

# Rethinking Judicial Deference to Legislative Fact-Finding<sup>†</sup>

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*It is traditionally assumed that the role of ascertaining and evaluating the social facts underlying a statute belongs to the legislatures. The courts in turn are tasked with deciding the law and must defer to legislative fact-finding on relevant issues of social fact. This simplistic formula, however, does not accurately describe the courts' confused approach to legislative fact-finding. Although the courts often speak in terms of deference, they follow no consistent or predictable pattern in deciding whether to defer in a given case. Moreover, blanket judicial deference to legislative fact-finding would not be a wise general rule. Because social fact-finding plays a decisive role in constitutional analysis, blind judicial deference would undermine the courts' responsibility to protect basic individual rights and liberties. Judicial treatment of legislative fact-finding is thus sorely in need of a coherent theory.*

*This Article proposes a new approach, a paradigm of selective independent judicial review of social facts. Under this model, the courts should independently review the factual foundation of legislation that curtails basic individual rights, even when those rights do not receive strict or heightened scrutiny. This approach is unique in ensuring a baseline protection for important individual rights, including emerging rights, while respecting the division of power between the branches of government. The paradigm is needed because, this Article asserts, legislatures are poorly positioned to gather and assess facts dispassionately, especially when addressing laws that restrict controversial or minority rights. The process of fact-finding in federal trial courts ensures a superior factual record when such rights are at stake. This Article illustrates the courts' and legislatures' contrasting capacities for fact-finding through case studies, including "partial-birth abortion," gay parenting, and indecency on the Internet. Moreover, the Article argues, because of the courts' traditional and vital role in protecting basic individual rights, the proposed paradigm honors constitutional structural principles.*

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#### INTRODUCTION

In the late 1990s, more than half of the states enacted "partial-birth abortion" bans.<sup>1</sup> This tide of legislation reflected a shared conviction that doctors were performing abortions by means of an especially gruesome, medically unnecessary procedure.<sup>2</sup> Yet nearly every trial court to consider a ban invalidated it on the grounds that it unconstitutionally endangered women's health.<sup>3</sup> These rulings were affirmed with near unanimity. The Supreme Court agreed that the bans were unconstitutional.<sup>4</sup> This striking divide between legislative and judicial outcomes on the bans stemmed from one overriding dynamic: fact-finding. The bans' constitutionality depended upon dubious factual conclusions about how abortions are performed and the availability of alternative procedures. The legislatures did not uncover the weak factual footing, but—through their independent review of the facts—the courts did.

Congress passed its own "partial-birth abortion ban" in 2003.<sup>5</sup> Four years later, the Supreme Court upheld the ban in *Gonzales v. Carhart*.<sup>6</sup> In a sharp reversal, the Court this time deferred to Congress on the key medical issues in dispute (although it formally disavowed any such deference).<sup>7</sup> Like the state legislatures, Congress had concluded that its ban did not endanger women's health, and it made these findings explicit in the statute. The Supreme Court's de facto deference to Congress on this key issue proved decisive, sparking debate over whether deference was appropriate in this context.

It is traditionally assumed that the role of ascertaining and evaluating the facts underlying a statute belongs to the legislatures. The courts, in turn, are tasked with

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1. Thirty-one states have enacted at least one "partial-birth abortion" ban. Am. Civil Liberties Union, *Abortion Bans: In the States*, <http://aclu.org/reproductiverights/abortionbans/12544res20051007.html> (information compiled in February 2006).

2. See *infra* text accompanying notes 125–36.

3. See *infra* text accompanying notes 151–57.

4. See *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914 (2000).

5. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

6. (*Carhart II*), 127 S. Ct. 1610 (2007).

