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Appellate Review of a "Strong Basis in Evidence" in Public Contracting Cases

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APPELLATE REVIEW OF A "STRONG BASIS IN EVIDENCE" IN PUBLIC CONTRACTING CASES

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In the context of state and local affirmative action programs in public contracting, federal circuit courts have split on the appropriate standard of appellate review of a district court's finding of a "strong basis in evidence," a finding necessary to uphold the constitutionality of such programs. Using as a backdrop the premise that Rule 52(a) establishes a critical procedural requirement to which federal circuit courts should consistently adhere, the author discusses the history of the "strong basis in evidence" standard, appellate review in the federal court system generally, and the analysis used by federal appellate courts to resolve the issue. The author recommends adhering to the policy underpinnings of Rule 52(a) to analyze the appropriate appellate treatment of this finding, and, based on the implications of treating the "strong basis in evidence" finding as a finding of fact versus a question of law, concludes that appellate courts should review the "strong basis in evidence" finding under the clearly erroneous standard of Rule 52(a).

INTRODUCTION

In the wake of federal initiatives to promote the participation of racial minorities in public contracting, many state and local governments enacted affirmative action programs to satisfy this same goal.[1] Challengers to these state and local programs claim the laws are unconstitutional in violation of the Equal Protection Clause of the United States Constitution.[2] The Supreme Court has held that to defend the constitutionality of racial set-aside or affirmative action programs in public contracting, the government must show both that the racial classification is

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1. *See* Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After* City of Richmond v. J.A. Croson, 25 S. ILL. U. L.J. 39, 39 n.1 (2000).

2. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–80 (1989).

justified by a compelling interest and that the program is narrowly tailored to achieve its remedial purpose.[3] To satisfy the compelling interest prong of the strict scrutiny standard, the government must show a "strong basis in evidence" to support its conclusion that a race-based remedial program is necessary.[4] Satisfying this burden requires the government to present evidence of specific instances of past discrimination, not just conclusory claims of past discrimination.[5]

Circuits have split on whether the appropriate standard of appellate review for a district court's finding of a "strong basis in evidence" is the "clearly erroneous" standard applicable to findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure ("Rule 52(a)"), or de novo review, which is usually reserved for questions of law.[6] This comment argues that in cases disputing the constitutionality of racial-preference programs in public contracting, a trial court's finding of a "strong basis in evidence" should be treated as a finding of fact to be reviewed on appeal for clear error.

Of those circuits that have decided the issue, the majority have held that the standard of appellate review for a district court's finding of a "strong basis in evidence" is de novo, which allows the appellate court freer review, including the authority to reweigh the evidence on the record and to reach a conclusion different from that of the trial court.[7] However, the "strong basis in evidence" finding is not clearly a question of fact or a conclusion of law. It constitutes a quantum of evidence, but is also the determinative factor in the compelling interest prong of the strict scrutiny standard and thus is entwined with conclusions of law.[8] When an issue is not easily categorized as fact or law but rather straddles the two categories, Rule 52(a) should not necessarily be cast aside. Instead, a more thorough analysis than that conducted by the courts of appeals should be applied to the "strong basis in evidence" question. A uniform approach to the resolution of this problem and those like it requires a policy-based analysis that stems directly from Rule 52(a). Applying this analysis to the "strong basis in evidence" finding results in the

3. *Id.* at 505, 507.

4. *Id.* at 497, 500.

5. *Id.* at 498–99.

6. *See* Concrete Works of Colo., Inc. v. City & County of Denver, 540 U.S. 1027, 1033 (2003) (mem.) (Scalia, J., dissenting from denial of cert.).

7. *See generally* Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003) [hereinafter *Concrete Works IV*]; Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306 (Fed. Cir. 2001); Majeske v. City of Chicago, 218 F.3d 816 (7th Cir. 2000); Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996).

8. *See infra* Part II.

conclusion that it should be treated as a finding of fact to be reviewed on appeal for clear error.

Several implications compel this argument. Uniform procedure in civil litigation across federal courts was the main motivation for enacting the Federal Rules of Civil Procedure.[9] When the circuits do not uniformly adhere to the spirit of Rule 52(a), the judicial system is weakened by instability, judicial inefficiency, overloaded appellate dockets, perceived illegitimacy of the courts in the eyes of litigants, and needless reallocation of judicial authority. A weakened system ultimately harms litigants.

The premise that the federal circuit courts should adhere consistently to Rule 52(a) supports the conclusion that the "strong basis in evidence" finding should be treated as a question of fact to be reviewed for clear error on appeal. Part I of this comment provides a brief background of the "strong basis in evidence" standard introduced in Supreme Court cases that have addressed the constitutionality of racial preference programs in public contracting. This part also discusses appellate review in the federal court system, Federal Rule of Civil Procedure Rule 52(a), and issues that have arisen in categorizing questions of fact and conclusions of law. Part II examines federal circuit court resolution of the standard of appellate review over a district court's finding of "a strong basis in evidence," concluding that while the majority of circuits deciding the issue have determined that this finding is a question of law to be reviewed de novo, the analysis used to reach this conclusion is incomplete. Part III argues that the finding of a "strong basis in evidence" is not clearly a question of fact or law and recommends adherence to the policy underpinnings of Rule 52(a) to analyze the appropriate appellate treatment of this finding. This part also evaluates the implications of treating the "strong basis in evidence" finding as a question of fact to be reviewed for clear error versus a question of law to be reviewed de novo. Finally, Part IV concludes that appellate courts should review the "strong basis in evidence" finding according to the clearly erroneous standard of Rule 52(a).

I. BACKGROUND

The following section discusses the foundation of the "strong basis in evidence" requirement in public contracting cases and examines the Supreme Court's analysis in two important cases. As discussed below, *Wygant v. Jackson Board of Education* is the origin of the "strong basis in evidence" standard. In *Wygant*, the Supreme Court provided only

9. *See infra* notes 85–88 and accompanying text.

broad principles for future courts to follow. The court elaborated upon the requirement in *City of Richmond v. Croson*. Ultimately, neither case provides a clear understanding of the appropriate standard of appellate review for a "strong basis in evidence."[10]

A. The "Srong Basis in Evidence" Test in Wygant v. Jackson Board of Education

The "strong basis in evidence" requirement was introduced in *Wygant v. Jackson Board of Education*.[11] In *Wygant*, the Supreme Court addressed whether a public school board's preferential treatment of employees based on their race or national origin was constitutionally permissible.[12] The Jackson School Board had added a provision to the collective bargaining agreement between the Board and the teachers' union which gave minority teachers preference in the event of a layoff.[13] After a series of court challenges, the school board eventually followed the terms of the agreement and discharged senior non-minority teachers while retaining junior minority teachers.[14] The senior non-minority teachers filed suit, and the district court held that the racial preferences in the agreement were constitutional because they attempted to "remedy societal discrimination by providing 'role models' for minority schoolchildren," yet the preferences did not need to be based on a finding of prior discrimination.[15] The Court of Appeals for the Sixth Circuit affirmed the decision.[16]

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10. Since the public contracting line of cases, the Supreme Court has further addressed the "strong basis in evidence" requirement in the context of voting districting cases. While factually distinguishable, the same constitutional standard is applied because the issue is the constitutionality of affirmative action programs instituted by state and local governments. *See generally* Shaw v. Hunt, 517 U.S. 899, 909–910 (1996). *See also* K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 424 (1997) (citations omitted):

> Thus in his majority opinion in *Shaw v. Hunt*, which invalidated a state redistricting plan, Chief Justice Rehnquist held that "for an interest [in remedying the effects of past or present racial discrimination] to rise to the level of a compelling state interest, it must satisfy two conditions." First, the discrimination must be identified with specificity—a condition that makes "an effort to alleviate the effects of societal discrimination . . . not a compelling interest," and second, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary."

11. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986). *See also Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (mem.) (Scalia, J., dissenting from denial of cert.).

12. 476 U.S. at 269–270.

13. *Id.* at 270.

14. *Id.* at 272.

15. *Id.*

16. *See id.* at 273.

A plurality of the Supreme Court declared that strict scrutiny[17] was the appropriate constitutional standard of review[18] and determined that the race-based preferences in the collective bargaining agreement violated the Equal Protection Clause of the Fourteenth Amendment.[19] While the court ultimately based its conclusion on the "narrowly tailored" prong of the strict scrutiny standard, it discussed the compelling interest strand and created the requirement that the "trial court . . . make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."[20] Justice Powell, writing for the plurality, stated that "unless such a determination is made, an appellate court reviewing a challenge by non-minority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination."[21] Justice Powell based this assertion on precedent that required "some showing of prior discrimination by the governmental unit involved" before allowing a race-based classification as a remedy to the past discrimination.[22] The plurality concluded that no such determination had been made,[23] but because the collective bargaining agreement was not narrowly tailored to achieve "even a compelling purpose," there was no need to provide the school board another chance to try to meet its burden.[24] Justice Powell did not further elaborate on the meaning of "strong basis in evidence."

Justice O'Connor in her concurring opinion attempted to clarify the plurality's position, stating that a public employer must have a "firm basis" for the need to implement racial preferences. Evidence of a disparity between the percentage of qualified minorities who were employed as teachers and the percentage of qualified minority teachers in the labor pool was one type of evidence that would establish a basis for a government entity to conclude that a race-based plan would be a proper remedy

17. Strict scrutiny, the most searching of constitutional standards, is a two-pronged analysis: the government must justify the racial classification by a compelling interest, and the means chosen to achieve the end must be narrowly tailored to meet the goal. *Id.* at 273–74 (citations omitted).

18. At this time, the court had not firmly settled on the appropriate constitutional standard of review for remedial race-based classifications. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 221 (1995).

