at 230 & n.16 (describing the constitutional fact doctrine as relevant to judicial review of adjudicative facts, not legislative facts).

171. See, e.g., Adamson, *supra* note 17; Christie, *supra* note 105; Monaghan, *supra* note 4.

172. FAIGMAN, *supra* note 32, at 128–29 (“As a practical matter, . . . all fact-finding done within categories of covered rights is subject to independent review. There is no separate class of facts, therefore, . . . that merit deferential review.”).

173. See, e.g., Gorod, *supra* note 19, at 10.

174. See, e.g., Bose, 466 U.S. at 508 n.27.

judges—and particularly Members of this Court—must exercise [independent] review in order to preserve the precious liberties established and ordained by the Constitution.”<sup>175</sup>

## II.

### RETHINKING THE EXCLUSION OF SOCIAL FACTS FROM RULE 52(A)(6)

Because the Court has applied Rule 52(a)(6) so haphazardly, it is helpful to consider whether the institutional values undergirding the standard are promoted or undermined by a social facts exception in constitutional rights cases.<sup>176</sup> A review of the rationales for Rule 52(a)(6), as well as for the social facts exception and the constitutional fact doctrine, casts doubt upon the appropriateness of de novo appellate review of social facts in constitutional rights cases.<sup>177</sup> The justifications supporting the “clearly erroneous” standard include pragmatic and substantive reasons. The pragmatic reasons are to promote efficiency and stability. The substantive reason is that trial courts are more competent to find facts than appellate courts, and thus the factfinding will be of a higher quality. Likewise, the rationales for social and constitutional fact exceptions to Rule 52(a)(6) encompass both pragmatic and substantive concerns. The pragmatic justifications include that social facts have always been treated as exceptional, that a change would be unworkable, and that different trial judges may reach conflicting conclusions about the same facts. The substantive concerns include that trial court factfinding may be substandard due to disparities in lawyer competence, party resources, or other factors; that social facts are by nature indeterminate; that they have precedential impact that goes beyond the parties to the case; that appellate courts must retain authority over lawmaking; and that the appellate courts, and ultimately the Supreme Court, have a responsibility to protect constitutional rights.

Before examining these justifications, it bears remembering that Rule 52(a)(6) itself does not classify facts in any way. Unlike Federal Rule of Evidence 201, it is not expressly limited to “adjudicative facts.” Indeed, when courts at one time read Rule 52(a)(6) too restrictively by limiting its scope to testimonial evidence, the rule was amended to preclude this.<sup>178</sup> It remains to be considered whether, despite the rule’s broad wording, the rationales described above justify a court-made exception for such facts. The following sections argue that they do not.

---

175. *Id.* at 510–11; *see also* Alfange, *supra* note 7, at 638; David L. Faigman, et al., *Amicus Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat, et al. in the Case of Gonzales v. Carhart*, 34 HASTINGS CONST. L.Q. 69, 91–92 (2006).

176. Adamson, *supra* note 17, at 29 (making the same point with respect to case-specific constitutional facts in redistricting cases).

177. Many, but not all, of the arguments made here may cast doubt upon the validity of the two exceptions more generally. Whether and to what extent this is the case merits further review.

178. *See supra* notes 106–09 and accompanying text.

*A. Efficiency and Stability*

The first goal of Rule 52(a)(6), efficiency, is equally applicable to social facts and case-specific facts. Few have suggested that we simply dispense with bench trials on contested issues of social fact in constitutional rights cases.<sup>179</sup> But why have trials at all if appellate courts can simply start from scratch?<sup>180</sup> Under such an approach, the trial is nothing more than a trial run. Of course, de novo review does not preclude the appellate court from considering, and even accepting, the trial court's findings. But such review provides no guarantee of deference whatsoever. The trial court findings are rendered advisory, at best, giving the losing party incentive to push for duplicative appellate examination of the facts.<sup>181</sup>

Moreover, rendering trials an “essentially pointless exercise”<sup>182</sup> in this manner undermines trial courts' legitimacy. It threatens to erode the public's and parties' confidence in the conclusions of district courts, which often have the final word in litigation.<sup>183</sup> Far from encouraging district judges to do a thorough and impartial job of evaluating contentious questions of social fact,<sup>184</sup> it dismisses their work as superfluous. And it creates uncertainty for parties, since there is no clear standard for the evaluation of social facts on appeal if the “clearly erroneous” standard does not apply. Parties are always subject to having facts introduced on appeal by amici or the court itself, without an opportunity to respond.<sup>185</sup>

Therefore, just as with case-specific facts, applying Rule 52(a)(6) to social facts would help conserve judicial resources and ensure stability by making trials a meaningful part of the litigation process.

---

179. See, e.g., FAIGMAN, *supra* note 32, at 45, 49, 64 (arguing against appellate deference to trial court findings of social fact but accepting that judicial examination of contested social facts generally begins with a trial). *But see* Monahan & Walker, *supra* note 53, at 495 (suggesting briefing and independent judicial research in place of trials).

180. Indeed, at least one commentator suggests that appellate courts *must* conduct such “a wholesale reassessment” of the factual record in constitutional rights cases. See Adamson, *supra* note 17, at 24–25.

181. See Wright, *supra* note 106, at 780.

182. *Jenkins v. Georgia*, 418 U.S. 153, 163 (1974) (Brennan, J., concurring) (noting that “the careful efforts of state and lower federal courts to apply the [patently offensive] standard will remain an essentially pointless exercise” given the majority's affirmance of independent Supreme Court review of this question) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 (1973) (Brennan, J., dissenting)).

183. *Cf.* Wright, *supra* note 106, at 779. Wright notes that the undisputed function of appellate courts “is to discover and declare—or to make—the law . . . to reverse for errors of law, to announce the rules which are to be applied, and to ensure uniformity in the rules applied by various inferior tribunals.” *Id.* He questions, however, whether appellate courts should serve a “second function” of policing the trial court's applications of law in particular cases. Wright believes there is a high price to pay for an expanded view of appellate power, because the ability to obtain appellate review will be limited to wealthier parties, and because public confidence in trial courts, which will continue to decide most cases, will be undermined. *Id.*

184. See *Jenkins*, 418 U.S. at 163.

185. See Gorod, *supra* note 19, at 31–32.

*B. Institutional Competence*

Rule 52(a)(6) not only promotes efficiency but also recognizes the trial courts' superior factfinding capacity.<sup>186</sup> This rationale too applies equally to case-specific and social facts. As discussed above, the 1985 amendment to Rule 52(a)(6) clarified that the rule applies to "documentary and other evidence," not just to testimonial evidence, where most would agree that the trial judge's ability to assess witness credibility gives her a distinct factfinding advantage over the appellate courts. Social facts may be presented to the trial court through expert testimony, documentary evidence, or both. The rule's broad language encompasses social facts, so the presumption should be that the rule applies to them. Two related arguments for their exclusion, however, are that social facts should be treated differently because they are ill-suited for trial, or because appellate courts are equally competent to find such facts. Neither of these reasons justifies excising social facts from the rule.

Some scholars have argued that trials are an undesirable way for judges to take in social facts. John Monahan and Laurens Walker, for example, argue that courts at all levels should be free to independently research social facts and that parties should present social science evidence exclusively through written briefs, which they suggest "are a superior medium to verbal testimony for communicating technical social science information."<sup>187</sup> Monahan and Walker offer several reasons for doubting the suitability of a trial for presenting social facts. They assert that an expert witness's ability to frame a precise answer suffers under the time pressure and format of delivering trial testimony. They contend that the oral presentation of social science evidence is longer, less organized, and harder to follow than a written brief. And, while they admit that their approach forecloses the opportunity to assess a witness's demeanor, they believe that demeanor in the context of social facts is more distracting than helpful to the court.<sup>188</sup>

Monahan and Walker's account overlooks many of the advantages of the trial format, however. One factfinding benefit that trial judges enjoy is the opportunity to "experience with their own senses the physical evidence that has been introduced and [to] observe the verbal and nonverbal behavior of the other participants in the trial."<sup>189</sup> Contrary to Monahan and Walker's suggestion, this advantage serves judges well in receiving evidence on social facts. Indeed, it

---

186. See Benjamin, *supra* note 143, at 333 ("Appellate courts . . . are removed from the world of fact-finding and have no expertise in it."). This is not to say that the American adversarial process is ideally suited to discovering the truth, whether of case-specific or social facts. See ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 273-314 (1999) (arguing that many aspects of the American adversarial system of adjudication inhibit the search for truth). The question this Article addresses is whether, given the system we have, independent appellate review is more likely to lead to accurate social factfinding.

187. Monahan & Walker, *supra* note 53, at 496.

188. *Id.* at 496-97.

189. Christie, *supra* note 105, at 46 (addressing exclusively "historical" or case-specific facts).

can be particularly helpful when a trial court confronts the contentious factual issues often underlying laws that restrict controversial or minority rights. For example, because legislators often demonize proponents of a particular point of view when addressing hot button social issues, it is critical for a judge to hear testimony at trial to test such characterizations. During a legislative hearing on Alaska's "partial-birth abortion" ban, advocates and members of the public compared abortion procedures to the "Nazi Holocaust" and testified that the medical profession had "cut its own throat" by allowing abortion providers to "perform unjustified abortions" and to "falsify the patient's records" in order to secure a "pre-arranged convenience for the mother and a financial benefit for the doctor."<sup>190</sup> Congressional testimony on the federal PBABA was likewise "not only unbalanced, but intentionally polemic."<sup>191</sup> The trial judges' opportunity to see and hear abortion doctors in person helped to counter these caricatures<sup>192</sup> and may help to explain why twelve out of thirteen federal district courts invalidated state bans, and why all three district courts to consider the PBABA held it unconstitutional.

Live testimony can provide other distinct advantages over paper evidence to judges learning about an unfamiliar topic. For example, in the "partial-birth abortion" cases, judges could ask questions of the experts, who could then draw diagrams and display abortion instruments and plastic models of female anatomy.<sup>193</sup> To claim that briefs are superior to oral testimony is akin to saying that law students would learn better if they simply read the material rather than attending class. The claim ignores the extent to which trials addressing social facts are an educational process. It also falsely presents the parties' options as binary and mutually exclusive. Monahan and Walker wish to resolve what they see as undesirable flexibility (or "indecision") in the choice of whether to present empirical research via briefs or oral testimony by forcing litigants into a single choice (briefing).<sup>194</sup> Their perspective discounts the benefits to parties in being able to choose the most effective presentations for the types of evidence relevant to their cases.

Moreover, the suggestion that social facts are ill-suited for trial wrongly assumes a bright-line distinction between social and case-specific facts. Often, social facts are no different from case-specific facts in terms of the competence required to assess them. For example, there is no real difference between expert

---

190. Borgmann, *supra* note 19, at 23–24 (quoting official Alaska legislative summary).

191. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004) (internal quotation marks omitted), *aff'd sub nom.* *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* *Carhart II*, 550 U.S. 124 (2007).

192. *See* Borgmann, *supra* note 19, at 24.

193. *See id.* at 24–27.

194. Monahan & Walker, *supra* note 53, at 496 ("The parties appear to be free either to present legislative facts via expert witnesses at a hearing or to include them in briefs, as Brandeis did in *Muller*. Conceiving of scientific research not as legislative fact but as social authority resolves this indecision.").

testimony that addresses whether a particular tire blew out because of a defect in the tire (a case-specific fact), and expert testimony addressing whether a specific brand of tires is defective in a manner likely to cause blowouts (a social fact).<sup>195</sup> Why is one appropriate for trial and the other not?

Running social facts through the rigors of the trial process also serves a helpful screening function that is wholly absent when judges rely on factual assertions pulled only from the parties' or amici's briefs, or from their own research.<sup>196</sup> For example, Arthur Miller and Jerome Barron discuss the plethora of historical and other information about abortion that the plaintiffs and amici supplied the Court in *Doe v. Bolton*, the companion case to *Roe v. Wade*, without any opportunity for vetting at trial or for opposing counsel to respond effectively.<sup>197</sup> In contrast, as David Faigman points out, "When evidence of reviewable [i.e. social] facts is offered at trial, ordinarily it is through the testimony of experts and must meet threshold requirements of admissibility. In most state and federal courts, rules of admissibility are designed to ensure that the basic foundation for this proffered testimony is valid."<sup>198</sup>

Kenneth Culp Davis argues that courts cannot practically apply these rules of admissibility to social facts.<sup>199</sup> Monahan and Walker agree with Davis that applying the usual admissibility rules to social facts would "produce 'obviously intolerable' results" because a judge may know about, and have to ignore, key research that the parties failed to introduce.<sup>200</sup> The judge would then be forced "knowingly to create an inadequate and perhaps erroneous rule of law that could affect future cases."<sup>201</sup>

This concern seems vastly overdrawn. At the trial level, the judge could simply point out the study to the parties and ask them to address it. At the appellate level, the court could request supplemental briefing or, if necessary, remand the case to the trial court for further factual development. Moreover, just because a judge is "aware" of a study that the parties failed to address does not mean she should be permitted to insert an independently researched fact that "could affect a ruling of law in a case."<sup>202</sup> While it is possible that the judge knows more than the parties about the particular issue and has researched it well, it is equally possible that the parties rejected the research for legitimate reasons, or that subjecting the research to the trial's normal gate-keeping

---

195. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999).

