ALL FACTS ARE NOT CREATED EQUAL

by BRYAN ADAMSON*

"The [ ] argument . . . is that the decisions of this court are not grounded in principle and reasoned argument, but in power, and that the judges of this court manipulate and ignore the rules in order to advance political agendas."

Little attention is paid to the procedure by which appellate courts determine, articulate, and apply standards of review. Whether a case is reviewed for clear error, de novo, or some standard in between is of no small moment. It is no exaggeration to say that classifying a trial court's findings as findings of fact, findings of law, or mixed questions of law and fact can dictate the outcome on appeal.

In cases tried without a jury, Federal Rule of Civil Procedure 52(a) (Rule 52(a)) is the procedural catalyst for determining the standard of review applied to the trial court's findings of fact. When the Eastern District of Michigan first considered Grutter v. Bollinger, the factual issues in controversy were fairly straightforward: 1) the extent to which the University of Michigan Law School (Law School), considered race as an admissions factor, and 2) whether the Law School's admissions policy disadvantaged non-minority applicants. Following Rule 52(a) would have required the Sixth Circuit Court of Appeals to reverse the District Court's factual findings only for "clear error." Instead, the Sixth Circuit engaged in de novo review of Judge Friedman's findings, casting the facts before it as "constitutional." The question arises whether the Sixth Circuit's approach was a legitimate exercise of de novo review, or whether the majority, in characterizing the factual issues as constitutional, manipulated or improperly ignored Rule 52(a).

This article attempts to: 1) illustrate the inherent ambiguities of Rule 52(a), exacerbated by a court-created fact typology; 2) explain one of those types—the constitutional fact doctrine—and demonstrate how the Supreme Court has applied that doctrine inconsistently; and 3) explore whether the Sixth Circuit, by invoking the constitutional fact doctrine in Grutter, was attempting to extend the doctrine into the jurisprudence of Fourteenth Amendment intentional discrimination claims, or wrongfully appropriating the trial court's fact finding role.

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3. Id. at 825. The Court also made mention of a third issue regarding whether schools may take race into account to "level the playing field." Id.
4. Grutter, 288 F.3d at 771.

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I. RULE 52(a) AND FACT TYPOLOGIES

It is helpful to examine Rule 52(a) within the broad framework of what courts do, which is to identify facts, declare law, and apply law.\(^5\) Rule 52(a) directs that "findings of fact, whether based on oral or documentary evidence . . . shall not be set aside unless clearly erroneous."\(^6\) Rule 52(a) draws the line of decisional authority between the federal trial and appellate courts, reposing in the former the authority over factual adjudication, and in the latter the final authority to declare law. In doing so, Rule 52(a) reflects important jurisprudential values: administrative efficiency; judicial competence; decision making free of judicial bias;\(^7\) doctrinal coherence; and the need for appellate courts to serve as corrective\(^8\) and affirming institutions.

Rule 52(a) ratifies the trial court's more advantageous position at taking testimony, receiving other evidence and making judgments about witness credibility. Given a court system whose structure does not permit, nor can sustain, matters being fully re-litigated at each level, conferring a high level of deference to facts found at the trial level promotes efficiencies within the system. Furthermore, as the role of trial court as fact-finder has evolved, trial jurists have adapted to, and mastered, the act of fact-finding.\(^9\) With this development of fact-finding competency, it is hoped that a heightened degree of credibility and confidence attaches to a trial court's findings.

Conversely, by not subjecting "conclusions of law" to the clearly erroneous standard, Rule 52(a) implicitly fortifies the appellate courts' role as final arbiter of "what the law is."\(^10\) That role is premised upon the assumption that appellate courts are more capable of articulating the law and giving coherence to legal principles and concepts. Appellate judges are not bound to try cases, but are expected to thoughtfully consider and apply the law with a greater degree of intellectual rigor.

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6. FED. R. CIV. P. 52(a) states, in full:
   (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.
   Id.
9. Wright, supra note 7, at 782.
10. Monaghan, supra note 5, at 264.
At those critical junctures where a trial court applies the law, declares the law, or elaborates upon legal norms, appellate courts serve to correct or affirm the trial court’s articulations. This responsibility takes on profound importance when facts presented touch upon salient rights and obligations (e.g., rights and obligations emanating from the Constitution). The point at which a factual finding “crosses the line between application of... ordinary principles of logic and common experience... into the realm of a legal rule,” Rule 52(a)’s clear error standard yields to de novo review. That line, however, is never easily drawn.

While Rule 52(a)’s directive that findings of fact not be set aside unless clearly erroneous may seem fairly straightforward, its language and application is anything but. One reason for the Rule’s ambiguity is that the meaning of the term “clearly erroneous” is hardly apparent. The term itself is essentially a legal fiction which finds meaning only when an appellate judge has “a definite and firm conviction that a mistake has been made.” Such a conclusion often involves more judgment—fallible to be sure—than defensible reason.