19. *Wygant*, 476 U.S. at 278.

20. *Id.* at 277.

21. *Id.* at 278.

22. *Id.* at 274.

23. *Id.* at 274–78. The court dismissed both the "role model" and "societal discrimination" rationales as insufficient grounds on which the school board could base its conclusion that a race-based remedy was proper. *See id.*

24. *Id.* at 278.

to prior race discrimination.[25] Justice O'Connor further stated that the government's remedying of past or present racial discrimination was a compelling government interest for implementing an affirmative action program.[26] The existence of a compelling interest turned on whether the government actor had evidence that supported "an inference of prior discrimination and thus a remedial purpose," and it was this evidence that the challengers to the action had to disprove.[27] In discussing the allocation of the burdens between the challenger and the government,[28] Justice O'Connor made clear that the court need not make "an actual finding of prior discrimination based on the employer's proof" before upholding the government action.[29] The court merely had to have the "means" to decide whether the public employer had a "firm basis" for concluding that remedial action—in this case, racial preferences in the layoff provisions of the collective bargaining agreement—was necessary.[30]

Ultimately, the plurality in *Wygant* held that to survive strict scrutiny, a trial court must make a factual determination that the government had a "strong basis in evidence" for its conclusion that remedial measures were necessary.[31] Satisfying the "strong basis in evidence" burden requires the government to make "some showing" of prior discrimination by the government unit enacting the racial preference program, but evidence of societal discrimination and the goal of providing role models to minorities are insufficient to support that burden.[32] *Wygant* also made clear that the government bears the burden of proving it has a "strong basis in evidence."[33]

B. Applying Wygant *in* City of Richmond v. Croson

Following *Wygant*, the Supreme Court in *City of Richmond v. Croson* applied the "strong basis in evidence" requirement to racial classifi-

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25. *Id.* at 292 (O'Connor, J., concurring).

26. *Id.* at 286. Justice O'Connor also states that the lower courts "did not focus on the School Board's *unquestionably compelling interest* in remedying its apparent prior discrimination when evaluating the constitutionality of the challenged layoff provision." *Id.* at 288 (emphasis added). *See also* Pillai, *supra* note 10, at 423.

27. *Wygant*, 476 U.S. at 293.

28. Like other discrimination claims, the government has the burden of producing evidence of an inference of prior discrimination. The challenger is given the opportunity to rebut this evidence and bears the ultimate burden of proving the action was unconstitutional. *Id.* at 292–93.

29. *Id.* at 292.

30. *Id.* at 293.

31. *Id.* at 277 (plurality opinion).

32. *Id.* at 274.

33. *Id.* at 277.

cations in public contracting, similarly holding that to satisfy the compelling interest strand of the Equal Protection strict scrutiny standard, the government had to have a "strong basis in evidence" for its conclusion that remedial action was necessary.[34] This meant the city was required to show, with some specificity, identified discrimination in the local construction industry.[35]

In *Croson*, the Court addressed the constitutionality of a city ordinance that required general contractors who were awarded city construction contracts to subcontract at least thirty percent of the contract amount to businesses with a majority ownership by one or more specified racial minorities.[36] The district court upheld the set-aside plan as constitutional, and the court of appeals affirmed.[37] However, both courts, relying on Supreme Court precedent applying a deferential standard to federal congressional findings, applied an erroneous constitutional standard of review.[38] Because of the recent *Wygant* decision, on certiorari, the Supreme Court vacated the court of appeals opinion and remanded the case.[39] On remand, the court of appeals held that the minority set-aside plan was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment because the plan failed both the compelling interest and narrowly tailored prongs.[40] The City of Richmond appealed.

Justice O'Connor held that the factual predicate offered by the City of Richmond to justify its set-aside program did not provide a "strong basis in evidence" for the city's determination that remedial action was warranted.[41] The standard in *Croson* thus shifted from the Court's suggestion in *Wygant* that a public employer have a "firm basis" for concluding remedial action was necessary[42] to a requirement that the city, with "some specificity," show "identified discrimination" in the local construction industry.[43] Because of the city's failure to meet this requirement, the Court concluded that the city had not shown a compelling interest for its racial classification. The Court admonished the city for

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34. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

35. *Id.*

36. *Id.* at 477–78.

37. *Id.* at 483–84.

38. *See id.* at 484. The cases relied upon were *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Id.*

39. *Croson*, 488 U.S at 485.

40. *Id.*

41. *Id.* at 498 (plurality opinion).

42. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 292 (1986) (O'Conner, J., concurring).

43. *Croson*, 488 U.S. at 500, 504–05. Although the specificity requirement might often require appellate courts to review findings of fact, this does not necessarily mean that the appellate courts may conduct a non-deferential de novo review of such findings.

relying on, as its factual predicate, good intentions, conclusory statements of racial discrimination, the disparity between the number of city contracts awarded to minority-owned firms and the number of minorities in Richmond's population, and evidence of low participation by minority-owned businesses in the city's construction industry.[44] The Court found that individually and collectively, these "facts" held little weight in a finding of discrimination and thus did not provide Richmond with "a 'strong basis in evidence' for its conclusion that remedial action was necessary."[45] Instead, the Court stated that gross statistical disparities, for instance between eligible minority-owned businesses and minority-owner membership in the city construction trade organizations, would constitute the "identified discrimination" necessary for the public employer to conclude that remedial relief was justified.[46] But backing away slightly from this seemingly heightened burden of "identified discrimination," the Court suggested that all that was necessary was an "inference" of discrimination in the local industry.[47]

The Court in *Croson* did not establish a standard of appellate review for the finding of a "strong basis in evidence," and the treatment of this issue as one of fact or law has remained unsettled. Part of the confusion is due to the fact that a "strong basis in evidence" is an evidentiary burden but at the same time supports, if not drives, the legal conclusion that the compelling interest strand of equal protection analysis is satisfied.[48] Another complication is that the constitutionality of a government action is undoubtedly a legal question to be reviewed de novo,[49] while the sufficiency of evidence is but one part of reaching the conclusion that the action is constitutional. However, one scholar has commented that remedying past or present discrimination is "widely accepted as compelling,"[50] which can be inferred from the Court's language in *Wygant*.[51]

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44. *Id.* at 498, 500–01, 503.

45. *Id.* at 500 (quoting *Wygant*, 476 U.S. at 277).

46. *Id.* at 503.

47. *Id.* at 503 ("If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.").

48. *See* Associated Gen. Contractors of Conn. v. City of New Haven, 41 F.3d 62, 66 (2d Cir. 1994) ("In the context of race-based set-asides, *Croson* makes clear that the constitutionality of any municipal plan is inextricably linked to its factual justification.").

49. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.13, at 2-73 (3d ed. 1999).

50. Jeffrey M. Hanson, Note, *Hanging By Yarns?: Deficiencies In Anecdotal Evidence Threaten The Survival Of Race-Based Preference Programs For Public Contracting*, 88 CORNELL L. REV. 1433, 1439 (2003). *See also Concrete Works IV*, 321 F.3d 950, 958 (10th Cir. 2003) (citing Shaw v. Hunt, 517 U.S. 899, 909–10 (1996), for the proposition that a state's interest in remedying past or present discrimination is compelling only if the discrimination is

Thus in public contracting cases, the focus has shifted from the question of whether remedying past or present discrimination is or is not a compelling interest to the questions of whether "evidence of discrimination is strong enough to lend credibility to a government's stated (or implied) goal of remedying discrimination, or . . . is too weak to eliminate the possibility that racial politics or notions of racial inferiority motivated policy makers."[52] In this respect, the compelling interest strand of the strict scrutiny test may take on a different flavor than other Equal Protection challenges because the "legal conclusion" aspect has, for the most part, been decided. At issue for the district courts is the evidence on which the legal conclusion that remedying past or present discrimination is based—a "strong basis in evidence."

In sum, the Supreme Court has not articulated a standard of appellate review for the finding of a "strong basis in evidence." Although *Wygant* states that "the trial court must make a *factual determination* that the employer had a strong basis in evidence for its conclusion that remedial action was necessary,"[53] it is established that there is a gray area between fact and law,[54] and thus simply describing a question as one of fact does not make it so.[55] It could be argued that the "strong basis in evidence" of prior discrimination is a factual finding, because both *Wygant* and *Croson* describe the finding of a "strong basis in evidence" in terms much like disparate treatment claims under Title VII,[56] and courts have held that proof of discrimination in Title VII cases is a finding of

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identified with "some specificity" and that a "strong basis in evidence" supports the state's conclusion that remedial action was necessary).

51. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (recognizing the remedying of past or present racial discrimination as a compelling government interest).

52. Hanson, *supra* note 50, at 1439.

53. 476 U.S. at 277 (emphasis added).

54. *See infra* text accompanying note 113.

55. *See infra* text accompanying notes 113–115.

56. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (citing *Wygant* for the argument that in this case, "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry"); *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring). In *Wygant*, Justice O'Connor in her concurring opinion suggests that disparate treatment claims may be an appropriate analogy to determining the sufficiency of the burdens of proof. *Wygant*, 476 U.S. at 292 (stating that "demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers" would be an example of a "reliable benchmark" on which an employer could base its conclusion that affirmative action was a fit remedy to past discrimination). The plaintiff is required to make a showing of reverse racial discrimination. The burden then shifts to the government to show a "strong basis in evidence" for its conclusion that remedial action was warranted. The plaintiff has the ultimate burden of proving that the action was unconstitutional. *Id.* at 292–94.

fact to be reviewed on appeal for clear error.[57] But disparate treatment cases do little to resolve the "strong basis in evidence" issue because they are factually and procedurally distinguishable.[58] Additionally, the Supreme Court's language in *Wygant* and *Croson* implies that the finding of a "strong basis in evidence" is both a determination that the government has satisfied an evidentiary burden[59] and a controlling factor in the satisfaction of the compelling interest strand of strict scrutiny.[60] The Supreme Court has left it to the lower courts to interpret the broad rules of *Wygant* and *Croson*.