7. See *id.* at 1637; see *infra* text accompanying notes 164, 286–89 (discussing *Carhart II*).

deciding the law, while deferring to legislatures' assessment of the relevant social facts. This simplistic formula, however, does not capture the Supreme Court's incoherent approach to legislative fact-finding.<sup>8</sup> Nor would it make an acceptable general rule.<sup>9</sup> Because the determination of social facts is nearly always decisive in constitutional decision making, blanket judicial deference would undermine the courts' crucial responsibility for protecting basic individual rights. The courts' approach to legislative fact-finding is thus in need of a lucid and sound theory. Not surprisingly, the Court's treatment of legislative fact-finding has received considerable recent attention among scholars. Several have argued for deference, criticizing the Court's close scrutiny of congressional fact-finding in the Enforcement and Commerce Clause contexts;<sup>10</sup> some have suggested that deference is to be avoided where fundamental or "specially protected" rights are at stake;<sup>11</sup> others have argued that deference is inappropriate in all contexts.<sup>12</sup>

This Article proposes a paradigm of selective independent judicial review of social facts. I argue that courts should independently review the factual foundation of all legislation that curtails important individual rights protected by the federal Constitution, regardless of whether the Supreme Court has held those rights to be "fundamental" or has deemed them to merit strict or heightened scrutiny. As the Court has moved further and further from neat distinctions between different levels of rights and the tiers of legal scrutiny applicable to laws infringing those rights, it makes less and less sense to rely upon these outdated categories in establishing a paradigm for

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8. See *infra* Part I.A. I use "legislative fact-finding" to mean fact-finding conducted by a legislature. I do not use it to denote a court's finding of so-called "legislative facts," also referred to as "social facts" (and contrasted with "adjudicative" or "historical" facts, which are the facts particular to the litigants and the dispute before a court). See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45 (1977); see also Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942) (distinguishing between "legislative" and "adjudicative" facts); cf. Peggy C. Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1590, 1600 (1987) (using "legislative fact-finding" to refer to a court's findings of legislative facts). For clarity, I avoid the term "legislative fact" and use exclusively "social fact." Legislative fact-finding by nature addresses social facts, which Donald Horowitz defines as "the recurrent patterns of behavior on which policy must be based." HOROWITZ, *supra*, at 45.

9. See *infra* Part III.

10. See, e.g., A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On The Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 332–39 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 11–12 (2003).

11. David L. Faigman, Ashutosh A. Bhagwat & Kathryn M. Davis, *Amicus Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat, et al. in the Case of Gonzales v. Carhart*, 34 HASTINGS CONST. L.Q. 69, 72 (2006) (arguing that Court should apply "searching, independent review . . . to all fundamental and other specially protected rights").

12. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law: The Courts Versus Congress in Social Fact-Finding*, 25 CONST. COMMENT. (forthcoming 2008), available at <http://ssrn.com/abstract=1061502>.

judicial treatment of legislative fact-finding. Moreover, the Court's designation of rights as fundamental or "specially protected" may lag behind a just conception of basic individual rights and liberties. The Court may initially be tentative in recognizing an emerging right and therefore may refrain from applying heightened scrutiny, even as it recognizes that essential human rights values are at stake.<sup>13</sup> Because the rights that are vital to human flourishing are not static, a theory of judicial review of legislative fact-finding must be flexible enough to accommodate evolving rights, ensuring baseline protection for such rights although their formal legal status may still be in flux.<sup>14</sup>

Deference to legislative fact-finding has been based on two different principles. First, there is a widely accepted view that legislative bodies are better than courts at fact-finding.<sup>15</sup> Second, courts and commentators have argued that courts lack the authority or legitimacy to question legislative fact-finding.<sup>16</sup> I argue that legislatures have in fact done a poor job of gathering and assessing facts in important cases and that the structural shortcomings of the legislative fact-finding process are particularly stark when laws restrict core personal rights and liberties.<sup>17</sup> In contrast, the process of fact-finding in federal trial courts ensures that they produce a superior factual record.<sup>18</sup> Moreover, I suggest that, because of the courts' vital role in protecting basic individual rights, independent judicial fact-finding in these contexts honors constitutional structural principles.<sup>19</sup>

Proponents of broad deference to legislative fact-finding often point to the *Lochner* era to show the dangers of independent judicial review of social facts.<sup>20</sup> But independent judicial review need not be an all-or-nothing deal. My proposal takes into account the federal courts' important responsibility to protect basic individual rights—especially unpopular and minority rights—while respecting the division of power between the legislatures and the courts. In particular, my approach would allow courts to defer to legislative fact-finding when legislatures seek to protect or expand individual rights.<sup>21</sup> Moreover, it leaves open the question of whether courts should defer to legislative fact-finding in cases where basic individual rights are not implicated at all. At the same time, because I propose independent judicial review in all cases of asserted basic individual rights, including those the Court has subjected only to rational basis review, my paradigm accounts for emerging rights, such as the rights of lesbian and gay adoptive parents.