Another reality which confounds a simple read of Rule 52(a) is the difficulty in divining a distinction between questions of fact and questions of law. First, defining what a “fact” is has eluded epistemologists and philosophers alike, to say nothing of jurists. In Proving the Law, Lawson has defined a fact as “a reality that exists independent of its acknowledgement by the conscious mind of a perceiver.” Certainly, one might take issue with Lawson’s post-modernistic spin. All should agree, however, that constructing a “finding” of fact requires a judge to do more than simply identify and describe a “reality;” it requires the judge to interpret, choose between, make inferences from, deduce toward, and/or synthesize, then articulate one or more “relevant realities.” Second, divining the law from articulations is difficult when factual findings are infused with legal terms, concepts or norms. So, while the terms “findings of fact,” and “clearly

11. Id. at 236-37.
13. Cooper, supra note 8, at 645 (stating that the term “clearly erroneous” has no intrinsic meaning... [i]t is elastic, capacious, malleable, and above all variable”). See Gary Lawson, Legal Theory: Proving the Law, 86 NW. U. L. REV. 859, 863 (1992) (stating “the law-fact distinction, whatever its utility, is purely a creature of convention”).
16. Lawson, supra note 13, at 866.
18. Mixed questions of law and fact are those questions which have embedded not only “pure” factual elements, but also indicia of legal principles. The Supreme Court has stated that “a mixed question of law and fact is”“ a question in which historical facts are admitted or established, the rule of law is not in dispute, and the issue is whether the facts satisfy the statutory standard. In other words, whether the rule of law as applied to the established facts is or is not violated.” Pullman-Standard, 456
"erroneous" may seem easy to define and apply, they are imprecise. This imprecision provides room for appellate courts—intentionally or unintentionally—to prescribe for themselves if Rule 52(a) should be followed.

On its face, Rule 52(a) applies to any and all trial court findings of fact, no matter what the type of fact, or the form of evidence. However, appellate courts have effectively discarded such a plain reading through the creation of a "typology" of facts: historical, legislative, ultimate, sociological, or constitutional. In carving out these "exceptional" types of facts, trial courts have been left only findings of "pure" facts, i.e., "historical facts," which are insulated by clear error.

U.S. at 289 n.19. Whether a party acted negligently is a prime, common example of the mixed question of law and fact. As the question turns on a breach of the duty of reasonable care, it is difficult to articulate a rule which would apply to all circumstances. The reasonable care standard (judged in reference to a person with "ordinary skills using ordinary care") is fact-specific. The conclusion, viz., the presence or absence of negligence, is a legal one, intricately dependent upon the facts of the case. Most federal courts, however, subject negligence to clearly erroneous review. 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2590 (1988).

19. Pullman-Standard, 456 U.S. at 287:

[Rule 52] does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a District Court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.


20. "Historical facts" are alternatively referred to as "pure" facts, "basic" facts, "adjudicative" facts, or "primary" facts. The paradigmatic illustration of historical facts is that they answer the question "what happened here?" Monaghan, supra note 5, at 235.


22. "Ultimate facts" are those which most directly trigger a legal consequence, and require the application of the facts to a legal standard. See JACk WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL, Para. 401[03], n.1 (Matthew Bender & Co. 6th ed. 2003) (1982) ("[f]act[s which are] of consequence to the determination of the action."). See also HONORABLE JOSEPH M. MCLaughlin & JACk B. WEstEin, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS § 401.4 (2d ed. 2001) (stating ultimate facts are sometimes referred to as "material facts," "operative facts," or "consequential facts"). For example, a factual finding that a defendant's car struck the plaintiff's car from behind while plaintiff was stopped at a red light is a fact, which without mitigation would lead to the legal conclusion that the defendant was negligent.

23. "Sociological facts" are best described as propositions which are general in nature and describe the status or condition of a subject. For example, one type of sociological fact at issue in Brown v. Board of Education, 387 U.S. 483, 494 (1954), was that separate schools for African-Americans had the impact of creating and instilling the sociological (and psychological to be sure) impression that African-Americans were inferior.

24. See discussion text and accompanying infra notes 28-32 (describing a constitutional fact).

25. "Legislative", "ultimate", and "constitutional facts" can be viewed as specific forms of mixed questions of law and fact. See supra notes 21, 22; text and accompanying infra notes 28-32.

26. Even "historical facts" have not been unassailable. Appellate courts have exercised independent judgment over historical facts based on documentary evidence (Orvis v. Higgins, 180 F.2d 537, 539-40
For all these other fact types, appellate courts have appropriated for themselves the ability to exercise independent judgment over factual findings.

The power of this typology cannot be underappreciated. The ability to characterize a fact as one other than historical enables appellate courts to re-examine the entire evidentiary record. The ability to re-weigh the evidentiary record distorts the traditional lines of decisional authority between the trial and appellate courts, upends notions of efficiency and arguably diminishes the confidence in the trial jurists’ decisions.

Moreover, depending upon the transparency of the process that appellate judges use to determine which standard of review to apply, and depending upon the substantive issues at stake, constructing a factual type as other than historical provides a prime opportunity for those judges to inject their own ideological bias into the case. At the very least, the lack of transparency leads to the perception that judges use standard of review determinations to manipulate outcomes and advance ideological agendas. With issues of profound social importance such as affirmative action at stake, that perception is magnified. The constitutional fact doctrine is one typology established outside of Rule 52(a) that enables judges to obfuscate their decisional process.