C. Appellate Review of Trial Court Proceedings

The appropriate standard of appellate review is problematic in many cases outside the context of public contracting. In order to provide a historical framework for the issue, this section briefly discusses appellate review before the enactment of the Federal Rules of Civil Procedure. Next, it describes the content of Rule 52(a) and the difficulties that have arisen in the application of the rule. This section concludes with the policies supporting the Federal Rules of Civil Procedure as well as the specific policies underlying Rule 52(a).

1. Appellate Review Prior to the Federal Rules of Civil Procedure

Before the adoption of the Federal Rules of Civil Procedure in the United States,[61] the standard of appellate review was determined by

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57. 1 CHILDRESS & DAVIS, *supra* note 49, § 2.24, at 2-144 to -152 (citations omitted) (noting that while not all findings that relate to proof of discrimination will be reviewed under Rule 52(a), Rule 52(a) has been applied to findings of discriminatory intent and ultimate determinations of discrimination, including findings of "no retaliation").

58. For instance, in public contracting cases, the government does not have the burden of proving that there was actual discrimination in order to satisfy the strong basis in evidence burden. Rather, there must be sufficient evidence that is "probative of any discrimination in the local construction industry" or gives rise to "an inference of discriminatory exclusion." *Croson*, 488 U.S. at 503.

59. *See Croson*, 488 U.S. at 494–95, 498 (O'Connor, J. concurring) (suggesting that to determine whether a racial classification furthers remedial goals, the court must "first engag[e] in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis" and discussing the insufficiency of the "factual predicate" offered in support of the city's plan); *Wygant*, 476 U.S. at 277 ("*Evidentiary support* for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees.") (emphasis added).

60. *See Wygant*, 476 U.S. at 274.

61. In 1935, the Supreme Court, pursuant to its rulemaking authority under the Rules Enabling Act of 1934, appointed an Advisory Committee to prepare a draft of proposed uni-

whether the action was at law or in equity.[62] The ancient chancery law allowed broad de novo[63] review of facts found during a bench trial, while the same findings made by a court at law were largely not reviewable because the Seventh Amendment right to a jury was extended to such trials.[64] The Committee formulating the Federal Rules of Civil Procedure wanted a single standard of review for both traditionally legal and equitable actions,[65] and the "clearly erroneous" standard adopted by the Committee and the Supreme Court in Rule 52 embodies the broader equity standard.[66]

2. Rule 52(a) of the Federal Rules of Civil Procedure

Rule 52(a) provides that a district court's findings of fact, based on both oral[67] and documentary[68] evidence, will not be disturbed by the reviewing court unless the findings are "clearly erroneous."[69] Rule 52(a) also delineates the district court's expertise from that of the appellate court by requiring the appellate court to consider the district court's opportunity to assess the credibility of witnesses.[70] Specifically, the district court in all actions will make findings of fact and separately state conclu-

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fied procedural rules. After several committee drafts and revisions by the Court, the Supreme Court adopted the rules and submitted them to Congress. Congress enacted the Rules in 1938. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 23–31 (3d ed. 2002).

62. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571, at 481 (2d ed. 1994).

63. "De novo" means "anew." BLACK'S LAW DICTIONARY 467 (8th ed. 2004). "A trial de novo is a trial had as though no action whatever had been instituted in the court below, a new trial in an appellate tribunal." 5 C.J.S. *Appeal and Error* § 756 (1993).

64. 9A WRIGHT & MILLER, *supra* note 62, § 2571, at 481; 1 CHILDRESS & DAVIS, *supra* note 49, § 2.02, at 2-5 (noting that the factfinding by the judge in a bench trial was considered "as conclusive as a jury verdict").

65. 9A WRIGHT & MILLER, *supra* note 62, § 2571, at 482; *see* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.02, at 2-6.

66. 9A WRIGHT & MILLER, *supra* note 62, § 2571, at 482; *see also* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.04, at 2-26 (stating the rule "echoes equity's *presumptively correct* deference without making the findings conclusive") (emphasis in original).

67. Oral evidence is given orally. *See* BLACK'S LAW DICTIONARY 600 (8th ed. 2004).

68. Documentary evidence is supplied by a writing or other document. BLACK'S LAW DICTIONARY 596 (8th ed. 2004).

69. FED. R. CIV. P. 52(a). The relevant text from the Rule states:

> 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. . . . 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.

Id.

70. *Id.*

sions of law.[71] By its silence, the rule implies that conclusions of law are not subject to the "clearly erroneous" standard of review.[72] Hence, the rule has been interpreted to require "special deference" when an appellate court reviews findings of fact, but otherwise, no deference is required.[73]

In practice, Rule 52(a) has not been easy to apply and courts have developed doctrines to circumvent its constraints.[74] Consequently, the Supreme Court has clarified the rule's breadth and meaning, in many cases calling for stricter adherence to the rule.[75] For instance, appellate courts have experienced difficulties in determining what type of evidence fell within the "clearly erroneous" standard articulated in Rule 52(a).[76] Prior to the 1985 Amendments to Rule 52(a), it was unclear whether or not the rule applied to trial court findings that were based upon documentary evidence.[77] Some courts held that documentary evidence did not require assessment of a witness's credibility or demeanor and thus should be afforded less deference, while other courts followed the reasoning that because the record was purely documentary, the trial court was no better positioned than the appellate courts to review the record.[78] Yet other courts held the rule to apply regardless of the type of evidence or whether the findings were inferences drawn from the facts.[79]

In the 1985 Amendments, the Advisory Committee modified Rule 52(a) to explicitly include documentary evidence.[80] In revising the rule, the Advisory Committee stated broad justifications for the amendment of Rule 52(a), namely, uniformity across the courts of appeals in applying the rule.[81] The Advisory Committee's main rationale for including documentary evidence within the scope of Rule 52(a) was that recognition of the district court as the finder of fact would promote the public interest in stability and judicial economy, and this public interest was stronger than arguments favoring non-deferential appellate review of

71. *Id.*

72. 9A WRIGHT & MILLER, *supra* note 62, § 2588, at 599.

73. *See* FED. R. CIV. P. 52(a) advisory committee's note on 1937 adoption.

74. Terri Y. Lea, Case Note, *Federal Rule of Civil Procedure Rule 52(a): Applicability of the "Clearly Erroneous" Test to Finding of Fact in All Nonjury Cases*, 29 HOW. L.J. 639, 645–46 (1986).

75. *Id.* at 645–56.

76. *Id.* at 642.

77. FED. R. CIV. P. 52(a) advisory committee's note on 1985 amendment.

78. *Id.*

79. *Id.* (noting that another issue at the time of the 1985 Amendments was whether inferences drawn from facts were subject to the "clearly erroneous" standard).

80. *Id.* Childress comments that this was an original intention of the drafters of the Rules. 1 CHILDRESS & DAVIS, *supra* note 49, § 2.02, at 2-6.

81. FED. R. CIV. P. 52(a) advisory committee's note on 1985 amendment.

non-demeanor evidence and inferences.[82] Furthermore, allowing appellate courts to encroach upon the district courts' fact-finding role would "tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."[83] The Advisory Committee did not explicitly state that these principles applied only to the 1985 Amendment to Rule 52(a). Arguably, these principles provide guidance for courts in their general application of Rule 52(a), which affirmatively puts the district court into the role of factfinder.

a. The Policies Underlying Rule 52(a)

Rule 52(a) therefore can be understood to encompass several intentions,[84] and these policies compose the spirit of the rule. First, there exists an underlying foundational presumption that the courts of appeals should uniformly apply the Federal Rules of Civil Procedure, including Rule 52(a).[85] The development of federal procedural rules in the late nineteenth century was spurred by the need for uniformity between federal common law procedure and state procedures.[86] As federal practice began losing its local character, diverse state procedural requirements became burdensome, and additional reform was needed to standardize procedure among the federal courts.[87] This eventually led to unified procedure both in equity and at law and the Supreme Court's adoption of the Federal Rules of Civil Procedure in 1937.[88] Thus, uniform procedure among the federal courts was the motivating factor behind the endeavors to reform the federal courts and promulgate the rules. After sixty-eight years, this compelling justification remains firm.

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82. *Id.* (stating "public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts" outweighs considerations supporting the argument for free review of documentary evidence).

83. *Id.*

84. These are intentions beyond the rule's general purpose, which requires the trial court to set forth findings of facts and legal conclusions separately. The justifications for the general rule include: providing an adequate record on appeal, clarification of issues for purposes of issue and claim preclusion, and encouraging the trial court to exercise care in discovering the facts of the case. 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 52.02 (3d ed. 2005).

85. *See supra* text accompanying note 81.

86. ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 61 (1952). Specifically, the Conformity Act of 1872 required the procedure of the federal common law to conform "as near as may be" to existing state procedures for similar causes. *Id.* at 59.

87. *Id.* at 61.

88. *Id.* at 62.