196. Gorod, *supra* note 19.

197. Miller & Barron, *supra* note 74, at 1202 ("The data were submitted with the request that judicial notice be taken of them. That means 'retrial' at the Supreme Court level, without benefit of adversarial presentations.")

198. FAIGMAN, *supra* note 32, at 170–71.

199. Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 941 (1980).

200. Monahan & Walker, *supra* note 53, at 486 (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 68, 83 (1964)).

201. *Id.* at 486 n.31.

202. *Id.*

processes would prove the research to be of questionable reliability or relevance.

It is true that it is not always necessary or even appropriate to apply all admissibility rules, such as rules concerning hearsay, to expert testimony addressing social facts. Nevertheless, trial judges (probably out of habit) do tend to apply many of the rules of evidence, especially concerning the admissibility of expert testimony, to social facts submitted at trial.<sup>203</sup> Whether this is required or not, it is usually a beneficial practice in that it serves to weed out scientifically suspect testimony.<sup>204</sup>

Some commentators argue that social facts must be exempt from Rule 52(a)(6) because the parties to litigation may not present all the relevant social fact evidence due to a lack of resources, the inexperience of counsel, or the parties' narrow focus on their case-specific circumstances.<sup>205</sup> When it comes to issuing findings on social fact that will affect many, such as when a court considers whether a law should be deemed unconstitutional, these commentators argue, the record is properly supplemented by the courts' own research and factual submissions via amicus brief.<sup>206</sup>

It is not at all clear, though, that the benefits of appellate-level fact development outweigh its downsides. This is especially true given the lack of procedural guidelines governing appellate treatment of social facts.<sup>207</sup> Perhaps the most significant concern is that of due process. Parties often lack a meaningful opportunity to respond to, and rebut where appropriate, evidence introduced by amici or the court. This raises serious notice and fairness concerns.<sup>208</sup> Reply briefs, constrained by page limits, often do not allow appellants to comprehensively rebut new factual assertions.<sup>209</sup> And appellees may not get the opportunity to file a reply brief at all.<sup>210</sup> Likewise, oral

---

203. Borgmann, *supra* note 19, at 43; Davis, *supra* note 199, at 941.

204. See FAIGMAN, *supra* note 32, at 100–01 (suggesting that courts should apply *Daubert*-like standards to the evaluation of social science evidence). This Article does not address whether the abuse-of-discretion standard, which is normally applied to trial judges' decisions regarding the admissibility of evidence, is appropriately applied to social facts. Given the lack of clarity concerning which rules of evidence apply to social facts, this issue deserves further attention.

205. See *infra* Part III.B.2.

206. See FAIGMAN, *supra* note 32, at 100 (“An attorney’s failure to adequately develop the factual record in an ordinary dispute only affects his or her client’s matter . . . [but] in constitutional litigation [it] potentially affects a multitude of cases . . . . If amici were not readily available to supply evidence regarding reviewable facts, the Court would be obligated to conduct its own independent research or remand for further factual development.”).

207. Gorod, *supra* note 19, at 43–46.

208. *Id.* at 4–5, 7–9; see also Miller & Barron, *supra* note 74, at 1202 (amicus briefs submitted by abortion-rights groups in *Roe* were replete with data “submitted with the request that judicial notice be taken of them,” meaning “retrial at the Supreme Court level without the benefit of adversarial presentations”). But see Larsen, *supra* note 32, at 1271 n.74 (“[C]ounting amicus submissions of fact as within the adversarial process because the litigants may respond to them before a decision is rendered (through reply briefs or at oral argument).”).

209. Gorod, *supra* note 19, at 4–5.

210. See FED. R. APP. P. 28(c).



arguments, with their strict time limits, are inadequate forums for rebutting factual claims.<sup>211</sup> Finally, if the court conducts its own research and mentions its findings for the first time in its opinion, the parties are denied even these limited opportunities to respond.<sup>212</sup> And this unfairness extends beyond the parties to the public:

If the rights and duties of uncounted Americans are being affected or influenced, if not controlled, by Supreme Court decisions often based on independent research conducted *sua sponte* by the Justices, then the products of those researches, to the extent that they are significant in the final decisions, are not tested by contrary argument. Those who lose, whether they are the particular litigants before the bar of the Court or those in the general public whose values run counter to the decisions, are not accorded their “day in court” that is basic to fairness.<sup>213</sup>

The realities of appellate-level factfinding raise another serious concern, which is the integrity of the evidence introduced on appeal. Without the procedural safeguards employed at the trial level, scientific and other evidence of questionable validity can easily find its way into the case.<sup>214</sup> Amicus briefs, in particular, are often submitted by advocates and may be replete with dubious factual assertions that would never be admitted at trial. When this happens, the concern that social factfinding will have a precedential impact cuts *against* appellate level factfinding, because lower courts are likely to treat the questionable, unvetted factual conclusions as influential, if not binding.

This problem is vividly illustrated by Justice Kennedy’s declaration in *Gonzales v. Carhart* asserting, admittedly without “reliable data,” that women are emotionally traumatized by abortion.<sup>215</sup> The “authority” Justice Kennedy cites for this assertion is an amicus brief submitted by Sandra Cano, the plaintiff from *Doe v. Bolton*,<sup>216</sup> who now claims to regret her abortion, and “180 post-abortive women who have suffered the adverse emotional and

---

211. Gorod, *supra* note 19, at 4–5.

212. *Id.*

213. Miller & Barron, *supra* note 74, at 1226.

214. *See id.* at 1226, 1228 (expressing concern when factual assertions made by Supreme Court are “not tested by contrary argument” and noting that “[t]he lack of a sound factual base in promulgating general norms raises the question of legitimacy”). Kenneth Culp Davis recognizes that allowing appellate courts free rein to find their own social facts will permit them to make controversial findings and to rely upon potentially unreliable sources: “When Mr. Justice Brandeis . . . said in the *O’Fallon* case that the railroads’ ‘property investment account in 1920 was about 19 billions of dollars,’ the fact stated was hardly ‘notorious,’ and the source was a statement by Senator Cummins in the Congressional Record, surely not a source of ‘indisputable accuracy.’” Davis, *supra* note 7, at 405 (quoting *St. Louis & O’Fallon Ry. v. United States*, 279 U.S. 461, 497 (1929) (Brandeis, J., dissenting)). Brandeis’s opinion in this case was a dissent, but Davis nevertheless seems untroubled by the thought of such facts forming the basis of constitutional rulings. *See id.* at 405–06.

215. *Carhart II*, 550 U.S. 124, 159 (2007).

216. 410 U.S. 179 (1973).

psychological effects of abortion.”<sup>217</sup> The brief was part of a deliberate campaign on the part of anti-abortion-rights groups to persuade Justice Kennedy to reverse his position on the constitutional status of abortion.<sup>218</sup> The asserted “fact” was of no real relevance to the case,<sup>219</sup> was not introduced by the parties, was of questionable scientific validity,<sup>220</sup> surely would not have survived the rigors of a trial,<sup>221</sup> and was even conceded by the Justice uttering it to lack a sufficient scientific foundation.<sup>222</sup> Yet it now carries the imprimatur of the Supreme Court and is being cited by lawyers trying to convince courts to uphold laws requiring women be told that abortions cause women emotional harm. And courts are buying the argument. The Eighth Circuit Court of Appeals, sitting en banc, recently cited Justice Kennedy’s statement in support of its decision upholding a South Dakota law that requires abortion providers to tell their patients that women who have abortions face an “[i]ncreased risk of suicide ideation and suicide.”<sup>223</sup> In news coverage of the case, a spokeswoman

---

217. Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 1, *Carhart II*, 550 U.S. 124 (No. 05-380); see also *Carhart II*, 550 U.S. at 159.

218. Letter from Samuel B. Casey & Harold J. Cassidy (Law Life Project, Christian Legal Society) to Members of the South Dakota Pro-Life Leadership Coalition, at 10 (Oct. 10, 2007) (on file with the author). As part of a broad legislative strategy, the South Dakota legislature appointed a task force to document alleged abortion-related emotional trauma. REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at [http://www.lc.org/attachments/SD\\_abortion\\_rpt.pdf](http://www.lc.org/attachments/SD_abortion_rpt.pdf); see also Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1011 (2007); Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1644–51 (2008). The work of the task force was so biased that the anti-abortion chair voted against its report to publicize her objections. Siegel, *supra*, at 1681.

219. See Borgmann, *supra* note 19, at 45.

220. Indeed, the weight of scientific evidence, as Justice Kennedy recognized, disproves the brief’s assertions that abortion causes lasting mental trauma. *Carhart II*, 550 U.S. at 15; see also *id.* at 183–84 & n.7 (Ginsburg, J., dissenting) (citing plethora of evidence discrediting claim that “having an abortion is any more dangerous to a woman’s long-term mental health than delivering and parenting a child that she did not intend to have”).

221. The brief did not purport to be a scientific study, but rather consisted of anecdotal evidence (the attestation of “180 post-abortive women”) not subjected to cross-examination or the Rules of Evidence. See Brief of Sandra Cano, et al. as Amici Curiae in Support of Petitioner at 1, *Carhart II*, 550 U.S. 124 (No. 05-380); cf. *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993) (setting forth standards for admissibility of scientific evidence).

222. *Carhart II*, 550 U.S. at 159.

223. *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 897 (8th Cir. 2012) (en banc) (quoting statute) (internal quotation marks omitted). The en banc court decided the case in a way that minimized the relevance of any causal link between abortion and suicide. See *id.* at 905 (requiring only that physician disclose a correlation between abortion and suicide rather than “that a causal link between abortion and suicide has been proved”). But the court nevertheless strongly suggested the existence of such a link, relying in part on *Carhart II*. See *id.* at 899 (citing *Carhart II* as support for claim that depression and psychological distress are known risks of abortion and concluding that, “[a]s a matter of common sense, the onset of depression and psychological distress also would increase one’s risk of suicide and suicide ideation”).

for Americans United for Life jubilantly explained how the group's strategy of advancing this claim via amicus briefs had paid off.<sup>224</sup>

If appellate courts routinely received inadequately developed factual records from the trial courts, perhaps we would be forced to accept the risks of judicial reliance on extra-record evidence. But this concern should be taken with a grain of salt.<sup>225</sup> Lawsuits challenging laws or policies as unconstitutional are often brought by well-funded advocacy groups. When these lawsuits involve controversial, high-profile social issues, the government is also likely to receive substantial support from advocacy groups. In fact, when governmental officials refuse to defend laws in such cases, national advocacy groups or their regular lawyers can be counted on to step in and take over the defense.<sup>226</sup> Thus, these cases are typically litigated from the very beginning with the lawyers' full awareness that they reach beyond the immediate parties to the case.<sup>227</sup> It is highly likely that the facts truly necessary to resolving the case will have been presented at trial.<sup>228</sup> If they are not, and if the parties themselves do not argue this to the appeals court, amici should be free to point out the factual gaps. However, if the appeals court is convinced that certain facts are important to the case and were not developed at trial, a remand should be ordered whenever possible.<sup>229</sup>

---

224. Sarah Kliff, *GOP Platform: Abortion Is Bad for Women's 'Health and Well-Being,'* WASH. POST (Aug. 23, 2012), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/23/gop-platform-abortion-is-bad-for-womens-health-and-well-being> ("AUL Action President Chairmaine Yoest says this is something her group has been working toward for a while. They have filed numerous amicus briefs that outline research on the relationship between abortion and women's health. 'We're just very excited because we feel like this is something that we've been working for a long time to establish data on,' Yoest says. 'We filed several amicus briefs that were all *working to establish this idea in the public record.*'" (emphasis added)).

225. See Woolhandler, *supra* note 9, at 118 ("[W]hen lawyers perceive that a particular showing will affect the outcome in a case, they tend to make such a showing, which courts tend to receive. If the court relies on an imbalanced presentation in one case, attorneys with sufficient resources and sophistication are likely to respond in later cases with counter-presentations.").

226. For example, in the California Proposition 8 litigation, ProtectMarriage (a coalition of national groups including the Family Research Council and Focus on the Family) and the California Family Alliance took over the defense of the same-sex marriage ban when state officials refused. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (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). Similarly, when state officials declined to defend New Jersey's "partial-birth abortion" ban, the legislature turned to Richard F. Collier, Jr., president of the Legal Center for Defense of Life, Inc., to defend the law. *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 130–31 (3d Cir. 2000); Abby Goodnough, *Somerset Lawyer Is Chosen to Defend New Jersey's Late-Term Abortion Law*, N.Y. TIMES (Dec. 25, 1997), <http://www.nytimes.com/1997/12/25/nyregion/somerset-lawyer-is-chosen-to-defend-new-jersey-s-late-term-abortion-law.html>.

227. See Miller & Barron, *supra* note 74, at 1193, 1201–02 (criticizing plaintiffs for litigating, and Court for deciding, *Roe v. Wade* in this manner).

228. And where this does not happen, the courts could always remand for further factual development, or even invite amici to participate at the trial level. Gorod, *supra* note 19, at 76.

