How to Do Things With Facts

Kenji Yoshino

Introduction

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

In the wake of that case, death-penalty abolitionists successfully lobbied pharmaceutical companies to withdraw the first drug in the *Baze* protocol—sodium thiopental. States substituted a different barbiturate—pentobarbital. The abolitionists again convinced the manufacturer of the drug to

---

1 Chief Justice Earl Warren Professor of Constitutional Law, NYU School of Law. I gratefully acknowledge the financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund. An earlier version of this paper was presented as the James Goold Cutler Lecture at the William & Mary Law School. I also thank participants at a workshop at the University of Chicago.


4 U.S. Const. amend. VIII.

5 Glossip, 135 S. Ct. at 2746 (Scalia, J., concurring).


7 Id. at 44 (opinion of Roberts, C.J.).

8 Glossip, 135 S. Ct. at 2733.

9 Id.
make it unavailable for executions. The states pivoted to yet another drug—midazolam. In Glossip, the Court faced the question of whether midazolam was an adequate substitute for the sodium thiopental approved in Baze. The Glossip petitioners observed that unlike sodium thiopental and pentobarbital, which were barbiturates, midazolam was a sedative (a benzodiazepine in the same class as Valium or Xanax). As such, they argued, it did not consistently render the prisoner insensate. On habeas, the district court held a three-day hearing, and determined that the 500-milligram dose of midazolam used “would make it a virtual certainty that any individual [would] be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs.” The Tenth Circuit affirmed.

Justice Alito’s majority opinion affirmed the Tenth Circuit on two grounds, only one of which is relevant here. The Court observed that “[t]he District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution.” Justice Alito offered four justifications for why such deference would be appropriate. First, he observed the high degree of deference required by clear-error review, which does not permit an appellate court “to overturn a finding ‘simply because [we are] convinced that [we] would have decided the case differently.’” Second, he contended that the petitioners bore the burden of persuasion on this issue. Third, he noted that other lower courts had reached the same conclusion. Finally, he maintained that “challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts.”

10 Id.
11 Id. at 2734.
12 Id.
13 Id. at 2736.
14 Id.
15 Justice Alito also observed that Baze required the petitioners to show that any risk of harm was substantial compared to “a known and available alternative method of execution.” Id. at 2738. He found that the petitioners had failed to carry that burden. Id.
16 Id. at 2739.
18 Id.
19 Id. at 2739-40.
20 Id. at 2740.
elaborated that “federal courts should not ‘embroil [themselves] in ongoing scientific controversies beyond their expertise.’”

Two years earlier, however, Justice Alito had opined that it would be absurd for an appellate court to accord clear error deference to a district court’s findings of fact. In 2013, the Supreme Court handed down two cases relating to same-sex marriage on the same day—United States v. Windsor and Hollingsworth v. Perry. In Windsor, the Court struck down the federal Defense of Marriage Act, which denied federal benefits to same-sex couples validly married under state law. In Hollingsworth, the Court confronted the more basic question—whether state bans on marriage were constitutional. The Hollingsworth Court determined that the case was not justiciable, as the petitioner lacked standing. It therefore did not reach the merits, leaving the district court opinion as the final disposition. That district court had invalidated California’s ban on same-sex marriage after holding a twelve-day trial and issuing eighty findings of fact.

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

He then observed:

---

21 Id. at 2740. This statement is a bit confounding, because the tribunal in which the facts were established was also, of course, a federal court.
22 133 S. Ct. 2675 (2013).
23 133 S. Ct. 2652 (2013).
24 Windsor, 133 S. Ct. at 2675.
25 Hollingsworth, 133 S. Ct. at 2659.
26 Id. (“Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.”).
28 Windsor, 133 S. Ct. at 2718 (Alito, J., dissenting).
29 Id.
The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in Hollingsworth v. Perry. In that case, the trial judge, after receiving testimony from some expert witnesses, purported to make “findings of fact” on such questions as why marriage came to be, . . . what marriage is, . . . and the effect legalizing same-sex marriage would have on opposite-sex marriage . . . .

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

And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are “clearly erroneous.” Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.30

As in Glossip, Justice Alito expressed concern about whether the answer to the question presented lay within the competence of the judiciary. Yet that uncertainty made him take diametrically opposed positions in the two cases. In Glossip, the uncertainty led him to defer to the lower court. In Hollingsworth, by contrast, Justice Alito viewed the position that the district court should receive clear-error deference to be ludicrous.

Of course, the facts found in Glossip and Hollingsworth are intuitively different. Glossip presented a narrow scientific question: does midazolam render prisoners unconscious? Hollingsworth presented a broad sociological question: what is marriage? But for the purposes of legal rules of deference, the two facts have two crucial commonalities. First, under the law governing each case, the answers are outcome determinative.31 The district courts therefore had to provide them. Second, both courts opted to do so using the traditional factfinding procedures that have been deemed to be their

30 Id. at n.7.
31 As the quoted material suggests, Justice Alito did not appear to believe that the factual determinations made by the district court in Hollingsworth were necessary, much less relevant, to the legal questions posed. This position is puzzling. It has been established through a line of canonical cases that the “right to marry,” while unenumerated in the constitution, is nonetheless a fundamental right. See, e.g., Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967). Justice Alito did not suggest any retreat from that view. In considering whether that right permitted same-sex couples to marry, any court would have to subscribe to a view about the nature of marriage. To exclude same-sex couples from marriage while declining to answer the question would be to settle the issue by fiat without taking any accountability for doing so.
comparative institutional competence—hearing dueling experts subjected to voir dire and cross examination.

The point here, of course, is not to criticize Justice Alito, but to suggest that the reality that any individual Justice can have such differing views about the deference owed district court findings might suggest a more general uncertainty on the part of the Court. In this essay, I explore the issue of what deference appellate courts must give findings of facts by trial courts. I seek to show how speech-act theory can illuminate that exploration.