The goal of uniformity is easily connected to the policy that the public interest in stability and judicial economy is a paramount goal in the administration of the Federal Rules of Civil Procedure and the application of Rule 52(a).[89] This public interest outweighs an appellate court's interest in conducting a searching review of a trial court's factual findings, even under circumstances where one judicial actor does not appear better positioned than another to undertake that task. The application of uniform rules secures stability and eliminates unpredictability in the judicial process. Consequently, to disrupt this stability would run counter to the goal of uniformity underlying the Federal Rules of Civil Procedure. Furthermore, Rule 1 of the Federal Rules of Civil Procedure addresses judicial economy by commanding the construction and administration of the rules "to secure the just, speedy, and inexpensive determination of every action."[90] Thus at all points in the federal trial process, federal judges should strive to further this mandate. While such a rule can be considered merely precatory, the complexity, expense, and length of the modern trial process provide good reasons to adhere to this principle.

Naturally following from the goal of a stable and efficient judicial system is the second policy concern: courts should not encourage the retrial of some factual issues on appeal. Clearly, the encouragement of appeals conflicts with the economical administration of the federal courts. Appellate courts are besieged with appeals,[91] and inviting claims with little merit hinders other litigants' access to the system. Moreover, an overload of cases can result in the risk that appellate judges will sacrifice reasoned decisionmaking at the expense of a pressing need for judicial efficiency.[92]

Third, appellate courts should attempt to prevent the weakening of the trial courts' legitimacy in the eyes of litigants.[93] The judicial system provides issue resolution and offers litigants the opportunity to assert their legal rights, and thus is vital to the functioning of our society. Public concern about the legitimacy of the judicial system could destabilize the institution, as distrust or devaluation of judicial function would erode its effectiveness. A public that doubts the authority of judges and the soundness of their decisions could create a reformulated perception of

89. *See* FED. R. CIV. P. 52(a) advisory committee's note on 1985 amendment.

90. FED. R. CIV. P. 1.

91. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 693 (2000–01) (noting that in the late 1990s, individual circuit judges had case loads of more than 900 cases per year).

92. *See id.* at 690.

93. *See supra* text accompanying note 83.

the judicial system in negative terms, ultimately leading to public outcry.[94] In response to public opinion, judges may inadvertently turn to outcome-oriented decisionmaking, which conflicts with the proper function of the judicial system.[95] The district court might be the only part of the federal judicial system to which a litigant is exposed, as many litigants may be unable to appeal or may decide to refrain from appealing issues decided at trial.[96] If a decision at trial may be freely reviewed by appellate courts regardless of the applicable rules of the system, this would ultimately undermine the district court's legitimacy and lead to negative consequences caused by the public's perception of the trial court as an unsound or inconsequential institution.

Finally, there should be a compelling reason for redistributing the trial court's authority to find facts and the appellate court's authority to develop the law.[97] Rule 52(a) explicitly states that reviewing courts should give due regard to the trial court's opportunity to judge the credibility of the witnesses.[98] Much of the evidence presented in a trial addressing the constitutionality of a racial preference program, whether to the bench or to a jury, is testimonial.[99] When a case goes to trial, the factfinder decides the facts. This judgment is made partially through the assessment of witness credibility. Meanwhile, appellate courts must make this evaluation from a cold record, which is devoid of the human factor that is so important in the search for the truth. Even in the absence of oral evidence, to duplicate factfinding at both the trial court level and

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94. *See* Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 853–855 (1991) (discussing the struggle of appellate judges to administer "principled decisionmaking" in an increasingly politicized judicial system and the public's perception of the judicial system as one of partisan decisions).

95. *See id.* at 855 (arguing that judges may not be "immune from the effects of the widespread misperceptions regarding politics and the judicial function" because of "the idea that judges, told often enough that their decisionmaking is crucially informed by their politics, will begin to believe what they hear and to respond accordingly").

96. *See infra* note 140 and accompanying text.

97. *See* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.12, at 2-73.

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

99. *See, e.g.*, *Concrete Works IV*, 321 F.3d 950, 969 (10th Cir. 2003) (reviewing testimony of the senior vice-president of a non-minority construction firm regarding treatment of minority-owned construction firms, testimony of several minority owners regarding the difficulty of prequalifying for public projects, the success of their bid proposals, and racially-motivated harassment experienced at work sites); Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 924–25 (11th Cir. 1997) (stating that the "County and the interveners introduced a great deal of anecdotal evidence about discrimination in the County construction market" but noting that while "anecdotal evidence can play an important role in bolstering statistical evidence, . . . only in the rare case will anecdotal evidence suffice standing alone"); Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586, 595 (3d Cir. 1996) (reviewing testimony presented by plaintiffs' witnesses challenging the validity and reliability of the statistics presented by the City's expert witness).

the appellate level is not only inefficient but directly contrary to the requirement that the trial court make findings of fact pursuant to Rule 52(a). Moreover, the appellate court's traditional expertise is in developing the law,[100] which is but another way of establishing certainty and stability for litigants and for trial courts that must apply the law to the facts. Regardless of the evidence, the segregated function of the district court as factfinder and the appellate court as an interpreter of law furthers the important goals of providing an efficient and stable system to litigants and therefore should not be circumvented unless there is a compelling reason to do so.

b. Clearly Erroneous Review Under Rule 52(a)

In addition to the important policies furthered by Rule 52(a), the rule sets forth procedural standards that all federal courts must follow. In unambiguous situations, the rule's requirements for the proper standard of appellate review are generally agreed upon. When reviewing a trial court's factual findings for clear error, the appellate court will afford the trial court greater deference on review because the district court's findings are "presumptively correct."[101] The most common definition is that "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."[102] The Supreme Court in *Anderson v. Bessemer City* later established that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[103] Therefore, some appellate courts have defined "clearly erroneous" on the basis of the plausibility of the district court's view of the evidence.[104]

When the factual findings of the trial court are not at issue on appeal, the limitations of Rule 52 do not apply.[105] It is generally accepted

100. *See* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.13, at 2-73.

101. 9A WRIGHT & MILLER, *supra* note 62, § 2585, at 565.

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

103. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

104. *See, e.g., Eng'g Contractors Ass'n*, 122 F.3d at 907 ("[U]nder the clearly erroneous standard, our duty is to examine the record solely to determine whether the district court's view of the evidence is a permissible one, a plausible one in light of the entire record.").

105. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957).

that conclusions of law are reviewed de novo on appeal.[106] This means that an appellate court need not exercise deference to the district court decision, but instead has the authority to freely review the decision and may come to a different conclusion from that reached by the district court.[107] The rationale behind this non-deferential review seems to be the recognized functional distinction between the trial court and the appellate court.[108] The trial court functions as the factfinder and is considered superior to the appellate court in this role because of its ability to assess witness credibility.[109] The primary function of the appellate court is to review legal issues.[110] When conclusions of law are at issue on appeal, there is no reason, unless the trial court is better suited than the appellate court in the development of law on those issues, for the appellate court to grant the trial court deference. Consequently, de novo is the appropriate standard of appellate review.[111]

D. Questions of Fact, Conclusions Of Law, and Possible Solutions to Issues That Fall Between

It is established that questions of fact are reviewed on appeal for clear error and conclusions of law are reviewed de novo, but what constitutes a question of fact and what is a conclusion of law? While there are unambiguous questions of fact and conclusions of law (for example, whether the car ran the red light is a finding of fact, while the constitutionality of a law on its face is a conclusion of law[112]), scholars and judges agree that the distinction between the two is often unclear and that many findings fall somewhere in between.[113] Issues that seem to involve both questions of fact and conclusions of law have been referred to as

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106. Elder v. Holloway, 510 U.S. 510, 516 (1994). *See also* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) ("[I]t is well settled that appellate courts 'accep[t] findings of fact that are not "clearly erroneous" but decid[e] questions of law *de novo*.'") (citations omitted).

107. Salve Regina Coll. v. Russell, 499 U.S. 225, 238 (1991). *See also* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.14, at 2-79.

108. *See Salve Regina Coll.*, 499 U.S. at 233 ("Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district-court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts.").

109. *See id.*

110. *See id.*

111. *See id.*

112. *See* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.13, at 2-73.

113. Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 659 (1988). *See also* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.13, at 2-73 ("Rule 52 does not stoop to draw the line between law and fact which it makes so important.").

"mixed questions," "legal inferences from the facts," and "application of law to the facts."[114] Creating clear-cut principles for resolving those issues that fall in the middle of the spectrum has been difficult for the good reason that to do so would be artificial.[115] There are no uniformly accepted court-made tests for determining into which category a "mixed question" falls, nor do the Federal Rules of Civil Procedure provide rules for making this distinction.[116] Even though there is authority that supports the view that mixed questions of fact and law "are not protected by the 'clearly erroneous' rule and are freely reviewable,"[117] at bottom, there is no clearly controlling, thoroughly analyzed precedent that rationalizes the appropriate standard of appellate review for a "strong basis in evidence." In other substantive areas, courts have employed some persuasive frameworks that could be applied to the issue at hand. But ultimately, these frameworks suffer from the same artificiality that occurs when developing a bright line rule based on the nature of the issue on appeal.

1. The "Ultimate Fact" Doctrine

One approach, rejected by the Supreme Court, is the "ultimate fact" doctrine. This doctrine allows the reviewing court to avoid applying the "clearly erroneous" standard when the facts found control the "ultimate issue for resolution" on appeal.[118] In *Pullman-Standard, Div. of Pullman v. Swint*, the Supreme Court proscribed this avoidance of Rule 52(a) in a suit by African-American employees against their employer, Pullman, and the employees' union. The employees argued that the seniority system instituted by the employer and employees' union violated Title VII of the Civil Rights Act of 1964.[119] The district court was required to

114. 9A WRIGHT & MILLER, *supra* note 62, § 2589, at 608; 1 CHILDRESS & DAVIS, *supra* note 49, § 2.18, at 2-102.

115. *See* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.13, at 2-73, 2-76; Cooper, *supra* note 113, at 659; Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985).

116. *See* Cooper, *supra* note 113, at 670.