Judicial deference to legislative fact-finding has not escaped scholarly critique. Some scholars are wary of judicial deference to legislative fact-finding because the doctrine often hinges upon a tendentious distinction between fact and law. These

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13. *See infra* Part III.A.

14. *See infra* Part III.A.

15. *See infra* Part I.D.

16. *See infra* Part I.C.

17. *See infra* Part III.B; *see also infra* Part II.

18. *See infra* Part III.B; *see also infra* Part II.

19. *See infra* Part III.A.

20. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 949–52 (1999) (describing the standard critique of “*Lochnerism*,” which holds that the Court improperly strayed from deference principles).

21. *See infra* text accompanying notes 243–55.

scholars contend that the Court exploits the fact/law distinction to justify its preference as to which branch of government should decide an issue.<sup>22</sup> If the Court wants to decide the issue, it characterizes the question as one of law. If it prefers to leave the issue to Congress, the Court frames it as a question of fact. One solution to this problem is forthrightly to declare everything to be a social fact and thereby to prevent the Court from using the subterfuge of a fuzzy fact/law distinction to justify realignments of constitutional power. Thus one recent article, arguing from the positivist premise that “law is a social fact,” asserts that, since courts are entrusted with deciding law, they should be equally entrusted with deciding other kinds of social facts.<sup>23</sup>

This second approach, while helpful, tends to gloss over the distinct and important category of social facts that underlie most constitutional decision making, facts I will refer to as “dispositive” social facts.<sup>24</sup> Dispositive social facts are the plainly empirical—as opposed to doctrinal—issues that a decision maker must resolve before determining a law’s constitutionality: Do children suffer harm when raised by gay parents? How are second- and third-trimester abortions practiced, and what are the relative risks and safety advantages of different procedures? These kinds of questions are not questions of law, policy, or morality.<sup>25</sup> Dispositive social facts thus differ from the social facts important to legal positivists, or what I will call “constitutive” social facts, the facts that for positivists establish the basis of legality.<sup>26</sup> The second criticism of judicial deference to legislative fact-finding rests upon positivist assumptions and foregoes a separate focus on dispositive social facts. But, setting aside the positivist claim that the law is rooted in (constitutive) social fact, there is no question that current constitutional analysis turns in significant part on dispositive social facts.<sup>27</sup> While the first criticism raises important questions about allocations of power in constitutional interpretation, to highlight the Court’s manipulation of the fact/law distinction does not

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22. See, e.g., Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1177–78 (2001); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 340 (1984).

23. See McGinnis & Mulaney, *supra* note 12.

24. David Faigman refers to these as “reviewable facts.” See DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 46, 52 (2008).

25. That is not to deny that they are often intricately intertwined with questions of morality or policy. See *infra* Part I.A.

26. See generally Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22 (Arthur Ripstein ed., 2007). David Faigman discusses a similar category of facts, which he calls “doctrinal facts.” See FAIGMAN, *supra* note 24, at 46, 52.

27. See Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 120–21 (1997) (noting that, whether or not they adhere to fact/law distinction, most scholars today recognize the influence of social legislative facts on constitutional decision making); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485, 488, 490–91 (1986); Solove, *supra* note 20, at 970–92. But see Hashimoto, *supra*, at 150 (arguing that the Supreme Court “includes scientific facts in its constitutional law opinions mostly for their persuasive appeal and symbolic expression”). For this reason, one might also call them “internal” social facts, since they are internal to the existing legal process, rather than constitutive of it.

answer which governmental body should determine dispositive social facts. I argue that, in our present system, the federal courts, and in particular federal trial courts, are best equipped to find such facts, especially those underlying laws that curtail controversial or minority rights.