229. *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing

Much appellate extra-record factfinding and reliance on amici's factual assertions occurs not because there is inadequate evidence in the trial record, but because the Justice or appellate judge authoring the opinion either does not like the facts found and wants to assert a contrasting factual conclusion, or is using the additional research as a rhetorical device. Each of these phenomena is well illustrated by Justice Kennedy's opinion in *Gonzales v. Carhart*. As noted above, the point about abortion regret was tangential to the case and seems clearly rhetorical.<sup>230</sup> For the facts concerning the relative safety of abortion procedures, which were central to the case, Justice Kennedy looked to Congress (although he admitted that some of its written "findings" were clearly wrong), rather than relying on the essentially uniform findings of the trial courts.<sup>231</sup>

Sometimes appellate judges add their own facts in order to supply what they feel is helpful background. Judge Richard Posner calls these "coloring-book facts,"<sup>232</sup> and he supports judges' and clerks' conducting Internet research and other independent research to flesh out opinions with these facts when the lawyers have not provided them.<sup>233</sup> Posner gives as an example "the basic facts about a corporate defendant, such as what its business is."<sup>234</sup> Posner does, however, make clear that "an appellate court should [not] make its decision turn on a fact, unless it is uncontestable, that is not in the judicial record."<sup>235</sup> I would add that appellate courts should generally refrain entirely from including controversial or contestable facts even if the decision does not "turn" on them. Because litigants and lower courts are likely to treat such factual statements as precedential,<sup>236</sup> courts should only insert them if (1) the opinion would be difficult to follow without the background and (2) the court is explicit that the facts are provided by the judge, as background only. The danger of future reliance on such facts as precedent means that courts should resist the

---

findings."); Gorod, *supra* note 19, at 76 (urging remands when trial courts face an inadequate trial court record); *infra* text accompanying notes 379, 387–91.

230. See *supra* notes 215–22 and accompanying text; see also *Carhart I*, 530 U.S. 914, 1007 (2000) (Thomas, J., dissenting) (citing emotionally charged congressional testimony of a nurse who was not called to testify at any of the dozen or so trials on "partial-birth abortion" and declaring that "[t]he question whether States have a legitimate interest in banning the procedure does not require additional authority").

231. *Carhart II*, 550 U.S. 124, 165 (2007); *id.* at 177 (Ginsburg, J., dissenting) (criticizing majority for rejecting three district courts' findings and essentially favoring more dubious findings of Congress); see also FAIGMAN, *supra* note 32, at 60–61 (explaining how the Court manufactured "medical disagreement" by crediting congressional findings equally with district courts' factfinding).

232. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQUESNE L. REV. 3, 12 (2013).

233. *Id.* at 11.

234. *Id.*

235. *Id.*

236. See generally Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. (forthcoming 2013) (manuscript at 3–4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2226395](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226395) (addressing the problem of "the tendency of lower courts to over-interpret Supreme Court opinions and to apply generalized statements of fact from an old case to a new one" and citing examples).

temptation to include them simply to make an opinion more interesting or stylistically elegant.

Upon closer examination, there is no reason to think that trial courts are ill-equipped to receive and evaluate contested social facts. And there is good reason to be concerned about the current way in which appellate courts establish social facts. As one appellate judge has noted, “Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.”<sup>237</sup> It remains to be considered whether any of the other justifications for exempting constitutional social facts from Rule 52(a)(6) hold up under scrutiny.

### C. *The Judiciary As Rights Protector*

One important rationale for the constitutional fact doctrine is its recognition of the courts’ critical role in protecting constitutional rights.<sup>238</sup> This rationale has also been invoked with respect to social facts in constitutional rights cases. Yet the rights-protective justification fails to explain why *each level* of the federal judiciary must review social facts de novo. As Henry Monaghan points out, since the constitutional fact doctrine developed to address a “legitimacy deficit” raised by *administrative* adjudication, “it does not establish the propriety of a similar scope of review by an appellate court over the decisions of an inferior court.”<sup>239</sup> Indeed, arguments supporting the constitutional fact doctrine fall into two distinct categories: concern for the judiciary as rights protector (as compared with administrative or legislative bodies) and concern for higher courts’ authority over lower courts in the creation and development of law. The first of these is not as clearly relevant to appellate review of *trial court* (as opposed to administrative agency) factfinding, but courts and commentators do not always make this distinction clear.<sup>240</sup>

It might be argued that appellate courts must retain authority over trial courts’ determinations of both factual and legal questions in order to ensure that constitutional rights are protected.<sup>241</sup> Since social facts are often inextricably entwined with law determination, an appellate court that grants deference to

---

237. *Orvis v. Higgins*, 180 F.2d 537, 542 (2d Cir. 1950).

238. *See supra* text accompanying note 175.

239. Monaghan, *supra* note 4, at 239.

240. *See, e.g.*, *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (“[O]n rare occasions in years past the Court has justified independent *federal or appellate review* as a means of compensating for ‘perceived shortcomings of the trier of fact.’” (emphasis added)); Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat, et al. as Amici Curiae in Support of Respondents at 70–71, 91–92, *Carhart II*, 550 U.S. 124 (2007) (No. 05-1382) (referring alternately to need for *judicial* review of legislature’s factfinding and to *Supreme Court* review of factfinding by any inferior body, including trial courts, in constitutional rights cases).

241. *See* Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat et al. as Amici Curiae in Support of Respondents at 91, *Carhart II*, 550 U.S. 124 (No. 05-1382).

such factfinding may cede too much control to the trial court, control that may be used in a rights-unfriendly way.<sup>242</sup> But this argument overlooks two things. First, there are a great many social facts that are important to the outcome of a case but that do not in and of themselves determine the meaning of a law or legal standard. For example, in deciding whether an abortion regulation amounts to an “undue burden,” a trial court may find that an abortion regulation was responsible for a certain percentage of clinics closing in the state. Or it might find that a mandatory waiting period will delay the abortions of some women in certain areas of the state from the first to the second trimester.<sup>243</sup> The appellate court can defer to these premise facts and still independently assess whether the burdens are “undue” and, therefore, unconstitutional.<sup>244</sup>

Second, an important purpose for judicial review of legislative factfinding is to provide an impartial forum that cannot be assured through the majoritarian process.<sup>245</sup> Assuming this review is properly done at the trial court level, its purpose is not further served—and indeed may be undermined—if courts of appeals and the Supreme Court may simply ignore the facts found by the trial court, especially when the trial court’s factfinding favors the constitutional rights claimant.<sup>246</sup>

#### *D. Appellate Court Authority over Lawmaking*

If the judiciary’s role as rights protector does not adequately explain why appellate courts should not defer to trial courts’ social factfinding, there is still the concern that deference would undermine their lawmaking authority. It is often assumed that appellate review of social facts must be de novo in order to preserve appellate courts’ undisputed role in the development of the law and the interpretation of the Constitution.<sup>247</sup>

There are three related claims made for why social factfinding implicates the appellate courts’ superior authority for law declaration. The first is that social facts are often used in the development of law; the second is that social facts’ general nature make them more like law than like fact; and the third is that social facts may present as mixed questions of law and fact.

---

242. *Id.* at 91–92.

243. *See, e.g., A Woman’s Choice–E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 712–13 (7th Cir. 2002) (Wood, J., dissenting) (describing district court’s detailed factfinding documenting burdens of mandatory delay and criticizing majority for not deferring to these findings).

244. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (establishing “undue burden” standard for abortion regulation).

245. *Cf. Daniel J. Solove, The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 981, 1012 (1999) (asserting that “the most important contribution of the judiciary to contemporary problems” that is lacking in factfinding by legislatures is “critical inquiry”).

246. *See infra* Part III.B.2.

247. *See, e.g., Monaghan, supra* note 4, at 264.

### 1. *Social Facts in the Development of Law*

Some commentators argue that social facts must be treated differently from case-specific facts because they are used differently, namely, in the service of legal reasoning or lawmaking.<sup>248</sup> The idea is that case-specific facts will be used only to resolve the case directly before the court and there is therefore no danger that appellate deference to the trial court's factfinding will establish a precedent.<sup>249</sup> This argument rests on a false dichotomy between social facts and case-specific facts, however. Case-specific facts, especially ultimate facts,<sup>250</sup> can also affect legal doctrine by providing a factual example of how a legal rule works in practice. Such a factual finding thus may take on the character of precedent, even though it is presented in a case-specific way.<sup>251</sup> Indeed, it is this concern—"the need to give doctrinal coherence to constitutional legal norms"<sup>252</sup>—that has given rise to the constitutional fact doctrine, which has been applied mainly to case-specific facts.<sup>253</sup> Therefore, anyone who supports a social facts exception on grounds of appellate authority over lawmaking should support the constitutional fact doctrine (as applied to case-specific facts) for the same reason.

However, while both social and case-specific facts may affect the development of constitutional doctrine, that alone cannot explain why appellate courts must review trial courts' factfinding *de novo*. If the concern is solely that appellate courts must retain their lawmaking authority, this can be addressed without completely sacrificing Rule 52(a)(6) deference. Reviewing courts can maintain authority over the ultimate legal question while deferring to the "subsidiary findings" related to it,<sup>254</sup> since the subsidiary factual questions can often be separated from the ultimate question the appellate court wishes to reserve for itself. For example, in *United States v. Appalachian Electric Power Co.*, the Supreme Court addressed whether a river was navigable.<sup>255</sup> The Court pointed out the difference between the underlying facts upon which navigability (the legally determinative question) was to be based and the question of navigability itself:

There is no real disagreement between the parties here concerning these physical and historical evidentiary facts. But there are sharp divergencies of view as to their *reliability as indicia of navigability*

---

248. See, e.g., Morgan, *supra* note 148, at 270–71.

249. See FAIGMAN, *supra* note 32, at 100.

250. See *supra* notes 90–97.

251. In *Bose*, the Supreme Court explained that case-specific factfinding must be independently reviewed on appeal where its "impact on future cases and future conduct [is] too great to entrust . . . finally to the judgment of the trier of fact." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 n.17 (1984).

252. Adamson, *supra* note 17, at 19.

253. See *supra* Part I.B.3.

254. *Anderson v. Bessmer City*, 470 U.S. 564, 568 (1985).

255. 311 U.S. 377, 403–06 (1940).

and the weight which should be attributed to them. The disagreement is over the *ultimate conclusion upon navigability* to be drawn from this uncontroverted evidence.<sup>256</sup>

The Court reserved that ultimate question for its own independent review. One can readily imagine that, had the underlying facts been disputed, the trial court could have resolved them, and the Court deferred to them, under Rule 52(a)(6).

Social facts' influence in shaping law may raise concerns related to the institutional competence question discussed above. One scholar has suggested that the broad effects of social factfinding mean that appellate courts must conduct independent review because mistakes in this context are unacceptable.<sup>257</sup> This argument is only valid if trial court factfinding is inherently untrustworthy. If that is the case, however, then it would not be right to subject anyone to it and we should rethink the whole system.<sup>258</sup> Of course, most do not question the integrity of trial court factfinding. In fact, as discussed above, Rule 52(a)(6) contemplates that trial courts are superior factfinders, and there is no reason to doubt this even in the case of social facts.<sup>259</sup>

It is true that appellate deference to trial courts' social factfinding could raise difficulties for appellate courts when two or more trial courts issue conflicting factual findings on the same question.<sup>260</sup> If appellate courts must defer to the trial court's factfinding, what is true in one jurisdiction may be false in another (or there could even be a conflict within a single circuit).<sup>261</sup> Of course, appellate courts in different jurisdictions can and do adopt different interpretations of constitutional law on questions the Supreme Court has not already definitively decided. There is no reason to think that they will diverge less on issues of social fact, whether they exercise de novo review or not. In fact, if independent review is permitted, the lack of procedural restraints leaves more room for bias and other troubling factors to influence the appellate courts' conclusions.<sup>262</sup> In any event, there are ways to address the problem of conflicting lower court findings without completely abandoning the "clearly erroneous" standard.<sup>263</sup> On the flip side, multiple lower court findings can actually be helpful to an appellate court when the findings are consistent, by reinforcing the validity of the trial court's conclusions below. Yet, remarkably,

---

256. *Id.* at 403 (emphasis added).

257. FAIGMAN, *supra* note 32, at 100.

258. *See* Wright, *supra* note 106, at 780–81.

259. *See supra* text accompanying notes 118–20.

260. *See* Carhart v. Gonzales, 413 F.3d 791, 799 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007).

261. *See id.*

262. *See generally* Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, at 1 (Pepperdine University School of Law Legal Studies Research Paper Series, Paper No. 2011/12, 2011), *available at* <http://ssrn.com/abstract=1805999> (arguing that "empirical evidence suggests that the appellate courts routinely revisit factual determinations by the trial courts, although often not transparently, and that appellate courts do so on an ideological basis").