In Part I, I set up the problem. It may seem axiomatic that trial court determinations of fact are reviewed for “clear error,” and determinations of law are reviewed *de novo*. However, this conventional wisdom does not extend to so-called “legislative facts,” or broad facts about the world. I observe that the Supreme Court has yet to deliver a binding answer about the deference due to a lower court’s finding of legislative fact. This issue cries out for resolution.

In Part II, I suggest that speech-act theory can illuminate this unresolved constitutional issue. J.L. Austin’s work underscores a difference between “constative” and “performative” speech. Constative speech describes utterances that are true or false, while performative speech calls into being the reality it may seem to describe. Over the course of his book, Austin expresses discomfort with the coherence of the distinction between performative and constative speech. He shifts from thinking of the distinction as pertaining to categories of speech to thinking about it as pertaining to aspects of all speech. And Austin himself recognized, his theory of speech acts has deep relevance for law.

In Part III, I apply the Austin framework to the problem of the deference due a trial court’s findings of legislative facts. I make three points here: (1) the constative/performative distinction tracks the fact/law distinction; (2) Austin’s concern about the cogency of the constative/performative distinction maps onto the concern about the cogency of the fact/law distinction; (3) the way in which Austin addresses this concern illuminates the question of the appellate deference due to a district court’s findings of legislative fact.
I. The Deference Due to Findings of Legislative Fact on Appeal

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

To understand how “clear error” deference works in the general case, consider *Anderson v. Bessemer City*. In that case, the district court found that the plaintiff had been denied a position with the city because of her sex. The court of appeals reversed because it disagreed with many of the lower court’s findings. The Supreme Court reinstated the district court’s ruling, noting that “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” Justice Alito cited this case in *Glossip* for the proposition that clear error deference required more than simple disagreement with the trial court’s findings.

However, the picture is somewhat more complex than this conventional wisdom. As Kenneth Culp Davis observed in a canonical article, courts have distinguished between “adjudicative facts” and “legislative facts.” Adjudicative facts are “facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were.” These facts have also been called “historical” facts or “case-specific” facts. Legislative facts, on the other hand, are “facts which are

---

32 The critical question of how jury findings are treated on appeal is beyond the scope of this paper.
34 470 U.S. 564.
35 Id. at 568.
36 Id. at 571.
37 Id. at 574.
40 Id. at 402–03.
41 See, e.g., Menora v. Illinois High School Ass’n, 683 F.2d 1030, 1036 (7th Cir. 1982).
utilized for informing a court’s legislative judgment on questions of law and policy.” 43 (To be absolutely clear, legislative facts, as used here, do not mean facts found by a legislature, but rather facts found by a court pursuing its “legislative” or policy-making function.) 44 It is settled that “adjudicative facts” receive “clear error” deference on appeal. 45 However, the deference owed “legislative facts” remains unclear.

While the Supreme Court has not ruled on this issue, it suggested in dictum in the 1986 case of Lockhart v. McCree 46 that legislative facts should not receive “clear error” deference on appeal. The Court in Lockhart confronted the question of whether a jury from which prospective jurors with a categorical objection to the death penalty had been excluded violated the constitutional requirement of impartiality. 47 On habeas, the district court had found “that ‘death qualification’ produced juries that ‘were more prone to convict’ capital defendants than ‘non-death-qualified’ juries.” 48 Finding that the “death qualification” violated the “fair-cross-section and impartiality requirements of the Sixth and the Fourteenth Amendments,” the court granted habeas relief, and the Eighth Circuit affirmed. 49 In reversing, the Court stated:

McCree argues that the “factual” findings of the District Court and the Eighth Circuit on the effects of “death qualification” may be reviewed by this Court under the ‘clearly erroneous’ standard of Federal Rule of Civil Procedure 52(a). Because we do not ultimately base our decision today on the invalidity of the lower courts’ ‘factual’ findings, we need not decide the ‘standard of review’ issue. We are far from persuaded, however, that the ‘clearly erroneous’ standard of rule 52(a) applies to the kind of ‘legislative’ facts at issue here. The difficulty with applying such a standard to ‘legislative’ facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the Eighth Circuit. 50

43 Id. at 404.
44 Because calling facts found by courts “legislative facts” is so confusing, some commentary has chosen retire the term. Borgmann, supra note ___, at 1993. However, given that Culp’s terminology is the most broadly used, I retain it here.
45 I bracket one exception: the so-called “constitutional facts” doctrine. Under that doctrine, even adjudicative facts are not given deference because of the claim is constitutional in nature. See Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984); Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985).
46 476 U.S. 162 (1986). It is not clear whether or how far this exception extends beyond the First Amendment context.
47 Id. at 165.
48 Id. at 167-68.
49 Id. at 168.
50 476 U.S. at 168 n. 3.
That footnote is the closest the Court has come to ruling on this issue. As one commentator has stated, “[i]t is unpardonable that the Supreme Court has not established a principled, explicit framework for the judicial reception and evaluation of such facts.”

Appellate courts both before and after Lockhart have taken the “no deference” view. In 1982, Judge Posner discussed this issue when Jewish basketball players challenged an athletic association’s rule forbidding basketball players to wear their yarmulkes during games. In ruling for the plaintiffs, the district court found that insecurely fashioned yarmulkes did not pose a significant hazard to basketball players. On appeal, Posner wrote for a majority to reject that claim. On a petition for rehearing, he acknowledged that in reaching that holding, the panel had been “accused of having failed to apply the clearly-erroneous rule to the district court’s finding.” He elaborated: “That rule, however, is designed for the review of findings of ‘historical,’ not ‘legislative’ facts.” Posner offered no citations for this analysis. In 1994, the First Circuit took a similar tack, now bolstering its position with a citation to the dictum in Lockhart. It found that “[t]he clear error standard does not apply, however, when the fact-finding at issue concerns ‘legislative,’ as opposed to ‘historical’ facts.” On this ground, it stated that it need not defer to the district court’s finding that the distinction between sentencing for cocaine base and for cocaine powder was racially discriminatory.