117. 9A WRIGHT & MILLER, *supra* note 62, § 2589, at 608. *See also* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) (arguing that "[m]erely labeling the issues 'mixed questions,' however, does not establish that they receive *de novo* review" and that "there is no rigid rule with respect to mixed questions" but acknowledging deferential review of such questions may be justified "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") (citations omitted).

118. *See* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.13, at 2-93.

119. Pullman-Standard v. Swint, 456 U.S. 273, 275 (1982).

make certain findings in order to determine whether the seniority system was protected by federal statute.

The Court of Appeals for the Fifth Circuit rejected the district court's findings and engaged in its own factfinding. The court of appeals reasoned that while "discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a)."[120] Because the finding of discrimination *vel non* was one of ultimate fact, the court of appeals concluded that it could "make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous."[121] The Supreme Court reversed, holding there was no distinction between facts and ultimate facts: "[Rule 52(a)] 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 . . . ."[122] This holding demonstrates the Supreme Court's unwillingness to allow certain factual findings to be considered so important to or controlling of an issue that appellate courts would be justified in circumventing Rule 52(a).

The finding of a "strong basis in evidence" arguably could be considered an "ultimate fact," similar to the finding of discrimination at issue in *Pullman-Swint*. A district court's conclusion that the "strong basis in evidence" burden has been satisfied is a conclusion that the compelling interest prong of the strict scrutiny standard also has been satisfied. And, there is little doubt that a "strong basis in evidence" is supported by a number of facts.[123] Consequently, it could be argued that the "strong basis in evidence" finding constitutes "facts found" which control the "ultimate issue for resolution" on appeal: the constitutionality of the government action. However, because the Supreme Court rejected the ultimate fact doctrine, resolution of the "strong basis in evidence" issue should not be based on similar reasoning that the finding is an "ultimate issue" considered so important that the court may avoid Rule 52(a).

2. The "Constitutional Fact" Doctrine

The "constitutional fact" doctrine could also have force in settling the "strong basis in evidence" issue. This doctrine provides for freer re-

120. *Id.* at 285 (quoting Swint v. Pullman-Standard, 624 F.2d 525, 533 n.6 (5th Cir. 1980)).

121. *Id.* (quoting *Swint*, 624 F.2d at 533 n.6).

122. *Id.* at 287.

123. *See supra* note 97 and accompanying text.

view when the decision rests on the satisfaction of a constitutional standard.[124] Courts apply a constitutional standard to underlying facts in order to determine the constitutionality of an action.[125] The facts are thus enmeshed in the legal conclusion.

The Supreme Court initially suggested this doctrine in *Bose Corp. v. Consumers Union of U.S, Inc.*[126] At issue in *Bose* was whether the Court of Appeals for the First Circuit erred when it applied a de novo review standard to a district court's finding of "actual malice" in a product disparagement case.[127] Bose had commenced a product disparagement action against a consumer magazine that published a review of a Bose speaker system.[128] Bose, in order to prevail, had to prove by clear and convincing evidence that the defendant consumer magazine "made a false disparaging statement with 'actual malice.'"[129] The district court made findings of fact on the falsity and disparagement of one of the published statements and concluded that Bose had met its burden.[130] The Court of Appeals for the First Circuit reversed the district court's decision, holding that the determination of "actual malice" was not subject to Rule 52(a) and that de novo review was the appropriate standard of appellate review.[131] The court of appeals reasoned that de novo review was necessary to ensure the district court properly applied constitutional law and that the plaintiff had met its burden of proof.[132] The Supreme Court affirmed the court of appeals decision and held that "the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice" and that "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."[133]

The underlying principle in *Bose* is that constitutional rights and values are particularly important.[134] Further refining this doctrine is the notion that appellate courts should create "constitutional norms," which requires the reviewing court to fully examine the underlying facts leading

124. Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1430 (2001).
125. *See id.*
126. 466 U.S. 485 (1984).
127. *Id.* at 493.
128. *Id.* at 487–89.
129. *Id.* at 490.
130. *Id.* at 490–91.
131. *Id.* at 492.
132. *Id.*
133. *Id.* at 514.
134. *See* Monaghan, *supra* note 115, at 267.

to the trial court's conclusion.[135] For the most part, *Bose* has been limited to First Amendment cases,[136] but it does set forth principles that arguably could be applied more broadly to cases in which the ultimate decision regards a constitutional right.[137] For example, in public contracting cases, the ultimate decision at trial will affect an individual's constitutional right to equal protection. Thus, because the courts are deciding a constitutional right, the argument is that district court findings regarding that right should be freely reviewed on appeal. However, the argument that issues regarding constitutional rights or norms are free from the standard of Rule 52(a) runs counter to the rationale for rejecting the "ultimate fact" doctrine. As noted above, the Supreme Court rejected the contention that certain factual findings, when sufficiently important, are excluded from the scope of Rule 52(a).[138] The Supreme Court in *Bose* seems to allow appellate courts to do exactly this, merely because the constitutional issue is considered to be so important.

Countering this concern is the argument that the constitutional fact doctrine is justified by the functional distinction between trial courts and appellate courts—that appellate courts are better situated to decide constitutional questions.[139] But there are other considerations. First, parties may choose not to appeal,[140] and even if a party does choose to appeal, there is no guarantee that the court of appeals will accept the case for review. This would mean that the district court is the only opportunity for these parties to litigate their claims, and thus to ensure the court's legiti-

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135. *Id.* at 273.

136. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685–86 (1989). In a jury trial, the Supreme Court reiterated its reasoning behind treating "actual malice" as a question of law, stating that

> the rule is premised on the recognition that "[j]udges, as expositors of the Constitution," have a duty to "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.'"

Id. at 686 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984)). Moreover, in *Bose*, the Court's holding was narrow: "The clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co.* v. *Sullivan*." *Bose*, 466 U.S. at 514.

137. Hoffman, *supra* note 124, at 1431–32; 1 CHILDRESS & DAVIS, *supra* note 49, § 2.19 at 2-108 to -109, 2-111.

138. *See supra* text accompanying note 122.

139. *See Bose*, 466 U.S. at 501 ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.").

140. Richard L. Aynes, *The Bill of Rights, the Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship*, 8 WM. & MARY BILL RTS. J. 407, 431 n.171 (2000) (book review) ("It is only a few disputes that are actually resolved by judges or jurors. Of that number, an even smaller number are appealed.").

macy in the eyes of litigants, its findings should be given deference on appeal, even if related to a constitutional right. Second, the appellate courts could guide district courts as to constitutional norms without reweighing the facts before the district court. The appellate courts could correct any errors made by the district courts with respect to constitutional standards, but remand the case to the district court to make any necessary findings. Thus, under the constitutional fact doctrine, while the appellate courts have the ability to apply Rule 52(a), they can avoid the constraint of the rule because the findings of the district court are integral to deciding a constitutional right. Finally, the Court's holding in *Bose* was very narrow[141] and has not been extended to all constitutional questions. In sum, the constitutional fact doctrine is a concept that can be interpreted too broadly to allow appellate courts to avoid the institutional distinction created by Rule 52(a). Moreover, the doctrine could be used to the detriment of Rule 52(a) because it artificially distinguishes the questions that fall within the ambit of Rule 52(a) based upon the Court's decision that one legal category is more important than other legal categories. Consequently, it does not represent a viable solution to the "strong basis in evidence" question.

3. Mixed Questions of Fact and Law: A Conclusory Analysis

A number of courts have resolved the appropriate standard of appellate review based upon the classification of an issue as a "mixed question" involving questions of both fact and law. When the issue rests on a legal conclusion, that determination is reviewed de novo, but underlying facts supporting that conclusion are reviewed for clear error.[142] For example, the Court of Appeals for the Eighth Circuit held that in a forfeiture proceeding, the district court's factual findings are subject to clear error review, but that a de novo standard of review applies to the reviewing court's consideration of whether or not the factual findings result in forfeiture of the property in question.[143] In another example, this time in the context of whether a plaintiff had submitted to his employer's Dispute Arbitration Policy, the Court of Appeals for the District of Columbia Circuit held that

> the determination that parties have contractually bound themselves to arbitrate disputes—a determination involving interpretation of state

141. *See supra* note 136 and accompanying text.

142. *See* 9A WRIGHT & MILLER, *supra* note 62, § 2589, at 608.

143. United States v. Dodge Caravan Grand SE/Sport Van, 387 F.3d 758, 761 (8th Cir. 2004).

> law—is a legal conclusion subject to our *de novo* review . . . but that the findings upon which that conclusion is based are factual and thus may not be overturned unless clearly erroneous.[144]

This test has been applied to a finding of a "strong basis in evidence," as discussed in Part II.

Unlike the ultimate fact and constitutional fact doctrines, which apply to questions of fact that are exempted from Rule 52(a), the mixed question doctrine applies when there are questions of both fact and law.[145] In that case, the issue is freely reviewable on appeal.[146] However, there are some gaps in the mixed question doctrine. First, the courts have not supplied an analysis for determining when a "legal conclusion" is in fact a legal conclusion. As mentioned previously, many questions are not clearly a legal conclusion or a factual finding.[147] For example, in the public contracting cases, the circuits are split on whether a "strong basis in evidence" is a question of fact or law.[148] Under the mixed question doctrine, when a question cannot clearly be categorized as fact or law and legal reasoning is required to decide the issue,[149] it would escape the scope of Rule 52(a). The mixed question doctrine presupposes the issue is a conclusion of law without providing guiding principles or an analytical framework to determine which issues involve a sufficient amount of legal analysis so that they can be considered conclusions of law.