263. *See infra* Part III.C (proposing how appellate courts can handle such circumstances).



the Supreme Court and appellate courts have sometimes refused to defer even when this is the case.<sup>264</sup>

## 2. *The Generalized Nature of Social Facts*

Some have argued that the generalized nature of social facts makes them more like law than like facts and thus they should fall within the appellate courts' lawmaking authority. Monahan and Walker have argued this point. They suggest that social facts could plausibly be grouped either with law or with fact for purposes of their judicial treatment because they share qualities of each.<sup>265</sup> Like law, social facts are general, "produc[ing] principles applicable beyond particular instances."<sup>266</sup> Like facts, they are positive.<sup>267</sup> Because either classification is plausible, Monahan and Walker opt for treating factual "authority" like legal "authority":

Treating empirical research as a source of authority rather than as a type of fact can provide the principled direction now lacking on the issue of whether judges should locate research independently. The analogy is plain: as courts are free to find legal precedents that the parties have not presented, they should also have the power to locate social science research through independent investigation.<sup>268</sup>

But choosing to place social facts in the same category as law (by calling both "authority") is a fallacy of equivocation: yes, they are authorities, but very different kinds.<sup>269</sup> As Monahan and Walker recognize, law is an "ought" (it can be violated), but a social fact is an "is" (it cannot be violated).<sup>270</sup> Social facts are descriptive; the authority they carry is that of truth. Law is prescriptive; its authority is backed by the police power of the state. While it is true that both law and social fact serve an authoritative function, this hardly means that judges, who are expert at finding, interpreting, and applying legal authority independently, are equally adept at doing so with social facts. Because most judges are not trained in the social sciences, they need the assistance of experts.<sup>271</sup> And because judges are not immune to bias,<sup>272</sup> the adversarial system is there to ensure that the best arguments on both sides of a disputed issue of social fact are fully presented, and that each side is fully cross-

---

264. See, e.g., *Carhart II*, 550 U.S. 124, 179 (2007) (Ginsburg, J., dissenting).

265. Monahan & Walker, *supra* note 53, at 493 & n.43.

266. *Id.* at 490.

267. *Id.* at 489.

268. *Id.* at 497.

269. David Faigman eloquently describes these differences in his book, *Constitutional Fictions*. See FAIGMAN, *supra* note 32, at 178.

270. Monahan & Walker, *supra* note 53, at 489.

271. FAIGMAN, *supra* note 32, at 33.

272. See, e.g., Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012) (presenting empirical evidence suggesting bias against Muslims in federal court system).

examined.<sup>273</sup> Monahan and Walker’s attempt to provide judges with guidelines for how properly to evaluate social facts in the course of their independent research does not answer why these facts should not be left to the same adversarial process we normally trust to uncover the truth.

### 3. *Mixed Questions of Law and Fact*

Finally, the social facts exception is sometimes defended on the ground that social facts may present as mixed questions of law and fact. This apprehension is related to the “ultimate fact” concern that has at times animated the Court’s articulation of the constitutional fact doctrine.<sup>274</sup> When social facts present as mixed questions of fact and law, ceding the question to the trial court can be seen as depriving the appellate court of its proper authority.<sup>275</sup> This concern is a red herring, however, as it presents no different a question than arises with all mixed questions of fact and law, including some case-specific facts. For example, a mixed question of case-specific fact and law might be whether a statement was made with “actual malice.” A mixed question of social fact and law might be whether a state’s abortion restriction imposes an “undue burden” on women seeking abortions. Each of these factual questions incorporates legal terms of art that sound factual but whose application to different fact patterns shapes the meaning of the legal test.<sup>276</sup> Moreover, each is an “ultimate fact” in that the answer decides the legal issue in the case.<sup>277</sup> Mixed questions of law and fact, whether arising out of case-specific or social facts, pose the same conundrum: should appellate courts defer under Rule 52(a)(6)?

The Supreme Court does not have a consistent answer to this question. Notwithstanding the First Amendment cases in which it has exempted such

---

273. It is these aspects of the adversarial system, including the existence of an impartial third party (the judge) to evaluate the factual assertions thus presented, that are missing from the legislative process of factfinding. *See infra* Part III.A.

274. *See supra* Part I.B.3.

275. *See, e.g.,* *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 567 (1995) (“[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.”); *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (“Th[e] admixture of fact and law, sometimes called 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.”).

276. *See, e.g.,* *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504–05 (1985) (discussing actual malice); Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat et al. as Amici Curiae in Support of Respondents at 15–17, *Carhart II*, 550 U.S. 124 (2007) (No. 05-1382) (discussing undue burden); *see also* Woolhandler, *supra* note 9, at 114–15 (“The line between adjudicative and legislative facts is indistinct, however, because decisionmakers use even the most particularized facts to make legal rules. For instance, courts may treat adjudicative facts as exemplary of the effects of legal rules.”).

277. *See, e.g.,* *Bose*, 466 U.S. at 498–99; Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat et al. as Amici Curiae in Support of Respondents at 70–73, *Carhart II*, 550 U.S. 124 (No. 05-1382).

“ultimate facts” from the scope of Rule 52(a)(6), the Supreme Court has not always seen de novo review as necessary whenever a factual question is closely intertwined with a legal one. For example, in *Salve Regina College v. Russell*, the Court noted that “we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.”<sup>278</sup> Whatever the solution to the “ultimate fact” dilemma, it should be the same for social and case-specific facts. There is no reason for the two to be treated differently.

In any event, concern over “ultimate facts” cannot justify a broad exemption for all social facts. Most of the social fact questions trial courts routinely face are not mixed questions of law and fact or “ultimate facts.” They are legally relevant, helping the court decide whether or not a law is constitutional by shedding light on both the government’s factual justifications for the law and the alleged harm the law will cause. But the facts and their legal significance can and should be kept separate: an appellate court can refuse to accept the legal conclusion that follows from a factual determination without rejecting the factual determination itself. Appellate courts often seem to forget this, interpreting their authority over lawmaking so expansively that they readily dismiss social facts out of hand rather than parsing them from the legal questions over which they do have rightful authority. For example, in the Supreme Court’s decision on the PBABA, the Court could have deferred to the trial courts’ findings that the intact D&E procedure offers safety advantages to abortion patients while disagreeing that denying women these advantages rendered the ban unconstitutional.<sup>279</sup> While such a judgment could be criticized in light of prior abortion precedent,<sup>280</sup> at least this shaping of the legal standard would fall more comfortably within a function belonging to the higher courts. It would also keep the Court from setting a troubling and amorphous standard of disregard for Rule 52(a)(6).

#### *E. Social Facts as Singular Facts*

As some of the previously discussed rationales have already demonstrated, many arguments in favor of a social facts exception presuppose that social facts are qualitatively different than case-specific facts. These arguments present social facts as singular, or exceptional.

---

278. 499 U.S. 225, 233 (1991).

279. See *Carhart I*, 530 U.S. 914, 1011–12 (2000) (Thomas, J., dissenting) (arguing, as to Nebraska’s similar ban, that added health risks to women from banning an abortion procedure do not necessarily justify need for health exception).

280. See *id.* at 931 (majority opinion) (criticizing Justice Thomas’s argument as inconsistent with precedent).

Arguments about the exceptional nature of social facts have their root in Kenneth Culp Davis's famous legislative/adjudicative classification. But Davis's taxonomy is problematic. First, it creates an overly rigid distinction among facts. The classification posits a binary opposition: if a fact is not case-specific, then it must form the basis for the creation of law or determination of policy, and vice versa. This ignores the close relationship between many legislative and adjudicative facts.<sup>281</sup> For example, a court or legislature may find that a certain chemical causes cancer. A court may also find that this chemical caused a particular plaintiff's cancer. The way the fact is used in each instance differs, but the underlying fact is essentially the same. The same type of technical or "other specialized" knowledge undergirds each factual claim. In fact, the very same expert would likely be called to testify as to each.<sup>282</sup> A trial judge would be no worse equipped to evaluate the former than the latter.

Second, Davis's rigid taxonomy seems outcome-driven. Davis wants social facts to be treated like law, so he gives them a name that suggests that their use necessarily implicates lawmaking. He accepts that "adjudicative" (case-specific) facts should be subject to the Rules of Evidence, that is, not treated like law, so he labels them accordingly.<sup>283</sup> Monahan and Walker insightfully critique Davis's distinction between legislative and adjudicative facts. They argue that Davis assumed a distinction between fact and law, but then cleaved the category of "facts" into two, one (which he conveniently labeled "*legislative facts*") so closely resembling "law" that it must be left for the courts to decide.<sup>284</sup>

Davis does not adequately explain *why* social facts are to be treated like law, however. One reason he gives is that the Supreme Court and appellate courts have traditionally treated social facts differently from case-specific facts.<sup>285</sup> He also argues that it would be "inconvenient" to treat social facts like

---

281. Cf. FAIGMAN, *supra* note 32, at 146 (pointing out that, under Davis's taxonomy, "[t]he very same fact might be described as adjudicative, because it was part of a jury's deliberations, and legislative, because a lawmaker used it to form or interpret the law"). Commentators have come up with additional categories of facts to try to capture the gray areas between Davis's black-and-white categories. For example, Monahan and Walker offer the concept of "social frameworks" which are social facts used as the basis for establishing case-specific facts. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 563-70 (1987).

282. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142-45 (1999) (describing mixed set of social and case-specific facts regarding what caused plaintiff's tire to blow out, for which plaintiffs intended to rely on a single expert).

283. See, e.g., Davis, *supra* note 199, at 941.

284. See Monahan & Walker, *supra* note 53, at 485; see also *supra* note 53 and accompanying text. However, Monahan and Walker employ a similar maneuver. After identifying important weaknesses in Davis's approach, they too make a question-begging categorization by deciding to treat empirical research as "social authority" (akin to law), even as they acknowledge that it could plausibly be categorized either as law or as fact. See Monahan & Walker, *supra* note 53, at 488-93.

285. Davis, *supra* note 7, at 403 ("[C]ourts have generally treated legislative facts differently from adjudicative facts, even though the distinction has not been clearly articulated and explanations have been beclouded by an erroneous use of the concept of judicial notice.").

case-specific facts: “The reason we allow judicial notice to be taken of extra-record [social] facts is . . . to promote convenience. Tribunals make factual assumptions because it is convenient to do so. Indeed, to fail to make factual assumptions would mean extreme inconvenience.”<sup>286</sup> But the mere fact that something has always been done a certain way, or that it is convenient, cannot alone justify continuing on the same course. As Monahan and Walker point out, “the jurisprudential underpinning of Davis’s position on independent judicial investigation of legislative facts is surprisingly weak.”<sup>287</sup>

The advisory committee note to Federal Rule of Evidence 201 fully adopts Davis’s dichotomy despite these problems. The note draws a bright-line distinction between facts “which have relevance to legal reasoning and the lawmaking process” (“legislative facts”) and “simply the facts of the particular case” (“adjudicative facts”).<sup>288</sup> The note justifies exempting social facts from judicial notice requirements because these facts are by nature never “clearly indisputable.”<sup>289</sup> As such, the note suggests, social facts cannot be subjected to formalized judicial notice treatment since indisputability is a requirement for such treatment. Yet, while case-specific facts that are not “clearly indisputable” are left to the adversarial process for resolution, the note to Rule 201 suggests that social facts are exempt from the adversarial process too.<sup>290</sup>

If social facts are not subjected to the adversarial process of a trial, then there is no trial record against which to measure a trial judge’s conclusions of social fact. It follows that those findings of fact cannot be tested for clear error. Moreover, the advisory committee note specifically says that judges at *all levels* should be unconstrained by ordinary adversarial rules and processes when finding social facts. Thus, following the advisory committee note to its logical conclusion, appellate judges cannot be required to defer to district judges, and Rule 52(a)(6) cannot apply to social facts. If social facts cannot be clearly erroneous, someone has to be responsible for making the final determination, and the advisory committee’s approach simply assigns that responsibility to the highest reviewing court. The advisory committee seems to suggest that, as with law, there is discretion involved in deciding a question of social fact. It thus comes uneasily close to suggesting that there is no objective truth that can be discovered and tested.<sup>291</sup>

---

286. Davis, *supra* note 145, at 93.

287. Monahan & Walker, *supra* note 53, at 487.

288. FED. R. EVID. 201 advisory committee’s note.

289. *Id.* (“Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.”) (quoting Davis, *supra* note 145, at 82).

290. *Id.* (stating that social facts should not be subject to “any requirement of formal findings at any level” and courts should merely “leave open the possibility of introducing evidence through regular channels in appropriate situations”) (emphases added).

291. See FAIGMAN, *supra* note 32, at 23–26 (describing, and disagreeing with, view that all scientific assertions are inherently subjective and normative); Shawn Lawrence Otto, *America’s Science Problem*, 307 SCI. AM. 62, 71 (2012) (criticizing “post-modernist” view that truth is relative and inherently subjective).

The idea that social facts cannot be tested for objective truth is incompatible with our system of justice, which is founded upon truth.<sup>292</sup> Indeed, Thomas Jefferson's very conception of democracy assumes that "the world is knowable and that objective, empirical knowledge is the most equitable basis for public policy."<sup>293</sup> There is a current best view for social fact questions.<sup>294</sup> Scientific claims, and perhaps social science claims in particular, are often hotly debated or clouded with uncertainty.<sup>295</sup> But case-specific facts as straightforward as whether the defendant ran a red light are also subject to doubt. These latter facts often rely on memory, imperfect senses such as sight or hearing, and other factors that render certainty elusive. This should not be a license to give up on a search for truth, a search for which the adversary system was especially designed.<sup>296</sup> The reality of uncertainty and the possibility of error should be openly addressed and reflected in legal standards that apportion the risk of error in accordance with constitutional values.<sup>297</sup> This is a very different proposition than treating facts as so unknowable or untestable that the finality of an appellate court's own assessment is the best we can hope for.