It might appear, then, that we are just waiting for the Supreme Court to make a latent consensus patent—that findings of legislative facts, like conclusions of law, receive no deference. Indeed, a leading

51 Borgmann, supra note ___, at 1248.
52 Menora v. Illinois High School Ass’n, 683 F.2d 1030 (7th Cir. 1982).
53 Id. at 1036.
54 Id.
55 Id.
56 Id. He wrote: “Legislative facts are those general considerations that move a lawmaking or rulemaking body to adopt a rule, as distinct from the facts which determine whether the rule was correctly applied. There is no question that insecurely fastened yarmulkes are within the scope of the Illinois High School Association’s no-headwear rule; the question is whether the Association’s concern with safety is substantial enough to support the rule as so interpreted; and a fact that goes to the reasonableness of a rule or other enactment is a classic example of a legislative fact, to which as we have said the clearly-erroneous standard does not apply.” Id.
57 United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994).
58 Id.
59 Id.
monograph has flatly asserted that “appellate courts revisit legislative fact questions de novo.” In discussing Hollingsworth, Justice Alito seemed to endorse that view.

Notice, however, the spanner in the works. The central finding of fact in Glossip—that midazolam was a knockout drug—was clearly a legislative fact. The issue was not whether midazolam had successfully rendered a particular prisoner unconscious, but whether it did so as a general matter. Justice Alito’s majority opinion stated that this finding was owed clear-error deference. That view appeared to be unanimous—Justice Sotomayor, in her vigorous dissent for four Justices, agreed that clear error deference applied.

In this paper, I will look to speech-act theory to understand why the Court would be reluctant to offer a clear answer here, and to think about what one might look like.

II. Speech Act Theory

In How To Do Things With Words, J.L. Austin begins by distinguishing two categories of speech—the “constative” and the “performative.” He then expresses some reservation about the coherence of the distinction. After making a fresh start, he moves to a different terminology that underscores that instead of talking about categories of speech, he is talking about aspects of all speech. In briefly summarizing his argument, I focus on the dimensions of it most salient to the problem posed above.

60 David Faigman, Constitutional Fictions 45 (2008).
61 Glossip, 135 S. Ct. at 2786 (Sotomayor, J., dissenting).
A. Constative/Performative Speech

Austin begins his work by distinguishing two kinds of speech—“constative” and “performative.”

Constative speech is speech that can be proven true or false.63 If I say, “There is a bull in the field,” we assume that the bull and the field pre-exist my words (or that I have made a false statement). Performative speech, in contrast, calls into being the thing it might seem to describe. So when I say “I name this ship the Queen Elizabeth,” “I give and bequeath my watch to my brother,” or “I bet you sixpence it will rain tomorrow,” the christening, gift, or bet are created by the words.64 “In these examples,” Austin says, “it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to describe my doing of what I should be said in so uttering to be doing or to state that I am doing it: it is to do it.”65 For this reason, the question to be asked about performative speech is not whether it is true or false. Rather, the question to be asked is whether it is “efficacious” or “inefficacious” (that is, whether the “appropriate circumstances” apply).

In dealing with those circumstances, Austin sets forth three pairs of so-called “felicity conditions.” I take up the first two pairs, which he calls “Misfires” and omit the third, which he calls “Abuses.” Austin terms the violations of first pair “Misinvocations.” To avoid a misinvocation,

A.1. There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances,66 and further,

A.2. The particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked.67 (Misapplication)

Austin gives an example that might fail both conditions: someone says “I pick George,” and George grunts, “I’m not playing.”68 We could see this as a violation of A.1, because there is no

63 See Austin, supra note ___, at 3.
64 Id. at 5.
65 Id. at 6.
66 Id. at 26.
67 Id. at 34.
68 Id. at 28.
convention of picking someone who is not playing. Alternatively, we could see it as a violation of A.2, because while there is a convention of picking people to play on teams, George, who is not playing, is an inappropriate object to whom to apply the convention.

Austin calls violations of the second pair of felicity conditions “Misapplications.” To avoid a Misapplication,

\[
\begin{align*}
&\text{B.1 The procedure must be executed by all participants correctly}^{71} \text{ (Flaws);} \\
&\text{B.2 The procedure must be executed by all participants completely}^{72} \text{ (Hitches).}
\end{align*}
\]

Austin gives the vague utterance as an instance of a flaw. If I say “I bet you the race won’t be run today,” when there is more than one race, that would qualify. As an instance of a hitch, Austin offers the situation where the utterance requires a response. If I say, “I bet you,” and you do not say “I take you on,” or its equivalent, that would meet the case.

If any of these felicity conditions are not met, then the performative utterance will misfire and be void. (It would seem that, to paraphrase Tolstoy, all happy utterances are happy in the same way, but unhappy utterances are not.) A performative that misfires will fail to have the reality-altering qualities associated with performatives. Yet whether it misfires or not, it would be a category error to ask whether it was true or false.

\[ B. \text{ The Distinction Assailed}\]

As his analysis proceeds, Austin grows uneasy about his provisional distinction between the performative and the constative. His disquiet begins with two points—first, all constatives may be reduced to performatives. It may seem that “I apologize” (a performative utterance) differs from “John is

\[\text{id.}\]

\[\text{id.}\]

\[\text{id. at 36.}\]

\[\text{id.}\]

\[\text{id. at 36.}\]

\[\text{id. at 36-37.}\]
running” (a constative utterance). But if we understand “John is running” as a shorthand for “I state that John is running,” the utterance is revealed to be a performative. Constative utterances can always be rendered into performative utterances by making explicit the performative prefix that has remained implicit in the original utterance. I call this the “performative prefix” problem.