Second, simply separating issues on appeal into a legal conclusion category and a supporting facts category does not actually create a new analysis for resolving those issues that are ambiguous. Rather, it recognizes that findings of fact are to be reviewed for clear error, which Rule 52(a) makes explicit.[150] Yet the question remains: where or how is this

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144. Bailey v. Fed. Nat'l Mortgage Ass'n, 209 F.3d 740, 744 (D.C. Cir. 2000).

145. The description of a mixed question is as follows:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.

1 CHILDRESS & DAVIS, *supra* note 49, § 2.20, at 2-114 (quoting Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 501 n.17 (1984)).

146. *See* 9A WRIGHT & MILLER, *supra* note 62, §§ 2588, 2589, at 608.

147. *See supra* text accompanying notes 112–14.

148. *See supra* note 6.

149. *See* 9A WRIGHT & MILLER, *supra* note 62, § 2588, at 605 (noting that commentators have criticized the mixed question test proposed by the Ninth Circuit as "unworkable" because "every finding of ultimate fact involves some degree of legal reasoning").

150. Scholars have argued that distinctions between mixed questions and conclusions of law are blurred, at best:

line drawn? Finally, while appellate courts have tended to grant these types of questions freer review,[151] the United States Supreme Court has not recognized a "rigid rule" governing the appropriate standard of appellate review over mixed questions.[152] Consequently, this comment recommends that the conclusory mixed question analysis be discarded in favor of a more robust policy analysis.[153]

4. A Proposed Policy Analysis

Underlying policy justifications for clearly erroneous review under Rule 52(a) should drive the appellate treatment of the finding of a "strong basis in evidence."[154] Recall that the Advisory Committee Notes to Rule 52(a) stated three main concerns: litigants' perception of the district court's legitimacy, encouragement of appeals on factual issues, and needless reallocation of judicial authority.[155] Regarding this third concern, the Supreme Court has recognized the importance of proper allocation of judicial authority. In *Miller v. Fenton*, a "mixed question" case, the Supreme Court declined to apply the clearly erroneous rule and stated that when Congress was silent and the issue was a mixed question of law and fact, "the fact/law distinction" may turn on "a determination that, as

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> The important inquiry asks exactly which findings get what level of deference. Thus, each case that formally characterizes a certain issue as *fact*, or even as *law* or *mixed*, also must be understood in terms of the actual conclusion at issue: is the court saying this issue was here controlled by the facts, or is it more broadly interpreting the legal concept those facts add up to? In this way, some surface conflicts between cases are not real, since they are actually considering different issues to be classified, though in many areas real conflicts, inconsistencies, or confusion will be found.

1 CHILDRESS & DAVIS, *supra* note 49, § 2.21, at 2-117.

151. *See id.* at 2-116.

152. *See* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting).

153. *But see* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.21, at 2-117 (explaining that in cases where the issue falls more safely into either the fact or law category, "intricate development of a functional policy analysis is unnecessary, since a literal approach to the law-fact labeling secures reasonable characterizations"). As exhibited by the courts of appeals in Part II, the "strong basis in evidence" arguably falls more safely into the "law" category than the "fact" category. This comment argues that the issue is not clearly a question of fact or law.

154. *See* Cooper, *supra* note 113, at 660 (commenting that "characterization of an issue of law application as fact or law for purposes of identifying a formalized standard of review depends on the perceived need for review" and that the standard of review depends on "identifying the characteristics that justify more searching appellate review or instead warrant greater reliance on trial judge decisions"). *See also* Monaghan, *supra* note 115, at 237 ("The real issue is . . . allocative: what decisionmaker should decide the issue?"). *But see* 1 CHILDRESS & DAVIS, *supra* note 49, § 2.13, at 2-76; *id.* § 2.20 at 2-114 (recognizing policy approaches "that in part ask[] which court should decide an issue" while also advising courts not to completely abandon analytical factors).

155. FED. R. CIV. P. 52(a) advisory committee's note.

a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[156] The Court in *Miller* regarded the issue as a legal question and based its decision in part on stare decisis, as there was settled case law establishing the question at issue as a legal one subject to plenary review.[157] However, the Court cited *Bose* for the proposition that:

> Where . . . the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.[158]

Thus, while the Supreme Court seems open to extending *Bose* to instances where, even beyond constitutional cases, a court of appeals need not exercise deference to a trial court's findings because the facts must be applied to the law in order to reach a legal conclusion, it has not foreclosed the possibility that policy considerations such as judicial allocation can be decisive in treating a question as one of fact or law.

II. CIRCUIT COURT RESOLUTION OF THE APPELLATE STANDARD OF REVIEW

The following sections briefly outline the approach taken by the courts of appeals in analyzing the appropriate standard of appellate review for a "strong basis in evidence" and argue that the courts of appeals do not provide compelling analyses to support their conclusions.

A. Question of Law: Application of Law to Underlying Facts

The courts of appeals in the following cases hold that the finding of a "strong basis in evidence" is a question of law while the underlying facts are reviewed for clear error.[159] It appears that these courts have

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156. Miller v. Fenton, 474 U.S. 104, 114 (1985).

157. *Id.* at 111, 114.

158. *Id.* at 114. *See also* Harte-Hanks Commc'ns. v. Connaughton, 491 U.S. 657, 686 (1989) (explaining that with respect to "actual malice," it is "only through the course of case-by-case adjudication [that we can] give content to these otherwise elusive constitutional standards").

159. *See, e.g.*, Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1522 (10th Cir. 1994) [hereinafter *Concrete Works II*]; *Concrete Works IV*, 321 F.3d 950, 958 (10th Cir. 2003); Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia, 91 F.3d 586, 596 (3d Cir. 1996); Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000); Rothe Dev. Corp. v. U.S. Dep't of Defense, 262 F.3d 1306, 1323 (Fed. Cir. 2001).

applied the "law applied to facts," or "mixed question," analysis to the "strong basis in evidence" finding without clarifying their reasoning for this treatment. Ultimately, the standard of appellate review applied in these cases cannot be reconciled with the policies upon which Rule 52(a) is grounded.

1. The Tenth Circuit's holding in *Concrete Works of Colorado, Inc. v. City and County of Denver*

The Court of Appeals for the Tenth Circuit held that whether the city has demonstrated a "strong basis in evidence" to justify an affirmative action program is a question of law.[160] However, "underlying that legal conclusion . . . are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program."[161] Consequently, the court held, these factual findings are reviewed for clear error.[162]

Concrete Works involved extensive litigation over the constitutionality of the City of Denver's ordinance that created participation goals for minority-owned business enterprises and women's business enterprises in city construction contracts and professional design projects.[163] The plaintiff, a construction firm owned and operated by a non-minority, alleged it lost three contracts with Denver because it failed to comply with Denver's ordinance.[164] In the first district court proceeding, Denver moved for summary judgment, which the district court granted.[165] The plaintiff appealed, and the Court of Appeals for the Tenth Circuit held that summary judgment was inappropriate because material facts existed about the accuracy of the data presented by Denver in support of its contention that public and private discrimination existed, which justified the need for the remedial ordinance.[166] Specifically, the court found that the plaintiff had presented enough proof to rebut Denver's evidence of public or private discrimination.[167] On remand, the district court, in a bench trial, held that Denver's affirmative action ordinances were unconstitu-

160. *Concrete Works II*, 36 F.3d at 1522; *Concrete Works IV*, 321 F.3d at 958.

161. *Concrete Works II*, 36 F. 3d at 1522.

162. *Concrete Works IV*, 321 F.3d at 958.

163. *Id.* at 956 (noting that the trial transcript exceeded three thousand pages and the entire appellate appendix exceeded ten thousand pages).

164. *Id.* at 957.

165. Concrete Works of Colo., Inc. v. City and County of Denver, 823 F.Supp. 821, 824 (D. Colo. 1993).

166. *Concrete Works II*, 36 F. 3d at 1530.

167. *Id.*

tional in violation of the Fourteenth Amendment and enjoined the city from enforcing them.[168]

In the second appeal, the court of appeals ruled that the district court's factual findings were premised on an erroneous legal framework and consequently overturned the district court's findings.[169] The court of appeals then examined the data and concluded that the evidence was sufficient to satisfy Denver's burden of showing a "strong basis in evidence" for its conclusion that remedial action was required.[170] The court of appeals justified its approach on the premise that a finding of a "strong basis in evidence" was a question of law to be reviewed de novo.[171]

The approach taken by the Tenth Circuit has important implications. Had the court of appeals applied a "clearly erroneous" standard, the outcome arguably would have been different because the court might not have been able to justify the district court's findings as clearly erroneous. However, because the court of appeals held that the district court had applied an incorrect legal framework, the court of appeals still could have made the argument that the findings were erroneous. Regardless, it is almost certain that under the "clearly erroneous" standard, the court of appeals would have needed to remand the case to the district court to make the requisite findings in accordance with the appellate opinion.