II. CONSTITUTIONAL FACT DOCTRINE

A “constitutional fact” has been simply defined as one “fundamental to the existence of a constitutional right.” Whether to classify a fact as a constitutional one depends on whether the fact, if established, demonstrates the presence or absence of the constitutional right or obligation. The constitutional nature of the fact infers that the matter has far-reaching implications—not only for the litigants, but for the fundamental law of our land. So as “to preserve the precious liberties established and ordained by the Constitution,” the presupposition is that appellate courts have a duty to review constitutional facts de novo.

Though the doctrine is not without its critics, it is nonetheless vital. The
constitutional fact doctrine arose out of cases involving administrative agency decisions which touched upon due process and takings issues. The principle was then extended to First Amendment cases, and to criminal cases, beginning with Near v. Minnesota. However, it has been inconsistently invoked and applied by appellate courts; the Supreme Court has been nothing if not schizophrenic in its application of the doctrine.

The Court has continued to invoke the doctrine to engage in de novo review of controversies presenting the issue of whether a defendant acted with actual malice, whether a waterway was navigable, whether a fine, in its amount, constituted cruel and unusual punishment, and whether reasonable suspicion and probable cause existed prior to an interrogation. Despite the apparent historical fact-based nature of these issues, the Supreme Court ruled that because a response to these issues implicated constitutional rights or obligations, it would engage in de novo review.

For example, in Bose v. Consumers Union, the Supreme Court applied the doctrine of constitutional fact to the trial court's finding of actual malice. Writing for the majority, Justice Stevens rejected Rule 52(a)'s clearly erroneous standard of review, citing the importance of the actual malice principle to First Amendment jurisprudence. In his opinion, Justice Stevens noted that "appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." Some appellate courts have interpreted Bose as not requiring de novo review of the subsidiary facts going to the presence or absence of actual malice. But by not


34. See, e.g., Ohio Valley Water Co. v. Ben Avon, 253 U.S. 287, 297 (1920) (addressing the scope of judicial review of Public Service Commission of Pennsylvania's decision regarding water companies' rates); Ng Fung Ho., 259 U.S. 276, 284 (involving the scope of review of Bureau of Immigration deportation decisions under the Chinese Exclusion Act); Crowell, 285 U.S. 22, 85 (analyzing the scope of review of U.S. Employees' Compensation Commission's findings of fact); Strong, supra note 30, at 223-24 (highlighting cases dealing with the constitutional fact doctrine); George C. Christie, Judicial Review of Findings of Fact, 87 NW. U. L. REV. 14, 20-26 (1992) (tracing the birth of constitutional fact doctrine to late Seventeenth Century administrative law).

35. 283 U.S. 697 (1931); Chicago, Milwaukee & St. Paul Railway v. Minnesota, 134 U.S. 418 (1890); Monaghan, supra note 5, at 247-63.

36. See e.g., Bose, 466 U.S. at 510-11 (stating that independent appellate review is the law in libel cases surrounding the determination of actual malice).


41. Id. at 514.

42. Id.

43. See, e.g., Connaughton v. Harte-Hanks Communication, Inc., 842 F.2d 825, 842 (6th Cir. 1988), aff'd 491 U.S. 657 (1989) ("Logic and reason dictate that the Bose directed de novo review did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but
clearly answering the question of which factual elements of actual malice would be subject to independent review—the historical facts, or the legal inferences made from those facts—the Bose decision has given appellate courts permission to fully re-weigh the facts underlying a District Court’s finding on actual malice.\textsuperscript{44}

While invoking constitutional fact doctrine in cases involving the First, Fourth, Fifth, and Eighth Amendments, the Supreme Court has not invoked the doctrine in Fourteenth Amendment equal protection cases where discriminatory intent based on race was placed squarely into controversy. In cases involving preemptory challenges,\textsuperscript{45} racial gerrymandering,\textsuperscript{46} and school segregation,\textsuperscript{47} the

\textsuperscript{44} For a discussion of the Bose case, see, e.g., Monaghan, supra note 5, at 240-47 (characterizing the Court as “speaking repeatedly of the duty of appellate judges to decide independently whether the facts are sufficient to show the speech is unprotected”); Eldred, supra note 43, at 585-95 (analyzing each element independently); Cathy Parker, Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases?, 60 WASH. L. REV. 503, 504-05, 513-18 (1985) (stating that “[b]ecause both factual and legal elements contribute to the determination of actual malice, the appeals court must review the entire record to verify the strength of the legal components used by the district court in shaping the decision”).

\textsuperscript{45} See e.g., Hernandez v. New York, 500 U.S. 352, 367 (1991) (“Findings of voluntariness or actual malice involve legal, as well as factual . . . elements.”); id. at 365-66 (the Supreme Court has decided that for factual findings in such cases, Rule 52(a) applies to criminal cases as well, there being no comparable procedural rule); Akins v. Texas, 325 U.S. 398, 402 (1945) (finding that grand jury selection that excluded Latinos was not with discriminatory intent reviewed with “great respect to the conclusions of the state judiciary”).