This Article proceeds in four parts. Part I describes and analyzes the courts' historical approach to legislative fact-finding, including the circumstances under which courts have given deference and their justifications for doing so. Part II presents three cases studies—the state and federal “partial-birth abortion” bans, gay parenting, and indecency on the Internet—that juxtapose legislative fact-finding with judicial fact-finding in the context of laws challenged as unconstitutionally infringing basic individual rights. Part III critiques the traditional approaches to legislative deference. It argues that federal courts' responsibility to protect basic individual rights carries with it a duty to examine independently the relevant social facts. Moreover, it contends that federal trial courts are institutionally better fact-finders than legislatures, especially where controversial or minority rights are at stake.<sup>28</sup> Part IV proposes a new judicial approach to legislative fact-finding and applies the proposal to the case studies presented in Part II, as well as to *Crawford v. Marion County Election Board*<sup>29</sup> and *Planned Parenthood v. Rounds*,<sup>30</sup> cases recently decided, respectively, by the Supreme Court and the Eighth Circuit en banc.

## I. JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING: A DOCTRINE IN DISARRAY

### A. *The Meaning of Judicial Deference to Legislative Fact-Finding*

The federal courts have traditionally been reluctant fact-finders. They have certainly disavowed preeminence in fact-finding, preferring to articulate their role, instead, as to decide the law.<sup>31</sup> In keeping with this self-described role, federal courts have generally deferred to congressional and state legislative fact-finding.<sup>32</sup> Federal courts have long held that Congress's findings of empirical fact are entitled to judicial deference.<sup>33</sup> In *Metro Broadcasting, Inc. v. FCC*, for example, the Supreme Court stated that the Court “must pay close attention to . . . the factfinding of Congress” and must “give ‘great weight to the decisions of Congress’” regarding “‘complex’ empirical question[s].”<sup>34</sup>

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28. This Article focuses primarily on the federal courts because many of their characteristics—including that judges are appointed, that they serve life terms, and that the Federal Rules of Evidence govern the proceedings—contribute to making federal courts a better forum for fact-finding in the context of statutes that curb individual rights. To the extent that some state courts share these (or similar) features, the arguments made here may apply to these courts as well, and indeed some of the examples in the case studies that follow demonstrate this. See *infra* Part III.

29. 128 S. Ct. 1610 (2008).

30. 467 F.3d 716 (8th Cir. 2006), *vacated en banc*, 530 F.3d 724 (8th Cir. 2008).

31. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Devins, *supra* note 22, at 1169–70.

32. For a helpful overview of the history of judicial deference to legislative fact-finding, see generally Solove, *supra* note 20.

33. See Kramer, *supra* note 10, at 151–52 (explaining that courts have been “highly respectful” of congressional fact-finding “at least since *M’Culloch v. Maryland*”).

34. 497 U.S. 547, 569, 579–81 (1990) (quoting *Columbia Broad. Sys., Inc. v. Democratic*

Similarly, in *Turner Broadcasting System, Inc. v. FCC (Turner II)*, the Court stressed the importance of “Congress’ factfinding function” and declared that the Court “must give considerable deference, in examining the evidence, to Congress’ findings and conclusions.”<sup>35</sup>

Courts have accorded similar deference to the factual findings of state legislatures. As the Supreme Court declared in *Minnesota v. Clover Leaf Creamery Co.*, “States are not required to convince the courts of the correctness of their legislative judgments. Rather, ‘those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.’”<sup>36</sup> Indeed, the Court noted that, so long as “there was evidence before the legislature reasonably supporting the classification,” legislation should not be invalidated even when its challengers “tender[] evidence in court that the legislature was mistaken.”<sup>37</sup> In *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, the Court found that

The District Court’s responsibility for making “findings of fact” certainly does not authorize it to resolve conflicts in the evidence against the [state] legislature’s conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was “pure speculation.”<sup>38</sup>

But a close examination of the cases addressing judicial deference to legislative fact-finding, and of the circumstances under which such deference has been accorded or denied, reveals a doctrine in disarray.<sup>39</sup> First, the Supreme Court has been unclear about the role facts should play in its constitutional decisions. At times the Court treats facts as a decisive factor in determining the constitutionality of legislation, while at other times it treats facts as largely irrelevant to that inquiry.<sup>40</sup> This inconsistency

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Nat’l Comm., 412 U.S. 94, 103 (1973)), *overruled by* *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995).