2. The Third Circuit's Interpretation in *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*

In this case, the plaintiff challenged the constitutionality of the City of Philadelphia's ordinance creating set-asides for African-American construction contractors in awarding city contracts.[172] The Court of Appeals for the Third Circuit followed an approach similar to that of the Tenth Circuit but elaborated on the distinction between factual findings, which would be accorded deference under Rule 52(a), and legal conclusions, which were not limited by Rule 52(a).[173] The court of appeals held that the district court's findings of fact, which included its "determination regarding the accuracy of the facts or assumption on which the expert testimony was based," are reviewed for clear error.[174] Based

168. *Concrete Works IV*, 321 F.3d at 957.
169. *Id.* at 970, 974.
170. *Id.* at 990–92.
171. *Id.* at 992.
172. Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586, 590–91 (3d Cir. 1996).
173. *See id.* at 596, 598.
174. *Id.* at 596. *See also* Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000) (citing *Contractors Ass'n of E. Pa.*, 91 F.3d 586, for its holding that "[w]hether there is enough

upon these findings, the district court was required to conclude that a "constitutionally sufficient basis" was not demonstrated "in the evidence."[175] Ultimately, this is the same standard adopted by the Tenth Circuit. In fact, the Third Circuit relied on *Concrete Works II* as precedent for its standard of appellate review as applied to the "strong basis in evidence" finding.[176] Similar to *Concrete Works II*, the court here categorized the city's evidentiary support for the remedial action as a factual finding but reiterated that the district court then must consider the evidence separately or together to decide whether it is "constitutionally sufficient" to support the compelling government interest of remedying past or present discrimination.[177] However, the Third Circuit departed somewhat from *Concrete Works II* by referring to the factual "strong basis in evidence" finding as the "ultimate issue."[178] This smacks of the ultimate fact doctrine, and because there is little support for the court's conclusion that the "strong basis in evidence" finding is a question of law, it is arguable that the court was influenced by this doctrine.[179]

The court of appeals then reviewed the evidence presented at trial. Because the court of appeals did not depart from most of the district court's findings, it is difficult to determine the impact of the court's application of the de novo standard of review to the "strong basis in evidence" finding. While the court of appeals affirmed the district court's decision on the ground that the ordinance was not narrowly tailored to serve a compelling interest,[180] it agreed with most of the district court's findings regarding the statistical evidence presented by the city.[181] The city argued three forms of discrimination to support its decision to enact the ordinance: first, that prime contractors discriminated in awarding subcontracts; second, that contractor associations discriminated in admitting members; and third, that the City of Philadelphia discriminated in

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evidence to support a finding of a compelling governmental interest and thereby justify a race-conscious action is a question of law that we review *de novo*"). *Majeske* involved a challenge to the Chicago Police Department's affirmative action plan. The Court of Appeals for the Seventh Circuit upheld the district court's granting of judgment in favor of the city, based on the jury's findings. *Id.* at 818. Arguably, the court of appeals granted the district court greater deference because it was a jury trial.

175. *Contractors Ass'n of E. Pa.*, 91 F.3d at 601.

176. *Id.* at 596.

177. *Id.* at 598, 601.

178. *Id.* at 598.

179. On the other hand, the court, by specifying that the facts must be "constitutionally sufficient," *id.* at 596, 598, may be justifying its conclusion with the constitutional fact doctrine; the court reasons that the issue is a question of law because the evidence required to amount to a "strong basis in evidence" is determinative of the constitutionality of the government action.

180. *Id.* at 591, 605.

181. *Id.* at 602–605.

awarding prime contracts.[182] Only in the third instance did the court of appeals suggest it might weigh the city's evidence differently than the district court.[183] The court of appeals agreed with the district court's suggestion that extensive participation of African-American firms in federally-assisted projects procured through the city impacted their participation in other city construction contracts, but wavered on the extent of the impact on minority participation in prime city contracts.[184] The court of appeals recognized that whether the record "provide[d] a strong basis in evidence for an inference of discrimination in the prime contract market is a close call," but declined to resolve the issue because the "narrowly tailored" prong was decisive.[185]

Thus, it is difficult to tell whether the court of appeals would have then weighed the evidence itself or remanded the case to the district court, and, if it had reweighed the evidence, whether it would have treated the district court's findings any differently had the court of appeals disagreed with those findings. However, it seems unlikely that applying a "clearly erroneous" standard of review would have had a significant impact on the outcome of the case because the findings of the court of appeals were, for the most part, in accord with those of the district court.

3. The Federal Circuit's Interpretation in *Rothe Development Corp. v. United States Department of Defense*

In *Rothe Development Corp. v. United States Department of Defense*,[186] the Court of Appeals for the Federal Circuit held that the question of whether the government has demonstrated a "strong basis in evidence" for remedial action is a question of law that the court will review

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182. *Id.* at 599.

183. *Id.* at 602–05. The district court concluded that the city's evidence of discrimination by the prime contractors and the contractor associations did not prove a "strong basis in evidence" for the city's conclusion that the affirmative action program was necessary. *Id.* at 601.

184. *Id.* at 604–05.

185. *Id.* at 605.

186. 262 F.3d 1306 (Fed. Cir. 2001). This case differs factually from *Concrete Works* and *Contractors Ass'n of Eastern Pennsylvania* in that the plaintiff challenged the validity of a federal statute that allowed the United States Department of Defense to give preference to bids submitted by "small businesses owned by socially and economically disadvantaged individuals." *Id.* at 1312. In contrast, the plaintiffs in *Concrete Works* and *Contractors Ass'n of Eastern Pennsylvania* challenged city ordinances. In *Rothe*, the court of appeals stated that "for purposes of determining whether Congress had a 'strong basis in evidence' for enacting the program, and whether the program is narrowly tailored, the district court is certainly correct that Congress had a 'broader brush' than municipalities for remedying discrimination." *Id.* at 1329. However, this does not change the court of appeal's procedural analysis of the appropriate standard of review for a finding of strong basis in evidence.

de novo,[187] but acknowledged that the district court should determine whether the evidence was sufficient to constitute a "strong basis in evidence" of past or present discrimination.[188] This case was an appeal of summary judgment that the district court had granted in the government's favor.[189] The court of appeals held that the district court had applied an erroneous constitutional standard[190] and had incorrectly weighed the evidence presented by the government supporting the need for the remedial program.[191] Hence, the court of appeals remanded the case to the district court to make the requisite findings, including: whether there was sufficient evidence of discrimination across racial lines to necessitate a preference program for all racial groups included in the government's program, whether that discrimination or its effects "were experienced in the specific industry," whether the evidence was relevant in time, and whether more substantive than anecdotal evidence existed to support the constitutionality of the preference program.[192]

This opinion is unclear because the court seems to refer to a "strong basis in evidence" in terms of factual findings,[193] but holds that the standard of review is de novo. While the language in this opinion is more deferential[194] than that of the Tenth and Third Circuits, the court's reasoning seems to be in line with those courts' decisions. However, because the district court had applied an incorrect legal standard and the case was before the Federal Circuit on an appeal of summary judgment, the court of appeals remanded the case to the district court to make the necessary findings. Therefore, it is unknown whether, in a factual situation or procedural posture more similar to the *Concrete Works* or *Contractors Ass'n* cases, the Federal Circuit would have so stringently followed its guidelines distinguishing the functions between the district court and the court of appeals.

In sum, the line of cases holding that a "strong basis in evidence" is a question of law to be reviewed under a de novo standard do little to support that conclusion. It appears that the courts escaped this challenge by applying the "mixed question" doctrine to the issue.

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187. *Id.* at 1323.
188. *Id.*
189. *Id.* at 1312.
190. *Id.* at 1321.
191. *Id.* at 1323.
192. *Id.* at 1329–31.
193. *See id.* at 1323 (stating, immediately after its holding that whether the city's evidence constitutes a "strong basis in evidence" is a question of law to be reviewed de novo, that "[h]owever, like the Supreme Court, we believe that it is the province of the district court to evaluate whether evidence within the particular reports and studies before Congress was indeed sufficient to constitute a 'strong basis in evidence' of discrimination").
194. *See id.*

B. *Finding of Fact:* Engineering Contractors Ass'n v. Metropolitan Dade County

Meanwhile, the Court of Appeals for the Eleventh Circuit held that the existence of a "strong basis in evidence" was a finding of fact, not a question of law.[195] In this case, the question was whether the district court erred in holding that Dade County, Florida did not have a "strong basis in evidence" to support its affirmative action program, which gave minority-owned businesses a preference in contracts awarded by the county.[196] Relying on *Wygant*, the court of appeals held that the finding of a "strong basis in evidence" was a determination of the factual predicate for the affirmative action program,[197] making clear that the government was required to show a factual basis, or "evidentiary foundation" for its decision to implement the set-aside plan.[198] The district court held that the statistical and anecdotal evidence presented by the county did not demonstrate a "strong basis in evidence" for the government's action, and the court of appeals affirmed,[199] noting that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[200] The outcome could have changed had the court of appeals applied a de novo standard because it would have been free to reweigh the evidence and arrive at a conclusion different from that of the trial court.[201] Unfortunately, the court of appeals did not provide a thorough analysis for its decision to apply Rule 52(a) to the finding of a "strong basis in evidence," but seems to have based its decision on a more strict interpretation of evidence and fact.[202] In the end, this case does little to convince other courts of the soundness of its reasoning.

Ultimately, these appellate decisions fail to provide a convincing analytical framework for resolving the appropriate standard of appellate review for a "strong basis in evidence." The Tenth Circuit acknowl-

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195. *See* Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 903–04, 906–07 (11th Cir. 1997).

196. *Id.* at 900. The court also had to decide the constitutionality of the part of the program that gave women business owners preference, *id.* at 903, but that issue is outside the scope of this comment.

197. *Id.* at 905.

198. *See id.* at 903–04.

199. *Id.* at 924, 926.

200. *Id.* at 924 (quoting Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)).

201. *See supra* text accompanying notes 105–07.