Performative prefixes can be weak or strong. A weak prefix (like “I state that”) obtains because the utterance is an utterance. A strong prefix would travel beyond recognizing that a statement has been made, and would accomplish a speech act not necessarily entailed by the utterance itself. “I bet you that John is running” differs from “I state that John is running” because the bet is not always made when I say “John is running,” while the statement is.

Second, Austin worries that performatives may depend on their efficacy on the truth of their constative predicates. “I warn you that the bull is about to charge” (a performative utterance) will be unhappy if the bull is not about to charge, but not in “any of the ways we have hitherto characterized as varieties of unhappiness.” I will call this the “constative dependency” problem, in which the happiness of the performative utterance depends on the truth of its predicate.

It bears note that each problem is not the mirror image of the other. With regard to the “performative prefix,” the point is that all constatives can be reduced to performatives with the addition of the weak performative prefix of “I state that.” The reverse—that all performatives can be reduced to constatives—is not true, given that saying that performatives depend on constative utterances is not the same as saying that they can be reduced to constative utterances.

Regardless, these boundary issues prompt Austin to question whether there is “some precise way in which we can distinguish the performative utterance from the constative utterance?” The short answer is no. Austin observes that the performatives he has considered to this point are all framed (deliberately,

---

75 Id. at 54.
76 Austin does not make this point explicitly, though he gestures towards it repeatedly. See id. at 68.
77 Id. at 55.
78 Id.
in what he calls a “piece of slyness”79 with verbs in the “first person singular present indicative active”80: “I name,” “I bequeath,” or “I bet.” But he systematically debunks all these grammatical restrictions as necessary markers for a performative. For instance, he raises, “The bull is in the field. Signed, John Jones,” as not only an example where many of the grammatical criteria are suspended, but also one where the same utterance can be seen as either performative (a warning) or constative (a description).81

Taking another assay at fixing his initial distinction, Austin asks whether we might not list out all the possible explicit performatives and then see if implicit performatives could all be reduced to explicit performatives.82 He takes this approach because, as he observes in a fascinating passage, he views the “explicit” performative to be a later development of language.83 A primitive society, he ventures, might offer warnings in the form of “Bull,” or “Thunder.”84 (He calls these “primary performatives.”)85 It would take a later development, he observes, to make the primary performative explicit: “I warn you that there is a bull.” The explicit performative is language that has become self-aware of its own capabilities.

Nevertheless, Austin observes that this approach is also a false rescue.86 Some primary performatives cannot be reduced to explicit performatives. Austin gives the example of an insult, which has no corresponding explicit performative “I insult you.” He also observes that some seemingly explicit performatives may not be true performatives. “J’aboube” may be an explicit performative in some contexts but not in others (in playing chess, for instance).87 So in the end, Austin says that it is “time to make a fresh start on the issue.”88

---

79 Id. at 56.
80 Id. at 56.
81 Id. at 62.
82 Id. at 68.
83 Id. at 71.
84 Id.
85 Id. at 72.
86 Id. at 91.
87 Id. at 82.
88 Id. at 91.
C. The Fresh Start

Austin’s fresh start divides speech into “locutionary,” “illocutionary,” and “perlocutionary” utterances. Locutionary acts are “roughly equivalent to uttering a certain sentence with a certain sense and reference, which again is roughly equivalent to ‘meaning’ in the traditional sense.” Illocutionary acts are utterances that “have a certain conventional force,” such as “informing, ordering, warning.” Perlocutionary acts “bring about or achieve” effects “by saying something, such as convincing, persuading, deterring.” Locutionary acts track constative utterances, while illocutionary acts track performative utterances. The new addition is the concept of perlocutionary acts, which stimulate an action through persuasion.

The real shift that Austin makes is from thinking of categories of speech to thinking of aspects of all speech. Put differently, a single utterance, like “Shoot her,” can encompass all three aspects. Rae Langton captures Austin’s point well:

To say something is usually to do a number of different things. An example (from Austin): Two men stand beside a woman. The first man turns to the second, and says “Shoot her.” The second man looks shocked, then raises a gun and shoots the woman. You witness the scene and describe it later. The first man said to the second, “Shoot her,” meaning by “shoot” to shoot with gun, and referring by “her” to the woman nearby. That description roughly captures the content of what was said: it captures what Austin called the locutionary act. To perform a locutionary act is to utter a sentence that has a particular meaning, as traditionally conceived. However, there is more to what you witnessed, so you describe the scene again. By saying “shoot her,” the first man shocked the second; by saying “shoot her,” the first man persuaded the second to shoot the woman. That description captures some of the effects of what was said: it captures what Austin called the perlocutionary act. But if you stop there you will still have left something out. You will have ignored what the first man did in saying what he said. So you go on. In saying “shoot her,” the first man urged the second to shoot the woman. That description captures the action constituted by the utterance itself: it captures what Austin called the illocutionary act.

---

89 Id. at 94.
90 Id. at 98.
91 Id. at 101.
92 Id. at 109.
93 Id.
94 Id.
The utterances Austin earlier called performatives were, then, just instances where the illocutionary aspect of the speech appeared ascendant.

Framed in these terms, the two problems that Austin raises with the distinction between performative and constative speech largely evanesce. The performative prefix problem is resolved because whether we take “The bull is in the field” to be a statement of fact or a warning will depend on whether we—considering context—believe the locutionary or illocutionary aspect of the utterance is ascendant. The constative dependency problem is resolved because we no longer need to see the performative category to be pure—the aspects of the speech may be so intertwined that a locutionary falsehood will create an illocutionary difficulty.