\textsuperscript{46} See Rogers, 458 U.S. at 614 (reviewing for clear error a finding that at large elections dilute African-American voting in violation of the Equal Protection Clause); Rural W. Tenn. African-American Affairs Council, Inc. v. Sundquist, 209 F.3d 835, 838 (6th Cir. 2000) (addressing whether a Voting Rights Act Section 2 violation that occurred in a 1994 reapportionment was a question of fact to be reviewed for clear error); Cousin v. McWherter, 46 F.3d 568, 574 (6th Cir. 1995) (addressing whether dilution of African-American vote in county at-large judicial election process intentionally discriminated on the basis of race was a question of fact). \textit{But see} Easley v. Cromartie, 532 U.S. 234, 263 (2001) (holding that the District Court’s finding that the legislature’s congressional redistricting plan was racially motivated was erroneous). In one controversial instance, the Supreme Court did hold that it was appropriate to broaden their inquiry into the District Court’s finding as to whether intentional racial discrimination in fact occurred. \textit{Easley} was a direct appeal from a finding by a District Court that the North Carolina legislature had improperly used race as a major consideration when it redeveloped the 12th Congressional District boundaries. \textit{Id.} at 235. Justice Breyer, writing for the 5-4 majority, announced that it would conduct an “extensive review for clear error.” \textit{Id.} at 243. This announced standard, while not quite approaching a de novo review, conferred much less deference to the District Court’s finding than directed by Rule 52(a). The majority defended this “clear error plus” standard of review in reversing the District Court’s conclusion that the General Assembly used facially race-driven criteria to redraw the districts without any compelling justification by saying that the question was a “constitutorially critical” one. \textit{Id.} at 240. Justice Breyer also justified the majority’s approach on the grounds that the trial at the District Court was “not lengthy,” there had been no intermediate appellate review, and the “key evidence consisted primarily of documents and expert testimony.” \textit{Id.} at 243.

The majority’s approach in \textit{Easley} prompted a scathing dissent. Writing for the minority, Justice Clarence Thomas argued that the majority’s “extensive review for clear error” standard had neither precedent nor support in precedent. \textit{Id.} at 259. To the dissent, the race question in \textit{Easley} regarded motive (viz., did the legislators consider the racial makeup of the constituents when drawing the
Supreme Court has held fast to the Rule 52(a) clearly erroneous standard. In such a case, the Supreme Court has even gone so far to admonish that “an issue does not lose its factual character because its resolution is dispositive of the ultimate constitutional questions.” It is important to scrutinize the possible rationales for the Supreme Court’s resistance to applying the constitutional fact doctrine to intentional racial discrimination cases.

III. GRUTTER AND CONSTITUTIONAL FACTS

The Sixth Circuit’s decision in Grutter represents an attempt to extend the constitutional fact doctrine to intentional race discrimination in the context of affirmative action. Exploring the use of the doctrine to justify de novo review requires a close look at what the litigants argued and how the District Court and Court of Appeals framed the issues.

A. The District Court’s Findings in Grutter

In her Complaint, the Plaintiff, Barbara Grutter, asserted that the Law School “used the race information provided by plaintiff and other applicants to determine who would be admitted to the Law School.” The Plaintiff also claimed that the law school used “different admissions standards based on each student’s self-identified race” as “one of the predominant factors” in deciding who to admit. Paragraph 24 of the Complaint asserted that the Law School had “no compelling interest” to “justify [its] use of race in the admissions process.”

Importantly, the Defendants’ response acknowledged that an applicant’s race was used as an admissions factor, but emphasized at several points that race was considered “as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single, though important element.” Answering the Plaintiff’s assertion of no compelling interest, the Defendants stated simply (and

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48. The Supreme Court has even held that the same deferential standard applies when reviewing determinations of discriminatory intent in Title VII cases. See e.g., Anderson v. Bessemer, 470 U.S. 564, 573 (1985) (holding that in Title VII sex discrimination case, a “finding of intentional discrimination is a finding of fact entitled to appropriate deference”); Pullman-Standard, 456 U.S at 267 (finding that company’s seniority system intentionally discriminated against African-American employees).


51. Id. at ¶ 20.

52. Id. at ¶ 23.

53. Id. at ¶ 24.

correctly) that the assertion was “a conclusion of law to which no response was necessary.” After the complaint and answer period, what ensued were various motions, including cross-motions for summary judgment, the decision on which District Court Judge Bernard Friedman deferred.

The District Court saw itself addressing, relevantly, two factual issues: 1) “[t]he extent to which race was a factor in the Law School’s admissions decisions,” and 2) “whether the Law School’s consideration of an applicant’s race constitutes a double standard in which minority and non-minority students are treated differently.” Over fifteen days in January and February 2001, the District Court conducted a bench trial, taking the testimony of several witnesses, and admitting into evidence volumes of documents and expert reports. In March 2001, after review of the testimony, pleadings, reports, studies, and other documents admitted into evidence, Judge Friedman ruled the Law School’s policy violated the Fourteenth Amendment’s Equal Protection Clause and Title VI of the 1964 Civil Rights Act.

Specifically the court found, as a matter of fact, that “race was not . . . merely one factor” among others considered. More than this, “the evidence indisputably demonstrate[d] that the law school place[d] a very heavy emphasis on an applicant’s race in deciding whether to accept or reject” that applicant. Specifically, the District Court reached the factual conclusion that the Law School “explicitly” considered an applicant’s race in order to attain a “critical mass” of minority students, which effectively “amounted to a quota system.” Having determined that Justice Powell’s opinion in Bakke v. Board of Regents was not controlling, the District Court found that the Law School’s interest in maintaining a diverse student body was not a compelling one. Even if it were, the court held, the Law School’s admissions policy was unconstitutional because it was not narrowly tailored to achieve that purpose.