### III.

#### A FRAMEWORK FOR APPELLATE REVIEW OF SOCIAL FACTS

Having considered the rationales for the "clearly erroneous" standard and the exception for social facts and concluded that the exception is not justified, this Article next examines Rule 52(a)(6)'s application to social facts. Part III.A considers the overarching constitutional values that judicial factfinding and appellate review are meant to serve in constitutional rights cases. Part III.B proposes a framework for applying the "clearly erroneous" standard to social facts. It first identifies and sets aside some special categories of social "facts," and then proposes what the "clearly erroneous" standard should look like as applied to constitutional social facts, offering factors that may point to gaps or clear error in trial courts' factfinding. Finally, Part III.C addresses particular

---

292. *See, e.g.,* *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9, 15 (1st Cir. 1997) (discussing "adversarial system's search for truth"); *Wash. Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 30-31 (D.C. Cir. 1988) (emphasizing importance of adversarial system in "testing for truth"); *United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (asserting that "[t]ruth is the essential objective of our adversary system of justice"); *Borgmann, supra* note 76, at 53-56; *Cooper, supra* note 103, at 657 ("[T]he matter [of factfinding] is treated as one of right and wrong, not one of discretion.").

293. *Otto, supra* note 291, at 71.

294. *See generally* PHILIP KITCHER, *SCIENCE, TRUTH, AND DEMOCRACY* 1-53 (2003) (arguing for the objectivity of truth); *GOLDMAN, supra* note 186, at 41-68 (1999). Despite the fact that we may later discover scientific "truths" to have been mistaken, we must always strive for the best current view, just as we do with case-specific facts. The fact that generally applicable rules of law are based upon potentially shifting social facts simply means that we must build in a mechanism for revisiting such facts in the future. *See generally* Benjamin, *supra* note 143 (proposing how best to accommodate changing social facts in lawmaking).

295. FAIGMAN, *supra* note 32, at 162.

296. *See supra* note 292.

297. *See* FAIGMAN, *supra* note 32, at 162.

concerns raised by the possibility of lower court conflicts and divided expert opinion.

### *A. Promoting Constitutional Values*

Because the exceptions to Rule 52(a)(6) are so ill-defined, they have been a source of great mischief. Courts seem to defer (or not) based on their own biases or whims rather than on a disclosed set of principles.<sup>298</sup> There is no reason to think that this serves constitutional rights claimants, or the public, well. It also denies the parties notice and predictability and makes it hard for litigators to advocate effectively for their clients.<sup>299</sup>

Judicial review of the social facts underlying laws challenged as unconstitutional must serve some purpose within our constitutional system. Otherwise, we should revert back to the idea of deferring to legislatures on facts underlying legislation, and courts should not bother reviewing social facts in constitutional cases.<sup>300</sup> So, if courts are to review facts, we must first consider why. Many of the theories for reform in judicial factfinding have not made this case one way or the other. The proponents of these theories have urged improvement in how judges absorb facts, but they have not said toward what end.<sup>301</sup> These arguments for reform skip over the reasons *for* judicial factfinding and jump straight to the problems raised by such factfinding. But without first clarifying the normative goals to be achieved by reform, we have no way to measure “improvement” in judicial factfinding processes.<sup>302</sup>

Kenneth Culp Davis, for example, stresses that it is important for courts to get the social facts right in constitutional cases but he does not state to what end. Instead, he stresses the dubious capacity of both district courts and the Supreme Court to do a good job of finding social facts.<sup>303</sup> By focusing on the potential downsides of judicial social factfinding, Davis’s analysis presents judicial social factfinding as fraught with peril and offers no affirmative vision of the good that judicial social factfinding should aim to advance.<sup>304</sup>

Some commentators have argued that appellate courts are the more appropriate forum for finding social facts because other interested parties can

---

298. See Anderson, *supra* note 262, at 1 (arguing that “empirical evidence suggests that the appellate courts routinely revisit factual determinations by the trial courts, although often not transparently, and that appellate courts do so on an ideological basis”).

299. See Karst, *supra* note 9, at 109; Wright, *supra* note 106, at 782.

300. See *supra* text accompanying notes 6–9.

301. Woolhandler, *supra* note 9, at 123–24 (asserting that various scholars’ “claims that regularized reception of legislative facts will lead to better substantive decisions ultimately fails because of [these scholars’] own inability to tell us what is a good decision”).

302. See *id.*

303. Davis, *supra* note 199, at 940–42.

304. Dean Alfange, Jr. more effectively presents such a vision. See Alfange, *supra* note 7, at 637–39 (discussing federal courts’ “vital role” in ensuring justice, protecting constitutional rights, and legitimating governmental power, and describing the important role judicial social factfinding plays in this endeavor).

weigh in via amicus briefs.<sup>305</sup> However, the proper forum for interest representation is the legislature.<sup>306</sup> The judicial process is not designed to serve as a public opinion survey<sup>307</sup> or to ensure that every perspective on the law is represented.<sup>308</sup> This justification for appellate court factfinding again fails to explain why social factfinding must occur within the judicial branch at all.

This Article urges that one of the most important functions of judicial factfinding in constitutional rights cases is to ensure that laws that infringe basic constitutional rights not do so based on a flimsy or flawed factual foundation. The federal courts serve as an important check on majoritarian oppression. While courts should not lightly overturn democratically passed laws, one of their critical roles is to protect individuals from having their constitutional rights unfairly restricted by the power of the majority.<sup>309</sup> Part of this responsibility entails overturning laws premised on bias, misapprehension, or fear.<sup>310</sup> Unlike a legislature,<sup>311</sup> a court is responsible for neutral, balanced factfinding. The well-established adversarial process helps to ensure a level of integrity in the factfinding process that is missing in legislative deliberation.<sup>312</sup>

Two aspects of Rule 52(a) help to further the federal courts' duty to ensure that rights-infringing laws rest on a sound factual footing. The first is the

---

305. See, e.g., FAIGMAN, *supra* note 32, at 100; cf. Gorod, *supra* note 19, at 69–70 (arguing for allowing more individuals to introduce social fact evidence at trial level by expanding standing rules rather than relying on amicus briefs submitted on appeal).

306. See Woolhandler, *supra* note 9, at 125.

307. See Miller & Barron, *supra* note 74, at 1217.

308. See Woolhandler, *supra* note 9, at 125; cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (Justice Holmes asserting, in the context of the right to participate in a hearing to contest increase in valuation of taxable property, “[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption”).

309. See FAIGMAN, *supra* note 32, at 125 (constitutional rights cases balance the majority’s “legitimate power” to enact laws of its choosing against constitutionally protected rights of individuals); Alfange, *supra* note 7, at 638 (“[T]he judiciary remains a part of the policy making sphere of government with unique and inescapable responsibilities . . . [including] to insure that the legal system is always directed toward coincidence with the society’s best conceptions of justice, to legitimate governmental power when the public interest demands the exercise of that power, and to protect constitutional rights against needless incursions by government or, in some cases, individuals.”).

310. See, e.g., *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (cautioning against ready acceptance of a law’s factual basis in the face of widespread public fear and reminding that “[m]en feared witches and burnt women”); cf. *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969) (in context of agency factfinding, noting courts’ important role in determining that law’s justifications “rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat”).

311. See Borgmann, *supra* note 19, at 40–41 (discrediting the myth of superior legislative factfinding competence).

312. Cf. Miller & Barron, *supra* note 74, at 1218 (“[E]ven as the Supreme Court moves to become a third legislative chamber by issuing general norms, it still remains a court. It looks like a court and acts like a court. Thus, there are certain institutional requirements that should be honored.”); see also *infra* notes 328–32.



rule's requirement of written findings of fact.<sup>313</sup> This requirement serves an important function in helping parties to challenge erroneous findings and reviewing courts to determine whether the district court's findings are sufficiently supported by the evidence. As commentators have pointed out, the uncertainty surrounding judicial treatment of social facts means that courts, especially higher courts, often do not candidly disclose the social facts upon which they have relied in reaching their legal conclusions.<sup>314</sup> If Rule 52(a) applies, trial judges must make their findings explicit.<sup>315</sup> And once these findings are spelled out, the parties and the appellate court have a common starting point from which to frame their arguments and analysis.<sup>316</sup> Judge Walker was both criticized and praised for his detailed findings on the California same-sex marriage ban,<sup>317</sup> but all can agree that the findings made his analysis and conclusions transparent and provided a clear basis for appellate review.<sup>318</sup> It is true that "[t]he express findings that accompany a case tried to a judge provide a basis for second-guessing a determination at the trial level that is not present when a jury brings in a general verdict."<sup>319</sup> But the "clearly erroneous" standard would still be far more deferential than independent review. Moreover, slightly closer scrutiny of social factfinding than jury factfinding should alleviate some of the concerns of commentators who are

---

313. FED. R. CIV. P. 52(a)(1), (2).

314. See, e.g., Gorod, *supra* note 19, at 6.

315. Interestingly, although the Supreme Court has intimated that Rule 52(a)(6) does not apply to social facts, district courts typically comply with the Rule's requirement for written factual findings even as to issues of social fact. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010) (holding a trial to address "significant disputed factual questions" on same-sex marriage ban and issuing eighty findings of fact including social facts), *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); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004) (holding trial to determine constitutionality of PBABA and issuing extensive findings of social fact), *aff'd*, 413 F.3d 791 (8th Cir. 2005), *overruled by Carhart II*, 550 U.S. 124 (2007); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004) (same), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *overruled by Carhart II*, 550 U.S. 124; *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000) (upholding provisions of 1997 Vermont Campaign Finance Reform Act after ten-day trial and issuing findings of social fact), *aff'd in part and vacated in part*, 300 F.3d 129 (2d Cir. 2002), *op. withdrawn*, 2002 U.S. App. LEXIS 28176 (2d Cir. 2002); *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (granting motion for preliminary injunction against provisions of the Communications Decency Act after extensive evidentiary hearings and issuing 123 findings of fact including social facts), *aff'd*, 521 U.S. 844 (1997).

316. See Jackson, *supra* note 37, at 5.

317. Compare Edwin Meese III, *Prop. 8 Ruling Ignores Precedent, Evidence, and Common Sense*, WASH. POST, Aug. 17, 2010, at A15, with Lithwick, *supra* note 22.

318. The Ninth Circuit panel reviewing Judge Walker's decision, however, chose to sidestep the factual issues. See *Perry*, 671 F.3d 1052.

319. Christie, *supra* note 105, at 53; see also Cooper, *supra* note 103, at 648–49 (explaining that "clearly erroneous" standard is less deferential than that applied to jury factfinding, as reflected in part by the requirement of written findings of fact).

concerned that excessive deference will undermine appellate courts' authority over formulating generally applicable rules of law.<sup>320</sup>

The second beneficial aspect of Rule 52(a) is the “clearly erroneous” standard. By requiring appellate deference to the trial court’s findings unless there is clear error, the “clearly erroneous” standard recognizes the adversarial process of a trial as the best way to answer disputed questions of fact.<sup>321</sup> As discussed above,<sup>322</sup> a trial provides a particularly helpful process for examining social facts. Compared with the legislative process, trials are much better suited to dispassionate and thorough social factfinding.

Legislative factfinding is not set up to be evenhanded.<sup>323</sup> Rather, it is unabashedly partisan.<sup>324</sup> Whether in Congress or a state legislature, the controlling party usually has control over key aspects of the process, including the number of witnesses who will testify for each side. Moreover, people often forget that the only audience for this hearing on the facts is the legislative committee, which comprises a small fraction of those who will vote on the measure. Once the bill gets to the floor, deliberation consists of lawmakers giving partisan speeches for or against the measure. In addition, legislative factfinding does not include an impartial judge to evaluate the facts presented. Rather, the party in control acts as both advocate and judge. This system may be fine for determining what policy course is preferable. But when minority groups or constitutional rights are in danger of majoritarian oppression, this is exactly when the availability of judicial reexamination of the facts is critical.<sup>325</sup>

Plaintiffs who challenge a law as unconstitutional seek a very different kind of hearing than what they had in the legislature, namely an impartial hearing on facts that the legislature may well have disregarded.<sup>326</sup> These facts may undermine the stated rationale for the law, or they may demonstrate the law’s predicted harms to rights-holders. Institutional legitimacy and respect for democracy and separation of powers demand that factfinding at the judicial level serve a very different function than at the legislative level. Legislators, as representatives of the public, are presumed to know and act upon majoritarian

---

320. See Cooper, *supra* note 103, at 649 (referring to two functions of the federal courts of appeals, “the correction of error in individual cases and the development of the law in ways that will guide future conduct and future litigation”).

321. See Gorod, *supra* note 19, at 11; Jackson, *supra* note 37, at 2.

322. See *supra* text accompanying notes 189–97.

323. See Borgmann, *supra* note 19, at 639–46 (comparing relative factfinding capacities of legislatures, trial courts, and appellate courts).