Importantly for our purposes, Austin’s evolution never leaves behind the core idea that illocutionary acts are special and also have been especially ignored. He ends his book by making good on his earlier promise to attempt to list out the formulations that seemed to lend themselves to performative (now illocutionary) usage. He splits these formulations into five categories: (1) verdictives, (2) exercitives, (3) commissives, (4) behabitives, and (5) expositives. I focus here solely on verdictives, which “consist in the delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact, so far as these are distinguishable.” As examples he includes “grade,” “rank,” or “rate.” And more pertinently for our purposes, he includes both “hold (as a matter of law)” and “find (as a matter of fact).” Once we get to the end of the work, Austin can put both conclusions of law and findings of fact under the same illocutionary category of verdictives, which will be important in solving the problem I posed at the outset. Before returning to that problem, however, I want to underscore that Austin’s references to the law are not glancing or adventitious.

96 Id. at 103.
97 Id. at 150.
98 Id. at 151.
99 Id. at 153.
100 Id. at 151.
101 Id.
D. Speech Act Theory and Law

From the beginning of his book, Austin recognizes the intimate connection between performative and legal utterances. He coins the neologism “performative” in his first chapter, noting that no word in extant ordinary language is broad enough to cover the category of speech he seeks to capture. However, he observes: “One technical term that comes nearest to what we need is perhaps ‘operative’ as it is used strictly by lawyers in referring to that part, i.e. those clauses, of an instrument which serves to effect the transaction (conveyance or what not) which is its main object, whereas the rest of the document merely ‘recites’ the circumstances in which the transaction is to be effected.” He then drops the following footnote: “I owe this observation to Professor H.L.A. Hart.” He then rejects “operative” because it has too many other meanings in ordinary language.

That link between performative utterances and the law is not simply nomenclatural, but also conceptual. As he acknowledges early in his work:

[I]t is worth pointing out—reminding you—how many of the ‘acts’ which concern the jurist are or include the utterance of the performatives, or at any rate are or include the performance of some conventional procedures. And of course you will appreciate that in this way and that writers on jurisprudence have constantly shown themselves aware of the varieties of infelicity and even at times of the peculiarities of the performative utterance. Only the still widespread obsession that the utterances of the law, and utterances used in, say, ‘acts in the law’, must somehow be statements true or false, has prevented many lawyers from getting this whole matter much straighter than we are likely to—and I would not even claim to know whether some of them have not already done so.

His obsession with this connection between performatives and the law threads throughout his book.

---

102 Id. at 6.
103 Id. at 7.
104 Id. at 7 n.1. In her book on Hart, Nicola Lacey notes the heavy influence that Austin had on Hart’s work and thought. Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream 133 (2004).
105 Id. at 19.
106 See, e.g., id. at 19 (“But furthermore, it is worth pointing out—reminding you—how many of the ‘acts’ which concern the jurist are or include the utterance of performatives.”); id. at 24 (“I do not think these uncertainties matter
Scholars have taken up Austin’s invitation to explore the implications of speech acts for the law. I discern two branches. One branch looks at how the law regulates speech acts. Kent Greenawalt’s work discusses how the law protecting free speech might create exceptions for “situation-altering acts”—such as threats or incitements. In similar vein, others have looked at how law might regulate incitement to genocide, pornography, or trademarks differently if it properly understood them as speech acts. By contrast, a second branch examines how the law itself is rife with speech acts. Scholars have considered how judges use speech acts when they overrule prior decisions, how legal remedies are performative in shaping the rights they purport to implement, and even how law might be understood as form of magic, in that it conjures new realities with its utterances. We might say that the first branch concerns the law of speech acts, while the second concerns the law as speech act. Many of the scholars listed here straddle this divide. This paper’s inquiry, however, falls under the second branch.
III. The Problem of Legislative Facts, Revisited

Given that Austin clearly sees a link between his work and law, I am surprised that more work has not been done (to my knowledge) on the most obvious application of speech-act theory to legal discourse—the fact/law distinction. The journey Austin takes over the course of his book to wrestle with the constative/performative divide is a journey we can profitably take again with the fact/law distinction.

A. The Fact/Law Distinction

The constative/performative distinction tracks the fact/law distinction. The facts found by courts are “(at least in theory) falsifiable.” And law, on the other hand, is characterized by classically performative utterances. “I concur,” “I dissent,” or “I hold,” create, rather than describe, the concurrence, dissent.

The law’s performatives are better characterized as efficacious or inefficacious, rather than as true or false. And such efficacy should be measured against whether they meet Austin’s felicity conditions. A classic instance of a performative utterance that misfired is Gavin Newsom’s declaration in 2004 that he, as the Mayor of San Francisco, had the power to issue licenses to same-sex couples. At that time, a state statute (Proposition 22) banned same-sex marriage. Yet Newsom felt he could ignore Prop 22 because he thought it violated California’s equal protection clause, and because he, too, had a “sworn duty to uphold the California Constitution.” From mid-February to mid-March, San Francisco issued marriage licenses to roughly four thousand same-sex couples. Later that year, the California Supreme Court found that the Newsom marriages had never been valid. It pointed out that allowing mayors to enforce their own interpretations of the constitution would destroy the rule of law: a mayor could just as easily

---

118 Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055 (2004).
refuse to enforce restrictions on assault weapons, if, in his personal view, such restrictions violated the Second Amendment.\footnote{id at 1055.}

Like Austin’s example of picking George, who wasn’t playing, Newsom could be seen as failing either A.1 or A.2. We could either say that there was “no accepted conventional procedure”\footnote{Austin, supra note ___, at 24.} that permitted mayors to engage in the practice of invalidating state action that contravened the constitution. Alternatively, we could say that there is a “colorable procedure,” namely judicial review, but that Newsom “was not a proper person, had not the ‘capacity’, to perform it.”\footnote{id at 23.} Austin observes: “Lawyers usually prefer the latter course, as being to apply rather than to make the law.”\footnote{id at 32.} And that was the case here: the California high court held that the power to invalidate statutes was reserved to the judiciary.