In recounting the District Court’s precise framing of the issues, it is important to recognize that its articulation does not use terms which connote or denote legal
principles. The extent to which race played a factor in the Law School’s admissions decision is informed by the “pure” evidence surrounding the Law School’s decisional process and policy. In the adjudication context, the facts required identification, and an evaluation of the quantum of facts existing (that is, the extent to which race played a factor—a lot? A little?). The process of factual evaluation does not call for law declaration, the application of a legal standard, or the elaboration upon a legal norm. It is, in fact, the type of judgment routinely made by trial judges. Similarly, an investigation into whether minority and non-minority applicants were treated differently under the admissions policy requires no law declaration or application or norm elaboration. Moreover, the District Court’s conclusion that the University of Michigan “explicitly” considered race in its admissions decisions is merely an evaluative statement based upon the facts presented. One could contend, therefore, that the District Court’s factual findings fell squarely into the category of historical facts, warranting review only for clear error.

B. The Sixth Circuit Application of De Novo Review

The Sixth Circuit reversed the District Court’s legal conclusion “that the Law School’s efforts to achieve a diverse student body through the consideration of race and ethnic origin is unconstitutional and violates Title VI of the Civil Rights Act of 1964.”67 The court immediately announced that it would review the District Court’s decision de novo,68 citing two of its own decisions for the proposition that de novo review was warranted when “constitutional facts are at issue.”69 Analyzing the District Court’s holding that Justice Powell’s rationale in Bakke did not apply, the Sixth Circuit disagreed, stating that the Law School did indeed have “a compelling [] interest in achieving a diverse student body.”70

The court reviewed the evidence presented below. To the majority, the evidence revealed that the Law School admittedly considered race and ethnicity as one factor of many, in an openly competitive process between minority and non-minority applicants, with no fixed target of non-minority applicants.71 Finding the Law School’s admissions policy was much like the Harvard plan endorsed by Justice Powell, the court ultimately ruled that the Law School’s effort at achieving...
A "critical mass" of diverse applicants was "not the equivalent of a quota."72

A majority of the court found that the Law School's consideration of race-neutral alternatives was also established below through the testimony of its admissions directors, current Dean Jeffrey Lehman and Professor Richard Lempert.73 The majority was persuaded that the Law School, with its pre-and post-admission recruiting efforts, and its contemplation of a lottery system, had "adequately considered race-neutral alternatives."74 As a matter of legal principle, the court held that deference should be given to the Law School's judgment as to which minority groups should be targeted,75 and in the context of a non-remedial admissions program, that the Law School's stated durational limit ("until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means") was satisfactory.76 Consequently, the Sixth Circuit found that the Law School's program was narrowly tailored to achieve its objectives.77

On appeal to the Supreme Court, the Sixth Circuit's choice of de novo review was vigorously opposed by the Grutter petitioners.78 They found it "extraordinary" that the Court of Appeals, with "little explanation," disregarded the clear error standard, and "substituted its fact findings for those of the District Court."79 The Petitioners asserted that the District Court's findings that the Law School used race as an impermissible "predominant factor" in the school's admissions process, and that it "effectively reserved' about ten percent of each class for students from 'underrepresented' minority groups" were pure questions of fact allowing review only for clear error.80 For the same reason, the Petitioners argued that the Sixth Circuit improperly viewed as issues of law the facts behind whether the Law School had considered race-neutral alternatives and which racial or ethnic groups received a "preference."81 As those findings could not be "characterized as essentially legal," the Petitioners argued that the Law School's admissions policy could not be upheld "under a correctly applied clearly-erroneous standard."82

While devoting a significant portion of their argument in support of Justice Powell's opinion in Bakke, the Respondents did not address, head-on, the Petitioner's objections to the standard of review applied by the Sixth Circuit. The

72. Id. at 747. Unlike the District Court, the Sixth Circuit found the record replete with what the term "critical mass" means. Id. at 751.
73. Id. at 750. Professor Lempert had been one of the architects of the Law School's admission policy at issue. Id. at 737.
74. Grutter, 288 F.3d at 750.
75. Id. at 751.
76. Id. at 752. The Court of Appeals also held that, as a matter of legal principle, the law school did not have to choose between "meaningful racial and ethnic diversity and academic selectivity." Id. at 750.
79. Id. at 46.
80. Id. at 46-47.
81. Id. at 47.
82. Id. at 48.
Respondents did assert that there was nothing extraordinary about the Sixth Circuit's choice of review, flatly stating that the "courts below clearly disagreed only as to matters of law and legal characterization, not historical fact."83 One error of law, to the Respondents, was that the District Court faulted the Law School for not experimenting with race-neutral options before implementing its race-conscious admissions policy because it "would not work without serious injury to the Law School’s other legitimate and central educational goals."84 The other error of law was not the finding that the Law School's policy produced a concrete range of minority enrollment, but the legal conclusion that there was no "principled difference between" the Law School's policy, and a quota system.85 Given the fact that the District Court's conclusions from the underlying facts were legal in nature, the Respondents contended that de novo review was required.