324. See Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1172–77 (2007) (reviewing MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005) and summarizing forces that produce inferior factfinding in the legislative realm).

325. Faigman et al., *supra* note 175, at 84.

326. See Paul Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. BAR REV. 406, 412 (1968) (commenting that, in an adversary system, “as a prelude to the dispute being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments”).

demands. This is not the job of the courts.<sup>327</sup> At their best, what courts—and in particular trial courts—do effectively is clear away the factual confusions sown by majoritarian passions and examine social issues impartially and deliberately.<sup>328</sup>

The federal trial courts are better suited than appellate courts to this kind of careful, dispassionate review. A trial provides the opportunity for a full presentation of the factual claims on both sides and for a judge's methodical evaluation of these claims.<sup>329</sup> The parties are able to cross-examine the experts testifying on the other side. The judge generally allocates the amount of time needed to allow all of the evidence to be presented, which may take weeks or even months. The judge is able to assess the credibility of the experts by hearing their testimony in person and, if not satisfied by their answers, she may herself ask questions of the experts. The judge may employ her own, neutral expert to help her understand the information.<sup>330</sup> Trial judges live and breathe a case in a way that legislatures and appellate judges do not.<sup>331</sup> While this system cannot guarantee excellent factfinding, it presents the best possible conditions for it.<sup>332</sup>

A trial cannot be replicated on appeal, however, and the “clearly erroneous” rule recognizes this.<sup>333</sup> Repeating a full airing of factual issues on appeal would waste resources. There should be a single place where the “main event” happens. Then, a process for review is needed in the event things go wrong at the trial level. The established mechanism for this is appellate review for clear error. As discussed above, there is nothing in the rule or its history that says this standard should not be applied to social facts in constitutional rights cases.<sup>334</sup>

In addition to promoting efficiency, the “clearly erroneous” standard reflects the relative structural capacities of trial and appellate courts. Appellate courts cannot claim to be better at factfinding than district courts.<sup>335</sup> We have already examined the dangers of unpoliced, wide-ranging factfinding on appeal

---

327. See Woolhandler, *supra* note 9, at 125.

328. See Solove, *supra* note 245, at 1017–19.

329. See FAIGMAN, *supra* note 32, at 133 (describing district courts' advantages in evaluating expert evidence).

330. FED. R. EVID. 706.

331. See Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 251 (1991) (discussing “benefits of the trial judge's having lived with the case over a sustained period”).

332. Borgmann, *supra* note 19, at 41.

333. *Id.* at 45 (arguing that “[t]he trial courts' advantages in fact-finding are not all replicated at the appellate level”); see also Gorod, *supra* note 19, at 6 (arguing that “appellate courts' failure to rigorously test their factual findings can undermine the quality of those findings”).

334. See *supra* text accompanying notes 106–09.

335. See Wright, *supra* note 106, at 781 (“If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges.”).

or reliance on amicus briefs of dubious quality.<sup>336</sup> Evidence is adduced at trial. We do not have a formal system for this at the appellate level, whether for case-specific facts or social facts.<sup>337</sup> Rule 52(a)(6) recognizes this in appointing the trial court as the authoritative factfinder.

### B. Rule 52(a)(6) and Social Facts

Given the malleability of the “clearly erroneous” standard, one might wonder if courts need a social facts exception at all, and whether there is any benefit to be gained from eliminating it. After all, one might argue, where an appellate court disapproves of the trial court’s factfinding, it could simply characterize those findings as clearly erroneous under Rule 52(a)(6).<sup>338</sup> Thus, the argument goes, appellate courts really need a social facts exception to Rule 52(a)(6) only for those rare instances when they are willing to admit that a district court’s finding is reasonable, but nevertheless wish to disregard it.<sup>339</sup>

This fairly cynical prediction, however, overlooks that a major problem with the social facts exception is its inscrutability. Courts applying the exception typically do not even openly acknowledge that they are doing so. Indeed, they often roam unapologetically far beyond the record without so much as a nod to the usual requirement for deference to the trial court’s findings.<sup>340</sup> Moreover, the above argument assumes that appellate judges are devious in how they treat social facts. But it seems just as likely that judges are genuinely confused about what kind of deference a trial court’s social factfinding warrants.<sup>341</sup> We should “assume that appellate judges do make a conscientious attempt to confine their review to that authorized by law, and that, so far as human frailties permit, they do not regard a finding as clearly erroneous merely because it differs from the finding they might themselves have made.”<sup>342</sup> By holding appellate courts to a defined “clear error” standard, Rule 52(a)(6) encourages judicial accountability, even if it cannot guarantee it. When appellate courts apply the “clearly erroneous” standard, they must at

---

336. See *supra* text accompanying notes 207–24.

337. Commentators have offered a variety of possible structural reforms to improve the reception of social factfinding at the appellate level, but these are unlikely to be implemented any time soon. See, e.g., Gorod, *supra* note 19, at 68–75 (proposing a variety of reforms including expanding the standing doctrine); Larsen, *supra* note 32, at 1263 (proposing that “either we shut down in house factfinding with stricter procedural rules, or we open up the evaluation of legislative fact to invite broader participation”); Monahan & Walker, *supra* note 53 (proposing relying exclusively on briefs and independent judicial research rather than expert testimony).

338. Christie, *supra* note 105, at 26; Wright, *supra* note 106, at 770.

339. Christie, *supra* note 105, at 26.

340. See, e.g., Larsen, *supra* note 32, at 1260 (describing how Justice Breyer “is candid about the fact that the Internet provides him a powerful new tool for gathering factual data, whether or not that data appears in the briefs”).

341. See, e.g., *Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *McPherson v. Rankin*, 786 F.2d 1233, 1237 (5th Cir. 1985).

342. Wright, *supra* note 106, at 770.

least contend with the trial record. If they choose to reject the trial court's findings, they must explain their reasoning rather than simply ignore the findings.<sup>343</sup> An understanding among federal judges that Rule 52(a)(6) applies to social facts will thus help guide courts and shine light on judicial use of social facts in constitutional decision making.

### *1. Ultimate Facts and "Thick" Social Facts*

As we have seen, the boundary separating social facts from case-specific facts is not exactly crystalline. Indeed, the indistinct line between the two categories is part of the justification for applying a uniform standard of appellate review.<sup>344</sup> Besides case-specific facts, two other types of factual questions are sometimes also confused with questions of "social fact"—mixed questions of law and fact (also known as "ultimate facts"),<sup>345</sup> and normative judgments that masquerade as social facts. As to these, it is less clear that Rule 52(a)(6) should apply. This Section considers these two categories of facts in turn and explains why.

As discussed above, the Supreme Court has not established a clear rule for whether or when appellate courts should defer to trial courts' findings of ultimate facts.<sup>346</sup> Commentators likewise do not agree on whether deference is a good idea.<sup>347</sup> For purposes of this Article, the important point is that there is no reason to treat ultimate social facts differently from ultimate case-specific facts. Both present the same potential concerns regarding appellate authority over lawmaking. Thus, any rule that does not call for *de novo* review or deference across the board must be justified on some ground other than the social versus case-specific nature of the facts.

A second common area of confusion that arises when courts address issues of constitutional social fact is a blurring between normative judgments and empirical fact. The social fact questions in constitutional rights cases are often hot-button, controversial issues, and courts tend to overlook the extent to which what they label as "facts" are layered with moral opinion.<sup>348</sup> Suzanne

---

343. See Jackson, *supra* note 37, at 5.

344. See *supra* Part I.A and text accompanying notes 281–82.

345. "Ultimate facts" is usually used to reference mixed questions of law and case-specific facts, but the term can also describe mixed questions of law and social fact. See *supra* text accompanying notes 92–95.

346. See *supra* notes 92–95; *supra* Part II.D.3.

347. Compare Adamson, *supra* note 17 (arguing in favor of independent review) with Lee, *supra* note 331, at 290 (arguing in favor of "clearly erroneous" standard "except where such review would create meaningful precedent").

348. Some would argue that, to the extent a "fact" is normative, it would more accurately be treated like law. See, e.g., Monahan & Walker, *supra* note 53, at 489 ("The principal similarity between social science research and fact is that both are positive—both concern the way the world is, with no necessary implications for the way the world ought to be. Both refer to the empirical reality that we infer from our senses, rather than to the value we impute to that reality. Law, in contrast, is

Goldberg calls these “thick facts.”<sup>349</sup> Ideally, when addressing these kinds of facts, courts would expressly distinguish the plainly empirical (“thin”) facts from the moral judgments they draw from those facts. Clarifying these boundaries would encourage courts to “expose and defend the norms that shape their decisions.”<sup>350</sup> In reality, courts rarely do this. A good clue for when an empirical fact has crossed over from thin to thick is when it incorporates a generalized appraisal of desirability: that something is good or bad, or that it produces benefits or harms.

*United States v. Virginia*, which addressed an equal protection challenge to the male-only admissions policy of the Virginia Military Institute (“VMI”), combined empirical questions of social fact with morally encumbered ones. In particular, the case concerned whether single-sex education is “beneficial.”<sup>351</sup> There may well be non-value-laden, subsidiary facts that would help to answer this question. For example, the district court referred to a study, “not questioned by any expert,” demonstrating that at single-sex colleges “[s]tudents of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.”<sup>352</sup>

The broader question whether men or women “benefit” from a particular style of education, however, contains an undeniably normative aspect. The Supreme Court did not squarely address the “thick” nature of this question, but rather changed the subject.<sup>353</sup> Justice Scalia, dissenting, reproached the majority for failing to apply Rule 52(a)(6) to the district court’s factfinding.<sup>354</sup> But whether men and women ultimately “benefit” from single-sex education is hardly a straightforwardly empirical question. It is inextricably bound up with weighty judgments about gender roles and stereotypes and the meaning of

---

normative. It does not describe how people do behave, but rather prescribes how they should behave.”).

349. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1964–65 (2006). An example of such a “thick fact” is the assertion that “people with mental retardation are ‘socially inadequate’ and ‘manifestly unfit.’” *Id.* at 1965 (quoting *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

350. *Id.* at 1972.

351. *United States v. Virginia*, 766 F. Supp. 1407, 1411 (W.D. Va. 1991) (“The record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females.”).

352. *Id.* at 1412. The Supreme Court agreed that it was undisputed in the case that single-sex education affords pedagogical advantages to “at least some students.” *United States v. Virginia*, 518 U.S. 515, 535 (1996).

353. *United States v. Virginia*, 518 U.S. at 535. The Court accepted the claim that single-sex education can carry benefits for some but asserted that “Virginia has not shown that VMI was established . . . with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.” *Id.*

354. *Id.* at 596 (Scalia, J., dissenting). Because it purported to accept that single-sex education can be “beneficial,” the Court took issue with Justice Scalia’s indictment. *Id.* at 535 n.8 (majority opinion) (“[T]he dissent sees fire where there is no flame.”).

equality.<sup>355</sup> While the Supreme Court rightly deferred to many of the underlying “thin” facts found by the district court, for example that most women would not choose VMI’s “adversative training” approach,<sup>356</sup> it properly reserved for itself the determination of whether these facts could justify sex discrimination.

*Miller v. Fenton* is a rare case in which the Court acknowledged the confluence of norm and fact in constitutional adjudication. In *Miller*, the Court considered the standard for determining whether a confession was “voluntary.” While the underlying factual issue of voluntariness concerns “whether the defendant’s will was in fact overborne,” the Court explained that the admissibility of a confession turns equally on “whether the techniques for extracting the statements . . . are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means.”<sup>357</sup> The Court pointed out that “[t]his hybrid quality of the voluntariness inquiry” subsumes “a ‘complex of values,’ [which] militates against treating the question as one of simple historical fact.”<sup>358</sup>

Like in deciding the admissibility of a confession, the courts cannot avoid deciding many of the normative issues embedded in constitutional social facts. Thin facts alone cannot answer whether governmental action has violated individual constitutional rights.<sup>359</sup> It is “the norms embedded in the ‘thick’ facts or associated with the ‘thin’ facts [that] do the explanatory work in adjudication.”<sup>360</sup> Such social values change over time, and these evolving norms in turn affect the substantive meaning and scope of constitutional rights. It is important that the judicial system accommodate such transformation. If it did not, decisions like *Brown v. Board of Education* would not have been possible. Responsibility for developing the meaning of the Constitution over

355. See Goldberg, *supra* note 349, at 1072 (distinguishing between empirical evidence of biological differences between men and women and legal distinctions that can permissibly be based upon such differences). See generally David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135 (2009) (offering a critical analysis of the current trend toward single-sex education and the way in which it perpetuates gender essentialism and sex stereotyping).

356. *United States v. Virginia*, 518 U.S. at 542. The district court, for its part, admitted that “the VMI methodology could be used to educate women and, in fact, some women . . . may prefer the VMI methodology to the [state’s proffered alternative].” *United States v. Virginia*, 852 F. Supp. 471, 481 (W.D. Va. 1994).

357. *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

358. *Id.*

359. See Goldberg, *supra* note 349, at 1972; see also Dunagin v. Oxford, 718 F.2d 738, 749 n.8 (5th Cir. 1983) (en banc) (plurality opinion) (“The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.”).