That court later went on to invalidate Prop 22 under the California Constitution.\footnote{In re Marriage Cases, 183 P.3d 384 (Cal. 2008).} In contrast to the Newsom weddings, this ruling was seen to be completely efficacious—it made same-sex marriage lawful in California. To be sure, the decision was superseded by the enactment of Proposition 8,\footnote{Proposition—Marriage—California Marriage Protection Act, 2008 Cal. Legis. Serv. Prop. 8. (Proposition 8) (WEST).} which amended the California Constitution. But Prop 8 simply trumped an efficacious performative by the Court with an efficacious performative by the people. To see the difference, note that the 4,000 couples who were married by Newsom were sent letters telling them that their marriages were invalid. In contrast, the 18,000 couples who got married between the California Supreme Court decision and Prop 8 were told that their marriages remained valid because they were valid when performed.\footnote{Strauss v. Horton, 207 P.3d 48 (Cal. 2009).}

The law is also subject to the second set of felicity conditions. Recall that “Flaws” occur when parties do not execute a procedure “correctly.” Austin leads us directly to a particular legal example when he observes that “Examples are more easily seen in the law; they are naturally not so definitely made in
ordinary life, where allowances are made.”\textsuperscript{126} He continues: “One of the things that cause particular difficulty is the question whether when two parties are involved ‘consensus ad idem’ is necessary. Is it essential for me to secure correct understanding as well as everything else?”\textsuperscript{127} In the celebrated contracts case of \textit{Raffles v. Wichelhaus},\textsuperscript{128} the court answered that question in the affirmative. An agreement had been made about cotton shipping on the freighter \textit{Peerless} traveling from Bombay to Liverpool. But as it turned out, more than one ship \textit{Peerless} traversed that route, and each of the parties to the contract was thinking of a different ship. Given that \textit{Peerless} wasn’t peerless, no meeting of the minds (\textit{consensus ad idem}) occurred, and the court deemed the contract void.\textsuperscript{129}

Where flaws implicate correctness, hitches implicate completeness. Staying in the contracts realm, we could think about an offer that had not been accepted. Or moving back to constitutional law, we can think about Jefferson’s objection to \textit{Marbury v. Madison},\textsuperscript{130} which he believed could have been resolved by such contract principles alone, given that the commissions were famously signed and sealed, but not delivered. As Jefferson complained, “if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of the deed.”\textsuperscript{131}

So it would seem that the constative/performative divide illuminates the fact/law distinction. It is worth pausing here and thinking about what the implications of this would be for our little problem. In an admirable exploration of the appellate deference to legislative facts, Caitlin Borgmann has argued that “clear error deference” is due to legislative facts.\textsuperscript{132} As a legal matter, she observes that Rule 52(a)(6) makes no distinction among facts. More deeply, as a policy matter, she sees no reason to treat facts differently: district courts, for instance, are just as competent to find legislative facts as adjudicative facts.

\textsuperscript{126} Id. at 36.
\textsuperscript{127} Id.
\textsuperscript{128} [1864] EWHC Exch J19.
\textsuperscript{129} One gets the sense that Austin is thinking of this case, or at least one like it, in discussing B.1. As noted above, he talks about the confusions that arise when one makes a bet on a race, but two are being run that day. He also talks about making arrangements about a house, when one has two. Then he goes on to talk about the importance of the meeting of the minds.
\textsuperscript{130} 5 U.S. 137 (1803).
\textsuperscript{131} Letter from Thomas Jefferson to William Johnson, Monticello, June 12, 1823.
\textsuperscript{132} Borgmann, supra note ___, at 1190 (“I propose a clear-cut solution to all the confusion. Appellate courts should straightforwardly apply Rule 52(a)(6) to social facts.”).
Implicit throughout her analysis is a steady confidence that fact and law can be distinguished. Yet Austin’s work applies pressure on precisely this point.

B. The Distinction Assailed

Many a scholar has argued that the fact/law distinction dissolves on closer examination. My desire here is to make a very limited intervention into this wide-ranging and storied debate. I limit myself here to dissolutions of the distinction related to Austin’s work.

(1) The Performative Prefix Problem

Whenever a district court finds facts, it is ostensibly engaged in a purely constative endeavor. But implicit in those findings of fact is the hidden performative—“we find that.” I observed that in ordinary usage, all constative utterances may be reduced to performative utterances by unmasking the hidden weak performative “I state that” before every statement. In the law, the hidden performative behind a finding of fact is the strong performative prefix “We find that.” As Langton puts it, this is the difference between a bystander calling “Fault” at a tennis match and an umpire saying the same thing: “[T]he bystander’s utterance makes no difference to the score. The umpire’s does.”

Consider, for instance, one of the findings that Justice Alito found so objectionable in the Hollingsworth trial: “Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of

---

134 Langton, supra note ___, at 304.
opposite-sex marriages.”135 This is presented as a purely constative utterance, a statement about the world that can be proven true or false (and which has been proven true).

Even if a layperson said it, it would have an implicit weak performative prefix: “(I state that) permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry . . . .” We might generally ignore this prefix as trivial. However, if a judge says the same thing, the utterance changes completely in its social signification. It now has a strong performative prefix: (I find that) permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry . . . .” The prefix is strong because it “changes the score,” by, for instance, foreclosing one rationale for the ban on same-sex marriage in the district court.