C. Was the Sixth Circuit's Use of Constitutional Fact Doctrine Necessary?

The Sixth Circuit's invocation of "constitutional fact" to embark upon a de novo review of the District Court's factual findings in Grutter is an instructive example of the prerogatives inherent in the ability to classify facts. The importance of the applicable standard of review in Grutter was not lost on the litigants. What may have been lost is a clearly articulated rationale as to why the Sixth Circuit invoked the constitutional fact doctrine to engage in de novo review.

To be sure, the Sixth Circuit did not have to invoke the doctrine. It would have been entirely within its review powers had it justified a de novo standard of review on the simple basis that the District Court misinterpreted Bakke. In fact, this is, in large part, what the Sixth Circuit did. The Supreme Court has consistently abided by the proposition that "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."86 This "mistake of law" principle is more firmly rooted in jurisprudence, arguably less assailable, and has been more commonly invoked. Under either the constitutional fact doctrine or the mistake of law principle, the Sixth Circuit could have reached the same result.

However, invoking the constitutional fact doctrine was remarkable in that the Sixth Circuit placed that doctrine into intentional racial discrimination jurisprudence. Even more interesting is the fact that it did so by relying upon two

84. Id. at 33 n.51.
85. Id. at 41-42 n.69.
86. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 n.15 (1982) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."). See also Thornburg v. Gingles, 478 U.S. 30, 79 (1986) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law . . . or a finding of fact that is predicated on a misunderstanding of the governing rule of law."); United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963) (holding that if the trial court's conclusion that Singer conspired with co-defendants to suppress competition was "derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law."); 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, CIVIL § 52.32 (3d ed. 1997) (discussing the appellate review of conclusions of law).
cases which had nothing to do with racial discrimination. At issue in *Johnson v. Economic Development Corp. of Oakland* was whether an Establishment Clause violation existed when Oakland County issued tax-exempt revenue bonds to finance construction of buildings at Catholic primary and secondary schools. *Women's Medical Professional Corp. v. Voinovich* was a challenge to an Ohio legislative bill restricting certain abortion procedures resting on due process, privacy, and liberty violations. More in line with precedent under the First, Fourth, Fifth and Eighth Amendments which has expressly applied the constitutional fact doctrine, neither case—nor the cases upon which they rely—stands for the proposition that underneath the legal issue of intentional racial discrimination lie constitutional facts warranting de novo review.

The Sixth Circuit also imprecisely articulated the constitutional fact doctrine. Announcing the standard of review, the court characterized the trial court's *legal conclusion* as a finding of *constitutional fact*. The conclusion to which de novo review was applied, viz., the District Court's finding that "the Law School's efforts to create a diverse student body were unconstitutional," is certainly a legal one. The facts adjudicated, i.e., the *extent* to which the Law School took race and ethnicity into consideration in making admissions decisions, and whether the Law School treated minorities and non-minorities differently are, strictly speaking, historical facts. However, the Sixth Circuit conflated the legal issue (Equal Protection) and the policy issue (diverse student body), both to which de novo review would most clearly apply, with the "pure" question of fact (the Law School's efforts). By fusing the constitutional *issues* at play in *Grutter* with the underlying historical facts, the Sixth Circuit essentially ruled that the Law School's deliberate and intentional use of racial and ethnic data, i.e., their effort to create a

88. See id. at 519 (holding that it was a violation of the Establishment Clause when a county issued tax-exempt revenue bonds to finance construction of buildings at Catholic primary and secondary school based on "de novo review of constitutional question").
89. 130 F.3d 187 (6th Cir. 1997).
90. Id. at 192 (holding that a due process, privacy and liberty challenge to an Ohio bill restricting abortion procedures and testing required "independent review of the record when constitutional facts are at issue"); Jacobellis v. Ohio, 378 U.S. 184, 190 n.6 (1964).
91. *Women's Medical* relied upon *Jacobellis*, 378 U.S. at 188-89 (noting that an obscenity finding required "independent review of the facts" because "whether a particular work is obscene necessarily implicates an issue of constitutional law"). *Johnson* relied upon two cases involving criminal sentencing and substantive due process—*United States v. Jackson*, 181 F.3d 740, 742 (6th Cir. 2001) (reviewing de novo a criminal conviction under sentencing guidelines for a constitutional due process violation) (relying on *United States v. Smith*, 73 F.3d 1414, 1417 (6th Cir. 1996) (de novo review of crack cocaine v. powder cocaine sentencing guideline for substantive due process comport)), and *United States v. Knipp*, 963 F.2d 839, 843 (6th Cir. 1992) (holding that charges, reviewed de novo, in violation of Article 1, Section 9 Ex Post Facto law where defendants were convicted under congressional extension of statute of limitation provision) (relying on *Loudermill* v. Cleveland Bd. of Edu., 844 F.2d 304 (6th Cir. 1988) (reviewing a challenge to pre-termination process on Section 1983 due process grounds for "totality of the circumstances" on a de novo basis)).
92. *Grutter*, 288 F.3d at 738.
93. Id.
94. Id. at 732.
diverse student body, was a constitutional fact requiring de novo review.95

D. The Sixth Circuit's Use of Constitutional Fact—A Doctrinal Analysis.

Procedural mechanisms such as standing and abstention principles have been extensively analyzed on the doctrinal continuum of formalism to critical legal theory.96 Less attention has been given to exploring standards of review along that continuum. Upon analysis, it is easy to see how Rule 52(a) and standards of review are equally susceptible to these doctrinal tensions.