360. Goldberg, *supra* note 349, at 1974; see also FAIGMAN, *supra* note 32, at 148 (“It can only very rarely be said that any particular rule would have been different if the facts had been different. . . . Constitutional doctrinal facts are almost invariably set forth as part of a litany of premises offered to support a rule or standard. Rarely do they stand alone, and when they do, they are often considered . . . as proxies for normative principles or values.”).

time must reside with the appellate courts.<sup>361</sup> Besides, there is no particular additional expertise that trial courts bring to making these kinds of moral judgments. For these reasons, as with questions of law, appellate courts must retain independent review over the normative aspects of social fact questions, especially where constitutional rights are at stake.

## 2. Applying the “Clearly Erroneous” Standard to Social Facts

Having clarified the categories of facts that should not be subject to the “clearly erroneous” standard, this Article now turns to setting forth a framework for applying that standard to social facts in constitutional rights cases. This Section first reviews the fundamental purposes of judicial review generally, and appellate review specifically, in these cases. Focusing upon these purposes helps to show why the “clearly erroneous” standard is appropriate. This Section then offers some specific factors that appellate courts should apply to identify clear error below.

Appellate courts applying the “clearly erroneous” standard to social facts should recall the overarching reasons for federal judicial review of the facts that underlie rights-encroaching laws, as well as the particular purposes of appellate review. As discussed above, a primary purpose of *judicial* fact review in constitutional rights challenges is to ensure that the legislature has taken action based upon a solid factual foundation and not upon bias, fear, or misunderstanding.<sup>362</sup> The purposes of *appellate* review of the trial court’s factfinding in such cases are to ensure that justice is done in the case at hand by examining the factfinding for errors, and to ensure that any impact the social factfinding has on generally applicable rules of law is consistent with existing doctrine and constitutional principles.<sup>363</sup>

In most cases, these purposes do not warrant a free-ranging appellate-court inquiry into social facts not developed at trial. Rather, an appellate court’s focus in the first instance should be on the trial record. Appellate courts should consider appointing, when necessary, an expert to help the court understand technical concepts. But the courts should not permit these experts to introduce new evidence outside of the adversary process.<sup>364</sup> Rule 52(a)(6)’s “clearly erroneous” standard serves to direct the appellate court’s attention to the trial record. This attention is helpful even if the appellate court ultimately disagrees with the trial court’s findings of fact, because it keeps the facts anchored in the

---

361. See, e.g., Lee, *supra* note 331, at 247–48 (discussing proper role of appellate courts, including primary role of “maintaining doctrinal uniformity”).

362. See *supra* notes 309–12.

363. See Lee, *supra* note 331, at 247–49.

364. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 550 (1974) (“What an appellate court needs, in my view, is an aide who is not a witness so much as a kind of hybrid between a master and a scientific law clerk, a scientific expert who might be available, at the call of the appellate court, not to give evidence or resolve factual or technical issues, but to advise a court so that it could better understand the record.”).



adversarial and gate-keeping processes that exist only in the trial court. It will also more likely prompt a remand in appropriate cases.

In *Beazer v. New York City Transit Authority*, the Second Circuit conducted such review of a trial court's findings of social fact. The issue in this case was whether participants in methadone maintenance programs are sufficiently likely to relapse to justify a blanket exclusion from employment by the New York City Transit Authority.<sup>365</sup> The circuit court concluded, on the basis of the "one-sided record" before the district court, that the evidence supported the district judge's finding that, "many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures."<sup>366</sup>

Since courts have not consistently applied Rule 52(a)(6) to social facts, there is no developed case law to help judges identify what trial conditions signal potential clear error in a trial court's social factfinding. Notably, although the "clearly erroneous" standard is deferential, it is less deferential than the standard applied to jury factfinding.<sup>367</sup> Given the important competing principles—individual rights versus the separation of powers—at stake when laws are challenged as unconstitutional, this somewhat closer review of the trial record is appropriate. Indeed, the "clearly erroneous" standard itself, assisted by some general guidelines or factors to help courts identify the presence or risk of clear error, can address many of the concerns raised in defense of a social facts exception. These factors can assist in clarifying when "a mistake has been committed," thus helping to rein in Rule 52(a)(6)'s infamous malleability.<sup>368</sup>

Appellate courts should look for signs of bias or carelessness, such as the district judge's wholesale and uncritical adoption of one party's proposed findings of fact.<sup>369</sup> They should also be aware of fact patterns that present a heightened risk of unconscious judicial bias, including when a party exercises a controversial right (like abortion) or belongs to a group subject to widespread antipathy (such as Muslims).<sup>370</sup> Reviewing courts should also be mindful of the factfinding problems that may arise from a lack of, or an imbalance in, parties' resources.<sup>371</sup> A related concern not necessarily tied to financial resources arises when counsel obviously lack relevant professional experience.<sup>372</sup>

---

365. *Beazer v. N.Y. City Transit Auth.*, 558 F.2d 97, 99 (2d Cir. 1977).

366. *Id.*

367. *See Cooper, supra* note 103, at 648–49.

368. *See id.*

369. *Id.* at 655 (describing case in which district court opinion was rendered two years after a six-day trial ended, and then only upon issuance of a writ of mandamus to compel entry of judgment, and where the district court then adopted much of one party's proposed findings of fact and conclusions verbatim, including typographical errors and erroneous mathematical calculations).

370. *See, e.g., Sisk & Heise, supra* note 272 (presenting empirical evidence of bias against Muslims in federal court system).

371. *Davis, supra* note 51, at 1552–54, 1580 (discussing how lack of litigation resources can affect the presentation and judicial reception of key social facts). Peggy Davis focuses especially on

Another red flag that calls for closer review of the trial court record is when two or more trial court opinions (whether from the same jurisdiction or not) reach opposing conclusions on the same issue of fact.<sup>373</sup> Similarly, appellate courts should look more closely at findings of fact that concern a hotly debated topic of social science on which there is evenly divided opinion among credible experts.<sup>374</sup> The presence of these factors should prompt a closer review of the trial record to ensure that the record is complete or that the evidence supports the judge's findings.

Facts may also be insufficiently developed in the trial court because of the procedural posture of the case. Rule 52(a) requires written findings of fact for preliminary injunction hearings.<sup>375</sup> But, as Edward Cooper acknowledges, “[t]he procedure leading to such interlocutory decisions . . . may be much less thorough than full trial procedure, and indeed may be nothing more than a contest of affidavits.”<sup>376</sup> On the other hand, the appellate court has no advantage over the trial court in assessing the factfinding following such a hearing.<sup>377</sup> Moreover, since the injunction is not permanent, mistakes of fact are generally not as troubling in these cases. However, because courts and lawyers often treat findings of social fact as precedential,<sup>378</sup> appellate courts should review more carefully findings of fact decided at the preliminary injunction

---

cases where plaintiffs seek individual, case-specific relief and where social facts play an important, but background, role. For example, where attorneys seeking to prevent removal of children from a parent's custody have not presented evidence to counter the theory of so-called “psychological parent,” judges have tended to accept the psychological parent theory unquestioningly. *Id.* at 1552–53, 1594. These issues may arise less frequently in the context of constitutional challenges to statutes, where the entire case is based on social facts and the cases are likely to be litigated accordingly.

372. Miller & Barron, *supra* note 74, at 1210, 1242 (pointing out that “[l]awyers are not fungible” and bring “varying degrees of competence” and experience to litigation).

373. *See infra* Part III.C.

374. *Id.* The mere presence of factual disagreement, however, should not necessarily cast doubt upon a judge's factfinding favoring a rights claimant. Because the Supreme Court has rejected laws based on pure moral disapproval or animus, *see, e.g.*, U. S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973); *Romer v. Evans*, 517 U.S. 620 (1996), governments may manufacture post hoc factual justifications for laws clearly motivated by such hostility. These cases are often readily identifiable by the one-sidedness in the quantity and quality of the evidence. Judicial factfinding plays a critical role in revealing such factual “disagreements” for what they are. *See generally* Borgmann, *supra* note 19 (using case studies in three different contexts to illustrate this phenomenon); *see, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (discussing one-sidedness of factual evidence in case addressing ban on same-sex marriage), *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).

375. FED. R. CIV. P. 52(a)(1), (2). Rule 52(a)(2) provides, “In granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action.”

376. Cooper, *supra* note 103, at 656 (nevertheless arguing, with respect to case-specific facts, that “clearly erroneous” standard should apply to such hearings); *see also* *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002) (“[T]here is generally a reduced evidentiary standard in preliminary injunction motions . . .”).

377. *See* Cooper, *supra* note 103, at 656.

378. *See, e.g.*, Larsen, *supra* note 236.

stage and should make clear in their opinions the preliminary nature of any such findings.

Finally, because social facts are broad in nature and affect more than just the parties to a litigation, the parties may not present all of the facts needed to resolve a question of social fact. This is particularly so if the court is inclined to rule in a broader way than the parties litigating the case had originally envisioned.<sup>379</sup> Whether appellate courts' proactive broadening of issues is advisable is well beyond this Article's scope, but certainly whenever the courts employ this tactic, they should remand the issue if possible and at the very least allow both parties the opportunity to brief the issue fully.

Even if none of the above factors is at issue, courts might also consider closer review whenever a trial court's factfinding disadvantages a constitutional rights claimant. Such a right-preferential approach to appellate review is in keeping with the important role courts play in safeguarding against majoritarian oppression.<sup>380</sup> As David Faigman points out, in criminal cases, appellate courts only review verdicts that go against the defendant.<sup>381</sup> One can imagine a similar standard of appellate review in which appellate courts only independently review facts supporting district court holdings that are detrimental to constitutional rights.<sup>382</sup> Although trial judges are supposed to be neutral, they are of course not immune to the social forces that can produce biased or partisan factfinding.<sup>383</sup> This fact alone may justify a rights-preferential approach as an extra safeguard against impermissible majoritarian encroachment on rights. In *Bose*, the Court emphasized the judiciary's important role as rights protector; although the opinion addressed case-specific

---

379. See Gorod, *supra* note 19, at 31–32 (discussing *Citizens United* as example of this phenomenon); Miller & Barron, *supra* note 74, at 1205 (discussing how, in light of the Justices' suggestive questioning at oral arguments in *New York Times v. Sullivan*, the *Times*'s lawyer "apparently sensed the Court's willingness to fashion a first amendment rule broader than the rule he had suggested" and subtly changed his position).

380. See *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (asserting that where a majority legislatively imposes burdens on itself to benefit a minority, the same strict scrutiny should not be applied as when the majority burdens the rights of a minority); Borgmann, *supra* note 19, at 38; Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1699 (2008).

381. FAIGMAN, *supra* note 32, at 124.

382. *Id.* at 125. Faigman posits, but ultimately rejects, a similar, hypothetical rights-preferential approach for substantive review of civil jury verdicts. *Id.*

383. See, e.g., Sisk & Heise, *supra* note 272, at 231 ("[T]he persistent uneasiness of many Americans about Islam and its followers appears to have filtered into the attitudes of such well-educated and independent elites as federal judges."); see also C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 37 (1996) (contending that in federal district courts "partisan effects are concentrated primarily in the realm of civil rights and liberties, and that partisan polarization in this realm is increasing").

rather than social facts, the Court clearly focused on whether the trial record contained sufficient evidence to support the deprivation of a right.<sup>384</sup>

There are a number of routes through which a reviewing court may become aware of social facts missing from the trial record, including the court's own knowledge or research, the parties' briefing on appeal, amicus submissions, or a decision on the same issue from another jurisdiction. Appellate courts should continue to rely on these sources to identify gaps in the record even if Rule 52(a)(6) applies to social facts. The problem with the social facts exception is not the *uncovering* of new potential issues of fact on appeal but appellate courts' haphazard and *ex parte* *resolution* of these issues. Too often, when appellate courts become aware of "missing" social facts, they arbitrarily decide how to fill in the gaps and do not feel compelled to remand the case.<sup>385</sup> If the missing facts were case-specific, an appellate court would much more likely remand than try to resolve the issue itself. The same should occur with determinative social facts.<sup>386</sup> If, upon review, the appellate court sees a need for more evidence on a matter crucial to its decision, it should remand for further development by the trial court or, if impracticable, ask the parties to brief the issue. The court should not rely *ex parte* on amicus briefs or its own research; however, with notice to the parties, some factual supplementation may be proper in cases of insufficient party resources or other significant barriers to a full development of the facts in the trial court. Extra-record appellate court factfinding should generally be a last resort, however, given the unlikelihood that a court's own research or amici's typically partisan, unscreened submissions will be subjected to the appropriate vetting and deliberate weighing of the evidence that happens at trial.

In deciding whether to issue a remand, the appellate court should consider whether the parties dispute the facts in question, whether a trial would help to develop the facts and test their validity, and whether the judgment is final. If

---

384. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984) ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"). In *Bose*, the Court determined that *de novo* review of the actual malice question was appropriate. This Article, while supporting a rights-preferential, closer review of certain trial court findings, does not argue for *de novo* review because of the dangers that such unpoliced appellate-level factfinding presents.