If appellate courts were to give such findings clear-error deference, it would significantly circumscribe their decisionmaking power. In the wake of the ruling, Andrew Koppelman, among others, wrote about the inversion of power that Judge Walker had effectuated through his detailed factual findings:

Judge Walker turned in a virtuoso performance, turning the obvious weakness of his position as a lower court judge subject to appeal into a strength.

A district court’s conclusions of law always get examined anew by the appeals courts, first in the federal Courts of Appeals and, if it can be persuaded to take the case, the Supreme Court. There’s no reason to feel confident that there are five votes on the Supreme Court to legalize same-sex marriage throughout the nation. District courts do, however, get to establish the facts. And appellate courts, because they don’t get to see the witnesses and assess their credibility, are supposed to accept the facts as the trial court found them.136

Koppelman appears to assume clear-error deference would apply to a district court’s findings. While this assumption is questionable, he usefully highlights the consequences of such deference by proceeding on it. In effect, it could invert the decisionmaking hierarchy of the federal judiciary, by allowing the district

---

court to decide all the factual predicates in such a way as to mandate an affirmance from a court of appeals (which might otherwise feel inclined to rule differently).

Of course, if we live in a world where facts and law are easily distinguished, then we might believe the appellate courts should be boxed in by district courts. Yet notice that what Judge Walker was really doing when he stated that same-sex marriage would have no negative effects on opposite sex marriage. He was stating that on the evidence he had before him from the Netherlands and other jurisdictions, he could detect no such negative effect. But this is not how the finding is framed—shucked of any kind of performative prefix, it is simply articulated as a brute fact about the world.

In a telling qualification, Judge Walker seemed obliquely to acknowledge the dangers of according such findings too much deference. Appended to his heading “Findings of Fact” was the footnote: “To the extent any of the findings of fact should more properly be considered conclusions of law, they shall be deemed as such.” By noting that his “findings of fact” could be re-categorized as “conclusions of law,” I believe he was acknowledging that clear error review could be replaced with de novo review.

(2) The Constative Dependency Problem

The constative dependency problem also has a ready legal analogue in the mixed question of law and fact. Recall that Austin’s concern was that if I were to state “I warn you that the bull is in the field,” and there was no bull, then the utterance would be unhappy, but not in any of the ordinary ways that would make the utterance misfire. In a sense, this would be the worst of both worlds. The utterance would still be efficacious—I would have given the warning. But given the false predicate, it would have been better if the attempted warning had been void, rather than simply abused.

---

138 Judge Walker attached an analogous footnote to his “Conclusions of Law” heading: “To the extent any of the conclusions of law should more properly be considered findings of fact, they shall be deemed as such.”
As seems usual in this context, the appellate courts have been more candid about this problem than the Supreme Court. In a case about an Indiana statute regulating abortion, the Seventh Circuit confronted the issue of a mixed issue of law and fact. The Indiana statute made a woman’s informed consent a condition to an abortion, which meant that a woman had “to make two trips to the clinic or hospital” to have an abortion. The governing Supreme Court precedent held that the state could not place an “undue burden” on the woman for pre-viability abortions. The question was whether the additional trip constituted an undue burden. The district judge found that the two-visit requirement in Mississippi was an undue burden because data from Mississippi and Utah showed that the two-visit requirement in those states reduced the number of abortions performed by about 10 percent compared with neighboring states without the requirement.

In overturning the district court, Judge Easterbrook wrote:

Indiana asks us to set aside these findings, but review under Fed. R. Civ. P. 52(a) is highly deferential, and we cannot say that the district court’s findings are clearly erroneous. The studies’ conclusions were hotly debated on both medical and statistical grounds, but the district judge dealt responsibly with these arguments pro and con and his findings cannot be upset. But what happened in Mississippi and Utah, a question of historical fact on which appellate review is deferential, does not necessarily ordain what will happen in Indiana—or whether what is likely to happen in Indiana amounts to an “undue burden.” That admixture of fact and law, sometimes called an issue of “constitutional fact,” is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects. Only the findings of historical fact are sheltered by Rule 52(a) Thus our consideration of the studies’ significance is not deferential.

The district court had ruled, in effect, “It is so ordered that the Indiana statute imposes an undue burden because the two-visit requirement will cause the frequency of abortions in Indiana to decline significantly.” In reviewing that decision, Judge Easterbrook observed that the factual predicate—“the

139 A Woman’s Choice-East Side Women’s Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002).
140 Id. at 685.
142 Newman, 305 F.3d at 689.
143 Id.
rate of abortions in Indiana will go down under the two-visit requirement” was not an adjudicative fact. He noted that what *had* happened in Mississippi and Utah (which he described as an adjudicative fact) was being used to infer what *would* happen in Indiana (which he described as a legislative fact). There was at least some uncertainty about whether the bull was in this field.

As in Austin’s example, the point here is not that the original performative misfired. “I warn you that the bull is in the field” is still a warning even in the absence of a bull. But in the absence of the bull, it is a degraded kind of performative. Similarly, the district court’s ruling in the abortion case—“It is so ordered that the Indiana statute imposes an undue burden because the rate of abortions in Indiana will go down under the two-visit requirement”—is still a ruling. But because the appellate court did not accept its predicate, the ruling was a degraded performative—in this case, a performative that was overruled.

(3) The Problem with the Instability

Let me now focus on why Austin’s instability—carried from the constative/performative context into the fact/law context—matters. It matters because it destabilizes the hierarchy of the courts. District courts are given power over facts because of their relative institutional competence in ferreting them out. But appellate courts—ultimately the Supreme Court—are given power over the law because of an interest in legal stability and finality.