35. 520 U.S. 180, 199 (1997). The Court’s deference to Congress’s fact-finding in *Turner II* contrasted with the plurality’s decision, in *Turner I*, to remand for further examination to determine whether Congress’s factual conclusions were adequately supported by the legislative record. *See* *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 664–68 (1994) (plurality opinion); *Bryant & Simeone*, *supra* note 10, at 332–39.

36. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463–64 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979) and citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) and *Henderson Co. v. Thompson*, 300 U.S. 258, 264–65 (1937)).

37. *Id.* at 464.

38. *Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 138–39 (1968); *see also* *Heller v. Doe*, 509 U.S. 312, 333 (1993) (holding that, on rational basis review, courts must defer to state legislature’s factual judgments, even if erroneous, when the legislature’s factual judgments may plausibly be correct); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) (similar).

39. *See* *Planned Parenthood Fed’n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1174 (9th Cir. 2006), *rev’d on other grounds sub nom.* *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610 (2007).

40. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 638 (Souter, J., dissenting) (criticizing majority opinion for suggesting that the “substantial effects” analysis under the

pervades the Court's application of constitutional tests that expressly turn on questions of fact. Moreover, the Court has never made clear whether "deference" to legislative fact-finding allows (or requires) courts to go beyond the legislative record to corroborate or supplement the facts.

Another source of uncertainty is that courts and commentators often use the term "deference" broadly, to encompass deference not only to Congress's fact-finding but also to its policy choices.<sup>41</sup> Although the line between legislatures' empirical fact-finding and policy judgments is not always crisply drawn, it is important to consider each of these legislative functions distinctly. In enacting a piece of legislation, a legislative body, generally through a committee, collects factual evidence relevant to the proposal. It then makes a policy judgment as to whether action is warranted in light of the facts.

If, for example, a legislature finds that the rate of death by head injury among motorcyclists has increased since it repealed a law requiring helmets, it may decide to reinstate the requirement. Deciding whether or not to require helmets is a policy judgment. As with all policy judgments, the legislature must make a choice, and that choice will turn at least in part on a factual assessment. But the underlying determination that the rate of head injuries has increased, and that the increase can validly be attributed to the repeal, is an instance of empirical fact-finding. Experts may dispute the factual question, but the question does not present legislators or courts with the same kind of choice inherent in questions of policy or legal interpretation. In short, a legislature's empirical fact-finding identifies a problem, and its policy choices offer a solution.

Empirical fact-finding is a distinct step in the process of enactment for virtually all legislation, and it is in this sense that I refer to "legislative fact-finding" in this

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Commerce Clause "is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence"); *see also* Devins, *supra* note 22, at 1172–73. Devins claims that when the Court treats facts as decisive, it usually does so in cases in which it agrees with the legislative outcome, and thus it tends to defer to the legislature's fact-finding. When the Court disagrees with the legislative outcome, it tends to cast the question as one of law rather than of fact, and to sidestep the question of deference to fact-finding by treating the facts as immaterial to the Court's inquiry. *See id.* at 1173–75 (discussing *Dickerson v. United States*, 530 U.S. 428 (2000), *United States v. Morrison*, 529 U.S. 598 (2000), and *City of Boerne v. Flores*, 521 U.S. 507 (1997)); Kramer, *supra* note 10, at 149–51 (arguing that the Court engages in close scrutiny of legislative record when it wants to "maintain interpretive control").

41. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 196 (1997) ("Deference must be accorded to [Congress's] findings as to the harm to be avoided *and to the remedial measures* adopted for that end." (emphasis added)); *Oregon v. Mitchell*, 400 U.S. 112, 206 (1970) (Harlan, J., dissenting) (objecting that "[w]hen my Brothers refer to 'complex factual questions' . . . they call to mind disputes about primary, objective facts dealing with such issues as the number of persons between the ages of 18 and 21, the extent of their education, and so forth," when in fact the real disagreement "revolves around the evaluation of this largely uncontested factual material"); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 210–11 (1971) (discussing "deference to legislative determinations of fact" but raising concern over courts' questioning of legislatures' policy judgments); Kramer, *supra* note 10, at 151–52 (stating that judicial deference to Congress has historically encompassed both deference to Congress's "choice of means to implement the Constitution's grants of power" and to its "factual conclusions").



Article.<sup>42</sup> Often, fact-finding is an implicit step, and sometimes a legislature will not engage in formal fact-finding at all but will instead act upon a shared understanding of the social facts necessitating the legislation. On occasion a legislature will spell out its factual conclusions in a so-labeled section of the legislation.<sup>43</sup> While fact-finding at some level always occurs, a legislature's explicit inclusion of factual findings helps the court identify the specific facts upon which the legislature relied.<sup>44</sup> Whether to defer to a legislature's policy choices raises very different questions about legitimacy and competency than whether to defer to a legislature's empirical fact-finding.<sup>45</sup> In this Article, I address only the latter topic.

Further confusion in courts' and commentators' treatment of judicial deference to legislative fact-finding stems from the murky lines that separate factual findings from moral judgments or legal conclusions. If legislatures think that courts will defer to their factual findings, they are likely to present what are really moral positions or legal conclusions as factual findings.<sup>46</sup> For example, a legislature wanting to justify its enactment of state-sponsored sterilization of mentally retarded persons might find that "the welfare of society may be promoted in certain cases by the sterilization of mental defectives," a morally laden conclusion that is not susceptible of empirical, evidentiary proof.<sup>47</sup> Or a legislature may find that a particular abortion restriction does not unduly burden women, a "factual" conclusion that decides the legal question whether the law unconstitutionally poses an undue burden.<sup>48</sup> Courts too can cause mischief by requiring unreasonable measures of scientific proof and accuracy to support measures resting in significant part on moral or other nonempirical norms.<sup>49</sup>

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42. See, e.g., *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) ("By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power."); see also Kenneth Culp Davis, *supra* note 8, at 402 (stating that creation of law depends upon fact-finding).

43. See, e.g., Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2006) (including findings on trafficking in the sex industry); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (2000) (including findings on solid waste disposal); N.J. STAT. ANN. § 9:17A-1.2 (West 2002) (including findings concerning minors' ability to make informed medical decisions and concerning the "medical, emotional, and psychological consequences of abortion").

44. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) ("Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied.").

45. See Pilchen, *supra* note 22, at 397.

46. See, e.g., Caitlin E. Borgmann, *The Packaging of Ideology as Science in Legislative Factfinding on Abortion*, 16 J.L. & POL'Y (forthcoming 2008) (manuscript on file with the Indiana Law Journal).

47. *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (deferring in part to "the general declarations of the legislature" regarding mentally retarded people); see Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1965 (2006) (using *Buck v. Bell* to demonstrate the normative judgments underlying many "factual" assertions by courts). Goldberg distinguishes between "thin" (objective or empirical) facts and "thick" facts (which contain moral judgments) and argues that courts routinely obscure the distinction between "thick" and "thin" facts. *Id.* at 1965-74.

48. See Faigman et al., *supra* note 11, at 70.

49. See, e.g., *Lamprecht v. FCC*, 958 F.2d 382, 408 (D.C. Cir. 1992) (Mikva, J., dissenting) ("Rather than supporting my colleagues' view that gender classifications must be supported by statistical evidence, *Craig v. Boren* warns of the dangers of their approach: . . . proving broad

It is important to isolate factual findings that are free of moral content from moral judgments that masquerade as objective fact.<sup>50</sup> Whether legislatures or courts are more competent at finding empirical facts is a wholly separate question from when and whether unprovable moral assertions justify particular legislative responses or judicial rulings and which institution we should entrust with such decisions.