There are a multitude of perspectives from which to examine the Sixth Circuit's use of constitutional fact doctrine to invite de novo review. One adhering to a strict reading of Rule 52(a) would argue that the Sixth Circuit impermissibly avoided Rule 52(a)'s construction. As Rule 52(a)'s clearly erroneous standard does not turn on the type of fact presented, a formalist would reject out of hand the appellate development of fact typology. Thus one would take issue with the Sixth Circuit's use of a procedural standard which amounts to a "new" constitutional rule.

The same formalist would contend that using the constitutional fact doctrine as a basis for de novo review ignores important underlying rationales for Rule 52(a): the District Court's superior competency at fact-finding, and the value of efficient adjudication of claims. He would agree that deciding the law, elaborating on legal norms, correcting or affirming legal interpretations should be exclusively reposed with appellate judges. After all, that role reflects traditional Article III and Rule 52(a) objectives. Thus, the formalist would view the Sixth Circuit's correction of the District Court's Bakke interpretation as appropriate. However, he would reason further that, given that mistake of law, calling upon the constitutional fact doctrine to justify de novo review was not only improper (because such a doctrine should not exist), but wholly unnecessary.

In contrast, a legal realist would contend that the doctrine was properly invoked, and necessary as a matter of principle. She would admit that Rule 52(a)'s inherent lack of clarity invites appellate courts to discern the meaning, or even multiple meanings of its terms. Above all, she appreciates that adjudication is an interpretive activity. With that comes the recognition that the law and procedural rules should be sufficiently flexible to address presenting factual circumstances. The constitutional fact doctrine, thus, is a useful procedural instrument, allowing appellate courts to respond to issues of constitutional dimensions.

A legal realist would make the case that the underlying adjudicative facts of

95. Id. at 738.
racial discrimination in *Grutter* are different than those in cases where intentional discrimination occurred as a point of contention. In *Grutter*, the Law School did not deny the discrimination, but argued that its affirmative action policy was legally permissible.  

As a result, de novo review was warranted in order to examine the facts underlying the Law School’s affirmative action policy. Though recognizing the factual distinctions that *Grutter* presented, the realist might even make the case that the facts underlying a claim of intentional race discrimination are always constitutional in nature. Whether discrimination did or did not occur is, of course, a conclusion of law, with constitutional implications when prosecuted or defended under the Fourteenth Amendment. In addition, while the subsidiary facts which go to support or reject a finding of discrimination might be historical in nature, they are constitutional in that, upon interpretation and articulation, they directly induce the constitutional right or obligation (i.e., the ultimate issue, A discriminated against B, or A did not discriminate against B). Moreover, the same policy considerations that justify the doctrine’s application under other constitutional provisions should apply in the Fourteenth Amendment context as well. In other words, the realist would say that the need to “unify precedent,” and “clarify legal principles” is no less important in the Equal Protection context than the First Amendment context.

Those who view fact-finders as pursuing ideologically-driven goals would assert that the *Grutter* majority’s approach represents use of the power to classify facts as a deliberate effort to reach the underlying facts of a profoundly significant case. That the Sixth Circuit reached a completely different conclusion from the same set of facts demonstrates that the Sixth Circuit majority was primarily interested only in reversing the trial judge’s findings through the manipulation of standard of review principles. The Sixth Circuit’s expropriation of Judge Friedman’s role amounted to “a direct judicial assault on the prerogatives of [the] fact finder[.]”

Furthermore, the Sixth Circuit’s extension of the constitutional fact doctrine to uphold affirmative action policies represented the most opprobrious type of progressive judicial activism. Beyond the result-oriented approach, critics would cite other evidence that the *Grutter* majority improperly induced the constitutional fact doctrine, including the fact that the cases upon which the *Grutter* majority relied to induce the doctrine were inapposite. Another indication might be the fact that since the trial judge misinterpreted *Bakke*, reliance upon the constitutional fact doctrine was unnecessary. This evidence would lead some to conclude that the *Grutter* majority was pursuing its own agenda with respect to race and affirmative action.

A critical race theorist would laud the Sixth Circuit’s decision and approach. If one recognizes that *Grutter* was about affirmative action, the nature of that question, and the nature of the rights at issue warranted viewing the underlying facts as constitutional. Going beyond that observation, *Grutter* was not really about race and intent as adjudicative facts, but more about “critical mass” or

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“diversity” as the new proxy for race. On that score, the Sixth Circuit’s (and the Supreme Court’s) endorsement of that proxy was essential to legitimizing a new paradigm in our discourse about race.

While not being fully overjoyed with the tentative nature of the Sixth Circuit and Supreme Court decisions, the critical race theorist would say that the Sixth Circuit’s Grutter holding represented an important re-affirmation of the “best” aspects of Bakke. In a sense, Grutter bows to the principle that laws should be developed and interpreted in a manner which (re)empowers the social, political, economic (and educational) standing of historically subordinated groups. Indeed, de novo review would be warranted in every case in which discrimination claims by historically subordinated individuals are at issue.