202. *See Eng'g Contractors Ass'n*, 122 F.3d at 903 ("Both the Supreme Court and this Court have held that a district court makes a factual determination when it determines whether there exists a *sufficient evidentiary basis* justifying affirmative action on the basis of race or ethnicity.") (emphasis added).

edged that it did not require or embrace "an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the . . . 'strong basis in evidence' benchmark. That must be evaluated on a case-by-case basis."[203] This suggests that such a finding is a factual question because it cannot be articulated as a "legal standard" that can be applied uniformly to a number of cases.[204] Yet, the court held that the question was one of law, supporting this contention with a District of Connecticut case which similarly lacked sufficient reasoning for its selected standard of review.[205] Meanwhile, the Third Circuit seemed to advance an "ultimate fact" or "constitutional fact" doctrine.[206] And the Third, Tenth, and Federal Circuits all seemed to apply the conclusory "mixed question" doctrine. Finally, the Eleventh Circuit's argument, while slightly more convincing because of its textual grounding in the language of *Wygant*,[207] is still incomplete. Due to the weaknesses addressed in Parts I and II, Part III of this comment argues that a policy approach is the best solution to resolving the appropriate standard of appellate review for the "strong basis in evidence" requirement.

III. THE "STRONG BASIS IN EVIDENCE" REQUIREMENT SHOULD BE TREATED AS A FINDING OF FACT SUBJECT TO A "CLEARLY ERRONEOUS" STANDARD OF APPELLATE REVIEW

The policies underlying Rule 52(a) provide an analysis for deciding the appropriate standard of appellate review that should be preferred over the ultimate fact doctrine, the constitutional fact doctrine, and the conclusory two-part "mixed question" framework applied by the Third, Tenth, and Federal Circuits. This section applies the policy analysis to the "strong basis in evidence" question and reasons that it should be treated as one of fact to be reviewed on appeal for clear error. The section concludes by discussing the significance of this application.

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203. *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994).

204. *See supra* text accompanying note 100.

205. *See Concrete Works II*, 36 F.3d at 1522 ("Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, is a question of law.") (citing Associated Gen. Contractors of Conn. v. City of New Haven, 791 F.Supp. 941, 944 (D. Conn. 1992), *vacated on other grounds*). The court in *Associated General Contractors* stated, "[D]efendant contends that questions of fact are disputed. That view assumes that whether the evidence before the Board of Aldermen justified its conclusion that a compelling interest was presented was a question of fact. It is not; it is a question of law." *Associated Gen. Contractors*, 791 F.Supp. at 944.

206. *See supra* notes 173–78 and accompanying text.

207. *See supra* text accompanying notes 185–93.

A. The Rationale Behind a Policy-Based Resolution

Case law has inadequately addressed the issue. The Supreme Court has expressly rejected the "ultimate fact" doctrine[208] and has not expanded the constitutional fact doctrine beyond First Amendment cases,[209] which suggests that its application to other fact situations is questionable. Moreover, the "facts applied to law" or two-part "mixed question" framework applied by the Third, Tenth, and Federal Circuits simply begs the question whether the issue is one of fact or law, and therefore should be rejected.[210] In resolving the appropriate standard of review for the "strong basis in evidence" finding, the best guiding principles are those at the heart of Rule 52(a).[211] First, the public interest in stability and judicial economy is of paramount importance to the administration of the Federal Rules of Civil Procedure. Second, the courts should refrain from encouraging the re-trial of some factual issues on appeal. Third, the courts should uphold the legitimacy of the district courts in the eyes of litigants. Finally, there should be a compelling reason for redistributing the allocation of judicial authority.

B. The Policy Analysis Applied to the "Strong Basis in Evidence" Finding

First, the public interest in stability and judicial economy would be furthered by recognizing the finding of a "strong basis in evidence" as a question of fact. On appeal, a second, similarly searching inquiry into the volumes of testimony and statistical data presented at trial to determine the sufficiency of such evidence is inefficient. This is factfinding that, according to Rule 52(a), is within the expertise of the district court judge.[212] The appellate judge as the expositor of the law should instead focus on providing a more uniform articulation of the type of evidence that could be considered sufficient as opposed to usurping the district court judge's function by actually weighing the evidence.

Second, if a "strong basis in evidence" were considered a question of law, it would encourage unnecessary retrial of factual issues. Appeals would be encouraged because appellate courts applying a de novo standard of review have greater discretion to overturn a reasoned trial court decision; that is, the appellate court can draw different inferences and

208. *See* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).
209. *See supra* note 135 and accompanying text.
210. *See supra* Part I.D.3.
211. For a discussion of the underlying principles of Rule 52(a), see *supra* Part I.C.2.a.
212. FED. R. CIV. P. 52(a).

conclusions or weigh the evidence differently than the district court.[213] Affirmative action programs in public contracting are already on tenuous constitutional ground because of the extremely difficult burden on the government to satisfy the "strong basis in evidence" standard.[214] Because trial courts have tended to find these racial preference programs unconstitutional, de novo review encourages litigants to appeal because less deference would be given to the trial court's decision. This in turn places unnecessary burdens on already overburdened courts of appeals,[215] forcing them to retry decisions that were supported by the evidence at the trial level and potentially hindering court access to litigants with meritorious claims.

Third, litigants would perceive de novo review of the finding of a "strong basis in evidence" as undercutting the legitimacy of the district courts. The district court evaluates and then weighs the evidence to determine whether a "strong basis in evidence" exists, even if it never considers the plaintiff's rebuttal evidence.[216] The district court must carefully consider volumes of statistical evidence and extensive witness testimony. If the appellate court is allowed to conduct a searching review of the district court's findings, even when the district court's conclusion is reasonable, the district court could appear to be of little value in the realms of evidentiary sufficiency and constitutional claims.

Another serious concern with respect to legitimacy is that of perceived partisan or outcome-determinative decisionmaking. The issue of affirmative action is contentious, and there is a risk that the public will perceive the appellate court's irreverent treatment of the district court's findings as outcome-determinative or driven by political motives.[217] While it may be acceptable in some cases to influence a litigant's decision to appeal or refrain from appealing in the name of judicial efficiency, it is unacceptable to base the appropriate standard of appellate review on the desired outcome that may be reached in a particular set of cases. Litigants depend on the system to provide fair resolutions to legal controversies, and the perception that a decision is merely outcome-determinative will break down this dependence. De novo review of the sufficiency of the methods, witness credibility, and weight of the evi-

213. *See supra* text accompanying notes 105–07. For an example, see *Concrete Works IV*, 321 F.3d 950, 950 (10th Cir. 2003).

214. *See* Rudley & Hubbard, *supra* note 1, at 45.

215. *See supra* note 91 and accompanying text.

216. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

217. *See* Edwards, *supra* note 94, at 854 ("[T]he popular understanding of the way our legal system works . . . that is beginning to emerge is a truly terrible one: individual judges and their politics govern outcomes, and justice and principle are relevant only secondarily, if at all.").

dence could very well invite appellate courts to engage, purposely or not, in this dangerous practice. Even if the judge, in deciding the outcome, is not influenced by his or her political, ideological, or moral views, the risk to the legitimacy of the judicial system exists and should not be encouraged by unnecessary and less-restricted review.

Fourth, the appellate court is not in a better position than the district court to determine whether a "strong basis in evidence" has been satisfied. The main thrust behind a "strong basis in evidence" is one of evidentiary sufficiency. This kind of question is usually left to the factfinder, whether judge or jury.[218] As the district court is considered better suited for factfinding, the finding of a "strong basis in evidence" should be left to the district court as a question of fact. In this situation, too, there may be volumes of statistics, other documentary evidence, and witness testimony. The amount of witness testimony involved in these cases presents credibility issues; credibility may be a significant factor in the weight a court gives to the evidence.[219] Arguably, the district court's determination that a "strong basis in evidence" was demonstrated by the government is in fact the weighing of the facts presented by the government.[220] Under de novo review, the appellate court need not give deference to these findings even though the district court had the opportunity to consider the documentary evidence and to assess the credibility and demeanor of witnesses providing anecdotal evidence.

Moreover, the appellate function has been recognized as developing the law.[221] The appellate court could certainly further the development of the law by creating rules that govern the type of evidence that would or would not satisfy the "strong basis in evidence" burden, thus providing substance to that burden. However, an appellate court's assessment of the sufficiency and persuasiveness of the evidence beyond the scope of the normal deference owed a district court's findings does very little to develop the law. If allowed to circumvent Rule 52(a) in this situation, appellate courts would have little incentive to develop the law because they could simply analyze the facts in the same manner as the district

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218. *See* Vern R. Walker, *Theories of Uncertainty: Explaining the Possible Sources of Error in Inferences*, 22 CARDOZO L. REV. 1523, 1558 (2001):

> One critical question of judicial management is how to allocate fact-finding roles between judge and jury. Rulings on the admissibility and legal sufficiency of evidence are traditional devices by which judges can take the factfinding function away from juries, in light of the proffered or admissible evidence in the particular case.

219. *See supra* note 99 and accompanying text.

220. Thus the mixed question doctrine employed by the Third, Tenth, and Federal Circuit Courts of Appeals is especially inappropriate because it does not give guidance as to when the weighing of legal facts crosses into the realm of legal conclusion.

221. *See* Miller v. Fenton, 474 U.S. 104, 114 (1985).

court. Consequently, appellate court decisions may end up providing less guidance to district courts that could then be applied to future cases.

CONCLUSION

Rule 52(a) of the Federal Rules of Civil Procedure establishes a critical procedural requirement that appellate courts review findings of fact for clear error. Courts have tried but have been largely unsuccessful in circumventing this rule. While various doctrines provide for less-restricted review when the question on appeal is not clearly one of fact or law, they provide inadequate guidance to courts and allow them to by-pass the rule in situations that should require adherence to the rule. Moreover, the appellate courts, interpreting the broad pronouncements of *Wygant* and *Croson* with respect to the "strong basis in evidence" finding, have done little to further a thorough analysis of this difficult question. Ultimately, the policies underlying Rule 52(a) provide the best method for resolving the appropriate standard of appellate review for a "strong basis in evidence" in public contracting cases. These policies support a strong judicial system, which functions to help, not hinder, litigants.