Yet another common confusion in discussions about judicial deference to legislative fact-finding lies in the nature of the connection between constitutional tiers of review and judicial deference to legislative fact-finding. Courts and commentators have often asserted or implied that the constitutional tiers of review dictate the extent to which courts should defer to legislative fact-finding.<sup>51</sup> It is frequently claimed, for example, that strict scrutiny mandates a skeptical evaluation of legislative fact-finding, while rational basis review implies a deferential approach.<sup>52</sup>

The constitutional tiers of review, however, are neither a reliable predictor of judicial deference to legislative fact-finding nor an acceptable guide to the appropriateness of such deference.<sup>53</sup> First, courts have not consistently given deference even when applying rational basis review.<sup>54</sup> Second, courts sometimes have given deference where strict or heightened scrutiny does apply.<sup>55</sup> Third, in cases involving

sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.”); *cf.* FAIGMAN, *supra* note 24, at 27, 162 (noting that “[t]he probabilistic character of applied science is an inherent limitation of the discipline” and asserting that “[t]he empirical uncertainties of factual statements are as important as the statements themselves and should be part of the legal calculus”).

50. *See, e.g.*, MO. ANN. STAT. § 1.205 (West 2000) (including “findings” that “the life of each human being begins at conception,” that “[u]nborn children have protectable interests in life, health, and well-being”; and that “[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child”).

51. *See, e.g.*, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 844 (S.D. Ind. 2006) (suggesting that court’s refusal to apply strict scrutiny to state voter identification law meant that court could not question state’s factual justifications for the law (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993))), *aff’d sub nom. Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008); *Am. Subcontractors Ass’n, Ga. Chapter, Inc. v. City of Atlanta*, 376 S.E.2d 662, 664–65 (Ga. 1989).

52. *See Heller v. Doe*, 509 U.S. 312, 333 (1993) (stating that under rational basis review, courts must defer to factual assumptions underlying legislative rationale, even if they are erroneous); *Rokita*, 458 F. Supp. 2d at 844; Faigman et al., *supra* note 11, at 87.

53. *See* FAIGMAN, *supra* note 24, at 130 (“[T]he answer to the question of how much deference is owed cannot be premised simply on preexisting standards of judicial review. . .”).

54. *See, e.g.*, *infra* notes 82–89 and accompanying text.

55. *See, e.g.*, *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1635–38 (2007) (deferring implicitly to Congress’s finding that intact D&E abortion procedure is not significantly safer than other procedures while applying undue burden standard); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 189, 195–96 (1997) (deferring to Congress’s fact-finding while applying intermediate scrutiny in First Amendment challenge); *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (applying strict scrutiny to a state restriction on speech at polling places but declining to require empirical evidence to support the law). *But see Turner II*, 520 U.S. at 229 (O’Connor, J., dissenting) (arguing that Court “misapplies the ‘intermediate scrutiny’ framework it adopts” and that, “[a]lthough we owe deference to Congress’ predictive judgments and its evaluation of complex economic questions, we have an independent duty . . . to inquire into the reasonableness of congressional findings regarding [the statutory scheme’s] necessity”).

legislation alleged to infringe basic personal rights, there has been a proliferation of standards governing the constitutionality of such legislation.<sup>56</sup> Recently, the Supreme Court has seemed reluctant to acknowledge explicitly what standard it is applying.<sup>57</sup> Uncertainty about which test the Court is applying in a given case and about the significance of the various tests makes it difficult to state as a general proposition whether deference to legislative fact-finding is inherent in a particular standard of review.

Moreover, the level of constitutional review a court should apply is (or should be) a distinct question from whether it should defer to a legislature's fact-finding.<sup>58</sup> The former is a question about how deferential of a legal standard a court should apply to the facts. The standard of review thus provides the legal framework within which facts are evaluated.<sup>59</sup> If a court applies a deferential legal standard of review in evaluating whether a constitutional violation has occurred, it need not necessarily accept the truth of facts found by the legislature. In contrast, in applying a stringent standard of review, a court could nevertheless defer to the legislature's findings of empirical fact.