On issues of great import, district courts will have strong incentives to reformulate issues of law as issues of fact to command greater deference. This would not be a problem if the fact/law distinction were stable. Yet as Austin shows us, it is simplicity itself to recast an issue of law as an issue of fact or vice versa. Both district judges in the cases just discussed were understood to be doing precisely this. As Koppelman argued, Judge Walker turned “the obvious weakness of his position as a lower court judge subject to appeal into a strength.”144 And Judge Easterbrook observed that he had to review the district

144 See Koppelman, supra note ___.

25
court “without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”

The introduction of the idea of a “legislative fact” is an instinctive acknowledgement that the fact/law binary—and its corresponding de novo/clear error forms of deference—are too crude. But any analysis that adheres to the fact/law distinction is unlikely to resolve the issue. If we take Austin seriously, what is needed is not another category of fact. What is needed, instead, is a movement away from categories altogether.

(C) The Fresh Start

Recall that the marquee move in Austin occurs when he shifts from the constative/performative binary to the locutionary/illocutionary/perlocutionary trichotomy. Just as Langton analyzed “Shoot her,” we could analyze the three-faced nature of any of the utterances we have been discussing. The statement—“same-sex marriages will have no effect on the frequency of opposite sex marriages” has the locutionary effect of presenting a causal relationship between same-sex marriage and opposite-sex marriage. It has an illocutionary effect of making a finding. And it has the perlocutionary effect of, for example, reassuring those who worry that the advent of same-sex marriage will “deinstitutionalize” marriage.

The key perlocutionary effect of a district court’s finding of fact, however, is to trigger deference from the appellate court. That deference in turn undermines the illocutionary power of the appellate court to overrule the district court. Because there is a convention (a felicity condition) of granting deference to facts, an appellate court may find that its illocution may be vulnerable if it fails to adhere to that convention. That was the case with the panel decision in Anderson.146

The concept of perlocution also allows us to see why courts distinguish adjudicative and legislative facts. The going-in assumption should be that this distinction is peculiar—a fact is a fact is a fact. It seems doubtful that the distinction can be sustained based on the intrinsic nature of the facts themselves, such as their complexity. Some adjudicative facts are extraordinarily complex, such as whether a particular ban on same-sex marriage was driven by “animus,” when the ban was produced through a referendum in which the intent of the voters was impossible to discern. And some legislative facts are simple, such as whether gays have suffered a history of discrimination. The real difference between adjudicative and legislative facts lies in their perlocutionary effects. By definition, adjudicative facts are case-specific. Any damage done by them will be limited to the case. But legislative facts—also by definition—span cases. They thus pose a much greater threat to the hierarchy of the legal order.

If we stay within the fact/law binary, the Supreme Court will face a stymie. On the one hand, if it says that legislative facts get no deference, this will flout a longstanding convention about the factfinding expertise of district courts. It might also dry up a needed source of institutional competence. If their efforts secured no deference, district courts might be even more unwilling to expend the time and resources on factfinding than they are now. On the other hand, if appellate courts give clear-error deference to legislative facts, they will surrender significant control over their dockets.

If we move to thinking about legislative facts as having Austin’s three aspects, however, a solution seems to emerge, in two parts. The first is that an intermediate standard between clear error and de novo review is needed for legislative facts. Ironically, such a standard was propounded by the constitutional law professors’ brief in Hollingsworth that Justice Alito so heavily criticized. While Justice Alito maintains that this brief argued for a clear error standard, the phrase “clear error” appears nowhere in the brief. Instead, the brief argues that the district court findings be given “significant weight.”

---

147 Amicus Curiae Brief of Constitutional Law and Civil Procedures Professors Erwin Chemerinsky and Arthur Miller in Support of the Plaintiffs-Respondents Urging Affirmance, Hollingsworth v. Perry, 133 S. Ct. 2652 (12-144). I was in no way associated with this brief.
148 Id. at 1-2.
Second, the tripartite understanding would guide an appellate court in thinking about how much deference should be given under the “significant weight” standard. (I am of course not suggesting that the courts adopt Austin’s somewhat technical terminology, but only his conceptual distinctions.) To the extent that the district court operated in a predominantly locutionary modality—meaning that a conscientious effort was made to discern the underlying facts, more weight should be given. Yet to the extent that the district court operated in a predominantly illocutionary modality—meaning that the court was using its power to create a reality while purporting only to describe it, less deference would be due.

This guidance will naturally lead to its own boundary problems. But fighting along this boundary would be a more honest war. The real concern of the appellate courts is not factual error below. It is law masquerading as fact; illocutions framed as locutions. A finding might not be “clearly erroneous,” but might nonetheless be apprehended as predominantly an illocutionary utterance.

IV. Conclusion

As an institutional matter, members of the Supreme Court occasionally demonstrate their awareness that the Court trades in the illocutionary rather than the locutionary modality. Think of Justice Jackson’s aphorism: “We are not final because we are infallible, but we are infallible only because we are final.”149 Under this view, the authority of the Court rests not in the unerring nature of its locutionary utterances, but rather in the efficacy of its illocutionary utterances.

I have tried to show that this insight has implications for how appellate courts treat legislative facts found by lower courts. The finality of which Jackson speaks alludes to the Supreme Court’s status at the top of a pyramid of authority. Yet even the district courts, which make up the base of that pyramid, have a countervailing power that the high court does not have. This power is the power to find facts. To the extent that the district courts are indeed engaged in that locutionary enterprise, their institutional competence should insulate their findings of fact. But to the extent that district courts are instead engaged

in repackaging illocutionary utterances as locutions, then the same finding can take on a different valence. Appellate deference is tied to the locutionary rather than the illocutionary competences. For that reason, a shift by the district courts toward the illocutionary mode should lead to a corresponding diminution of deference.