Considering the constitutional fact doctrine itself, the critical race theorist might cite it and Rule 52(a) as another example of how supposedly value-neutral procedural rules work to favor or disfavor certain groups. While seeing the constitutional fact doctrine as valuable, they would criticize the Supreme Court’s favor of the doctrine in constitutional areas other than Equal Protection discrimination claims. Such a reluctance to invoke the doctrine in such claims is further proof of the Court’s hostility to historically subordinated groups, a retrenchment of federalism principles regarding race, and continued retreat from affirmative action. In short, the Sixth Circuit’s use of the constitutional fact doctrine represented an imperative rebuke of that retrenchment.

CONCLUSION

There is no shortage of explanations for the Sixth Circuit majority’s approach in Grutter. Obviously, it recognized the important qualitative differences between constitutional facts and other facts. Thus, the majority perhaps saw the need to expand the constitutional fact doctrine to reach affirmative action and intentional discrimination—a concept and a condition which, like the issues at stake in Johnson and Women’s Medical Professional Corp., are measured against the Constitution’s edicts. For the Sixth Circuit, whether the Law School did or did not intentionally discriminate was not the issue; the question to be answered was whether the underlying facts constituting the Law School’s admissions program were lawful under Bakke.

The Sixth Circuit seemed to appropriately recognize that when the District Court recast the Law School’s “critical mass” objective as a “quota,” it invoked a legal conclusion. Like “quota,” “critical mass” is a concept, not a fact. Moreover, like the term “quota,” “critical mass” is a concept with legal identity. Until Grutter, the critical mass concept had not been considered within the law of affirmative action. The Sixth Circuit majority correctly saw that concept as something possessing not only a legal identity, but one with constitutional dimensions. Consequently, even if the District Court had not erred in interpreting Bakke, Rule 52(a)’s clearly erroneous standard was not the correct standard of review to apply.

Finally, the political, legal, and social importance of substantive issue—affirmative action and diversity as a compelling state interest—was not lost on the court. The Sixth Circuit majority obviously felt that the case demanded plenary
examination with a heightened degree of intellectual rigor, and appropriate review in the context of equal protection doctrine. In light of these considerations, the Sixth Circuit’s application of the constitutional fact doctrine was both appropriate and necessary, if not imperative.

While we might applaud the Sixth Circuit’s approach and conclusion in *Grutter*, the constitutional fact doctrine carries jurisprudential consequences which should be of concern. Efficient administration of justice suffers when more cases can be reviewed de novo. Respect for trial process arguably diminishes as well, where litigants will not develop trial records as vigorously, understanding that they will have a second chance to try their cases. Regard for trial judges will be adversely impacted if their decisions are perceived to be, or are in fact, easily set aside. In sum, those interests sought to be preserved by Rule 52(a)—administrative efficiency, clear lines of tribunal authority, and dignity of the trial court—are severely compromised by the development of fact typologies which have the effect of further narrowing Rule 52(a)’s application.

Under all circumstances in which the standard of review must be articulated, appellate courts must take care in explaining why a particular standard applies and another does not. Transparency in the choice of standard is critical to mitigate charges of judicial bias. The perception (if not reality) of bias in decision making has sharpened dramatically over the past few decades, perhaps for many reasons: the openness and politicization of the federal judicial selection process, the overall demystification of the judicial decision making process, and the profound sociological, political, and legal questions being raised in the courts.

Given the decisive role standards of review play in adjudication, the failure of a court to at least explain its choice of standard makes it vulnerable to the perception that its decisional approach, at best, is result-driven, or worse, that judges are indeed pursuing ideological agendas. In the long run, such a perception, unmitigated, diminishes the trust in our judicial system. The risk of diminished trust in our system due to appellate courts failure to fully articulate the applicable standard of review is completely avoidable. That risk *must* be avoided when courts are wrestling with matters of profound public importance such as affirmative action.

The Sixth Circuit’s *Grutter* opinion provides fertile ground to discuss the important issues which underlie Rule 52(a) and standards of review. *Grutter* also provides the opportunity to more closely consider the constitutional fact doctrine. To be sure, the legitimacy of the constitutional fact doctrine as a procedural tool is debatable. Some see the doctrine as an illegitimate derogation of Rule 52(a). Appellate courts which recognize Rule 52(a)’s inherent ambiguities recognize the doctrine’s critical role in cases where the law-fact distinction is blurred, and heightened factual scrutiny is vital to ensuring preservation of essential rights. To that end, the constitutional fact doctrine is indispensable.

Despite its flawed articulation, the constitutional fact doctrine was applied to positive effect in *Grutter*. We can be grateful for the de novo review of constitutional facts in such cases, because it would be easy to imagine a different result, and indeed a different world, had deference been given to the trial court’s factual conclusions. That said, by advocating for the doctrine’s consistent application in all equal protection cases, one must accept the possibility that the
result on appeal will not always be the "correct" one, i.e., a result with which one agrees.

Whether applying the constitutional fact doctrine or some other standard of review, it is imperative that appellate courts do more to better articulate their choice of review. This is particularly vital in cases which carry enormous public and private implications, such as Grutter. By clearly explicating their standard of review choices, appellate courts can better demonstrate that decisional outcomes were indeed based on "principle and reasoned argument," and not ideological bias. Doing so mitigates the concern for whether the result on appeal was the "correct" one by ensuring that the decisional process—in which standard of review plays a pivotal role—was also based on principle.