385. *See* Miller & Barron, *supra* note 74, at 1190–91.

386. *See id.* at 1233–36 (suggesting "improving the method of dealing with the independent development of legislative fact and legal doctrine by the Supreme Court" by recommending that the Court remand to the trial court the issue whether to take notice of a particular question of social fact); *see also* Alfange, *supra* note 7, at 667–68 (defending value of Brandeis brief but conceding that, "[w]here an adequate trial of the facts is not held, . . . and the appellate courts find it necessary to be more fully informed on factual questions, a remand to the lower court for a more thorough trial would be entirely in order"). I qualify this suggestion by limiting it to "determinative" facts, recognizing that there are significant potential downsides to remands, including cost to litigants, delays in obtaining justice, and potential "infinite loops" of factfinding and appellate review. Benjamin, *supra* note 143, at 330; *see also supra* text accompanying notes 225–29.

the decision is made on a preliminary injunction motion, then the lower court will have a chance to address the new facts before it issues its final ruling.<sup>387</sup> At minimum, parties should be able to address any new facts introduced by the appellate court in briefs, for example to contest their legal significance. If there appears to be a legitimate dispute about the reliability or accuracy of the evidence, however, the balance tips toward a remand.

This approach is not without precedent. The Supreme Court has, on occasion, implicitly recognized the superiority of trial court factfinding by remanding when trial court proceedings have not produced an adequate factual record for a final determination of a law's constitutionality. In *Borden's Farm Products, Co. v. Baldwin*, the Supreme Court emphasized the importance of factual support in determining whether the government violated individual constitutional rights.<sup>388</sup> Because it lacked a sufficient evidentiary record to decide a key factual premise in the case—the effects on independent dealers of the government's fixing of milk prices—the Court remanded for further factual development.<sup>389</sup> The *Borden* Court stated, "We [have] held that before . . . questions of constitutional law, both novel and of far-reaching importance, [a]re passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'"<sup>390</sup> Parties and trial courts that know to expect this process will do a better job of, respectively, presenting and resolving these social facts the first time around.<sup>391</sup>

### C. Lower Court Conflicts and Divided Expert Opinion

One of the reasons commonly given for why appellate courts must review social facts independently is that trial courts may reach conflicting conclusions about the same factual issue. Because social facts apply beyond the case at hand, such inconsistency could be problematic,<sup>392</sup> especially if district court findings differed within the same jurisdiction. Thus, it is sometimes argued that appellate courts can "impose uniformity within their jurisdictions by according

---

387. As discussed above, the appellate court should make the preliminary nature of its findings clear so that future opinions do not treat them as precedential.

388. 293 U.S. 194, 210–11 (1934).

389. *Id.* at 213.

390. *Id.* at 212 (quoting *Hammond v. Schappi Bus Line*, 275 U.S. 164, 171–72 (1927) (addressing the validity of city ordinance regulating motor traffic and remanding because lower courts had not made findings upon crucial questions of fact)).

391. See Cooper, *supra* note 103, at 652 ("Parties who know that they will not have any significant second chance to convince another tribunal on the facts must take the initial trial seriously . . . . In like fashion, a judge who knows that the central responsibility of decision cannot be shared is likely to take the task of decision more seriously.").

392. See *Dunagin v. Oxford*, 718 F.2d 738, 749 n.8 (5th Cir. 1983) (en banc) (plurality opinion) (explaining that it is generally not tolerable that "identical conduct be constitutionally protected in one jurisdiction and illegal in another").

no deference to a lower court's record-based conclusions."<sup>393</sup> I argue, however, that the concern over conflicting lower court findings does not justify a general rule of de novo review of social facts.

Where two or more district courts reach conflicting conclusions, this conflict warrants (indeed, requires) a more searching review of the facts. Even then, however, the appellate court is not justified in abandoning the record and embarking on a freewheeling search for evidence. Instead, the court should begin by reviewing the proceedings below to determine if deficiencies in the process might have accounted for the difference. For example, did a party in one of the cases lack the resources to litigate the case competently? How many experts appeared and was there overlap in expert witnesses between the two cases? What documentary evidence did each district judge consider? These kinds of questions might reveal the appropriateness of deferring to one court's finding over the other, without necessitating a de novo review of the facts or warranting the appellate court's reliance on wholly other sources of "facts," such as amicus briefs or Internet searches.

The risk of conflicting social factfinding across jurisdictions may be overstated, however. When parties challenge state laws as violating the federal Constitution, conflicting trial court factfinding may often be less likely, depending on the nature of the law and the constitutional claim.<sup>394</sup> If the constitutional claim is highly dependent on how the law is worded and how that wording implicates conditions specific to the state, the district court's factfinding, although addressing social facts, will likely be of little relevance beyond the state's borders. For example, a state may tailor restrictions on campaign expenditures to its particular history of campaign finance regulation.<sup>395</sup> A district court's factfinding detailing this history will be relevant to that state, but not another.<sup>396</sup>

---

393. *Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007).

394. If multiple lawsuits are filed against a single state law, the cases will likely be consolidated. FED. R. CIV. P. 42(a); *see, e.g., Landell v. Sorrell*, 118 F. Supp. 2d 459, 463 (D. Vt. 2000), *aff'd in part and vacated in part*, 300 F.3d 129 (2d Cir. 2002), *op. withdrawn*, 2002 U.S. App. LEXIS 28176 (2d Cir. 2002).

395. *See, e.g., Landell*, 118 F. Supp. 2d at 464 (noting that "the constitutionality of some provisions of Act 64 depends heavily on facts," including "a substantial amount of background concerning the history of campaign finance regulation in Vermont"); *see also* *W. Tradition P'ship, Inc. v. Att'y Gen.*, 271 P.3d 1, 8 (Mont. 2011) (explaining that Montana's campaign finance law "cannot be understood outside the context of the time and place it was enacted, during the early twentieth century").

396. Unfortunately, reviewing courts often treat such state-specific factfinding as precedential, making it impossible for constitutional rights claimants to overcome a bad result in a different jurisdiction with new and more germane facts. *See, e.g., A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 712–13 (7th Cir. 2002) (Wood, J., dissenting) (criticizing this phenomenon in context of mandatory delays for abortion); *cf. Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (reversing Montana Supreme Court's ruling upholding state's campaign finance law, and declaring that facts concerning Montana's unique history "fail to meaningfully distinguish" *Citizens United*).

In some cases, however, the threat of conflicting findings of social fact is real. States sometimes pass cookie-cutter versions of a model statute for which the relevant social facts are general rather than particular to each state. For example, in the “partial-birth abortion” cases, one issue addressed by the lawsuits was the relative safety of different abortion procedures and the risks of banning one or more of these methods.<sup>397</sup> In such cases, district courts ruling on different state laws may address virtually identical questions of social fact.<sup>398</sup> The risk of conflicting factual findings is at its height when multiple district courts address challenges to a single federal or state statute.<sup>399</sup> Yet independent appellate review would not guarantee uniformity across jurisdictions and thus would not solve the problem of trial courts’ conflicting findings of social fact. Issues of law are reviewed *de novo*, yet circuit splits occur routinely on such questions.

When an appellate court faces contradictory district court findings, or when credible experts are truly divided on a key issue of social fact, the appellate court confronts a choice. However it makes that choice, it will necessarily allocate the risk of error. This allocation should be done according to constitutional norms that the federal courts are entrusted to enforce.<sup>400</sup> An approach consistent with such norms would be for the appellate court to err on the side of the rights claimant. This rights-preferential thumb on the scales makes sense given the judiciary’s important role in protecting individual constitutional rights against majoritarian oppression.<sup>401</sup> This was the approach that the Court took in *Brown v. Entertainment Merchants Association*, where the Court found that competing psychological studies were insufficient to support a predictive judgment linking violent video games and acts of aggression.<sup>402</sup> The Court took a similar approach in *Stenberg v. Carhart*, erring on the side of plaintiffs challenging a “partial-birth abortion” ban in reviewing evidence addressing the safety advantages of certain abortion procedures.<sup>403</sup>

---

397. See, e.g., *Carhart I*, 530 U.S. 914 (2000).

398. See *id.*

399. See, e.g., *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580–81 (2012) (describing the multiple challenges to the Affordable Care Act).

400. See FAIGMAN, *supra* note 32, at 171 (“Very often in constitutional cases too little will be known about relevant reviewable facts. When this is so, the normative principles of the Constitution allocate the risk of error.”).

401. Some scholars have advocated such a rights-preferential approach for judicial review of legislation. See *supra* note 380; see also Suzanna Sherry, *Why We Need More Judicial Activism* 1, 8–9 (Vanderbilt University Law School, Public Law and Legal Theory, Working Paper No. 13-3, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2213372##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213372##) (arguing that federal courts should err on side of judicial activism in striking down statutes, in light of judiciary’s anti-majoritarian role in checking popular tyranny and passions).

402. 131 S. Ct. 2729, 2738–39 (2011) (acknowledging that the Court took a different approach in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), because that case applied intermediate scrutiny to a content-neutral regulation, rather than strict scrutiny).

403. *Carhart I*, 530 U.S. 914, 936–37 (2000) (“The upshot is a District Court finding that D&X significantly obviates health risks in certain circumstances, a highly plausible record-based

In *Lockhart*, the Supreme Court took the opposite approach, ruling against a capital defendant and rejecting the trial court's findings, based on the Court's independent assessment that relevant social science authority was divided.<sup>404</sup> The Court reviewed in detail (and apparently de novo) the district court's findings that death-qualified juries are more prone than non-death-qualified juries to find in favor of a death sentence. After six pages of probing examination of the evidence,<sup>405</sup> the Court disingenuously dismissed the relevance of this evidence to its analysis, declaring,

Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.<sup>406</sup>

Even after this searching review, the Court found only disagreement or uncertainty among experts on the issue.<sup>407</sup> If, following a review for clear error, a court finds that social science evidence is essentially tied on a determinative issue, the Court should generally err in favor of protecting constitutional rights.<sup>408</sup> This is especially true in a case like *Lockhart*, where the claimant's life hangs in the balance.

On the other hand, when a court faces multiple lower-court decisions that agree on key social facts underlying a particular legal issue, that agreement weighs heavily in favor of deference to the lower courts' factfinding. This is especially so if the factfinding contradicts the legislatures' factfinding, because one might more likely expect trial courts to defer to legislatures. Accordant findings by courts across the country contradicting multiple legislatures' factfinding on a hot-button issue is a reliable indicator that prejudice, fear, or other emotions drove the legislative agenda.<sup>409</sup> This was so in the context of bans on violent video games and on "partial-birth abortion."<sup>410</sup>

---

explanation of why that might be so, a division of opinion among some medical experts over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these medically related evidentiary circumstances, we believe the law requires a health exception."'). The Court took the opposite approach in *Gonzales v. Carhart* when it upheld the federal PBABA. *See supra* note 231 and accompanying text.

404. *Lockhart v. McCree*, 476 U.S. 162, 168–73 (1985); *see supra* text accompanying note 128.

405. *Lockhart*, 476 U.S. at 168–73.

406. *Id.* at 173; *see also* FAIGMAN, *supra* note 32 (commenting on cases in which the Supreme Court has critiqued and discounted social science evidence while then declaring the evidence irrelevant and purporting to assume its validity).

407. *See Lockhart*, 476 U.S. at 169–73 & n.11.

408. *See supra* note 380 (citing authority for rights-preferential approach).

409. *See generally* Borgmann, *supra* note 19.

410. *See, e.g.,* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734, 2737–38 (2011) (addressing the constitutionality of ban on violent video games, discussing emotions raised by violent



In sum, applying de novo review to all findings of social fact because of occasional conflicts among lower court decisions presents a cure that is worse than the disease, inviting unpoliced appellate-level factfinding for all cases, even where lower court factfinding is consistent. The much more targeted approach outlined in Part III.B can adequately address the problems raised by conflicting trial court social factfinding.

#### CONCLUSION

Social facts have become an intrinsic part of the fabric of constitutional rights decision making. It is unpardonable that the Supreme Court has not established a principled, explicit framework for the judicial reception and evaluation of such facts. This is especially so since the well-established mechanism for appellate review of trial court factfinding, Federal Rule of Civil Procedure 52(a)(6), by its terms encompasses social facts and could easily be applied to them. Judicial review of the social facts underlying laws that restrict basic rights serves the critical function of protecting against majoritarian oppression. As such, its primary purpose should be a search for truth, a purpose quite different from that which motivates legislative factfinding. The best way to ensure that facts are examined dispassionately and deliberately is through the adversarial process of a trial. Where such facts are determinative of a law's constitutionality, trial courts should hold trials testing the facts, and their findings should receive a presumption of finality. To the extent that social facts raise special concerns, for example because of their precedential impact, the framework of the "clearly erroneous" standard can readily address these concerns. This straightforward approach promotes fairness, predictability, regard for factual integrity, and the safeguarding of constitutional rights.

---

depictions, and explaining that First Amendment protection is not waived for "whatever a legislature finds shocking"); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004) (describing congressional testimony on federal PBABA as "not only unbalanced, but intentionally polemic"), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *rev'd*, *Carhart II*, 550 U.S. 124 (2007).