A deferential legal standard of review may mean that the court accepts the law's stated purpose as the actual purpose. For example, the court might defer to a state legislature's assertion that its involuntary commitment procedures for mentally retarded persons are intended to protect society from those who pose a danger and to protect mentally retarded individuals from themselves.<sup>60</sup> Or a court may defer to a legislature's judgment about the wisdom of or need for particular legislation given a certain set of facts by requiring only a rational connection between the two (in this example, the factual premises may not be in doubt, but the connection to the stated legislative goal may be attenuated). In either case, however, the court could still require the government to submit factual evidence supporting the law's rationality.<sup>61</sup>

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56. See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950, 952 (7th Cir. 2007) (deciding whether Indiana voting requirement imposed an "undue burden on the right to vote" and asserting that "[a] strict standard would be especially inappropriate"), *aff'd*, 128 S. Ct. 1610 (2008); *Crawford*, 472 F.3d at 956 (Evans, J., dissenting) (arguing that court should apply a standard "that would at least be something close to 'strict scrutiny light'"). See generally Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984).

57. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575–78 (2003).

58. Cf. Solove, *supra* note 20, at 955 ("In deference cases, the very minimal examination of factual and empirical evidence tends to override whatever level of scrutiny is applied, and is often dispositive."); Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 129–30 (2008) (describing how deference to legislative fact-finding can be determinative in free speech cases even where legal standard remains the same).

59. See *Carhart v. Gonzales*, 413 F.3d 791, 797 (8th Cir. 2005) (distinguishing factual question of whether an abortion procedure "is medically necessary in a given instance" from legal question of whether there is sufficient evidence to meet legal standard of "substantial medical authority"), *rev'd*, 127 S. Ct. 1610 (2007); see also FAIGMAN, *supra* note 24, at 49 ("Ultimately, . . . even the plainest facts . . . must be evaluated in light of the applicable legal standard.").

60. See *Heller v. Doe*, 509 U.S. 312, 339 (1993) (Souter, J., dissenting).

61. See *infra* text accompanying note 78 (discussing factual assumptions underlying Kentucky civil commitment law).

Courts and commentators often conflate strict scrutiny (and the burden of proof traditionally placed upon the government under that standard) with judicial skepticism of legislative fact-finding, but again the two are distinct, though related, doctrines. In contrast with rational basis review, a court applying strict scrutiny views the legislature's goals skeptically and may reject certain goals as insufficiently compelling to justify the adopted measure. Or it may accept the goal as compelling but may find that, in light of the empirical facts, the "fit" between the legislation and the stated goal is too loose.<sup>62</sup>

There is nothing inherent in the strict or heightened scrutiny standards that precludes the government from relying on a legislature's factual findings in lieu of submitting evidence in court or the court from relying on such findings regardless of whether the government has submitted evidence. A court theoretically could defer to the legislature's fact-finding while applying a stringent legal standard of review. A court granting such deference would still have to determine whether Congress's goal in enacting the legislation was a compelling (or "important") one.<sup>63</sup> It would also examine skeptically the fit between the law's provisions and this goal in light of the facts found by the legislature.<sup>64</sup>

This may appear to shift the burden of proof in strict scrutiny cases from the government to the plaintiff/challenger (contrary to what is normally required), but it is in fact different. The burden of proof would remain with the government, which must put forward a compelling interest and prove that its law is not over-inclusive.<sup>65</sup>

Of course, a court's deference to the legislative fact-finding would give the government an enormous leg up. One might well respond that for a court to grant deference to a legislature's fact-finding would therefore seem to undermine the very purpose of strict scrutiny. It makes intuitive sense that a court applying the strict scrutiny standard should examine the legislature's factual premises closely by

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62. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

63. In *Carhart II*, the Court deferred to the legislature on the key disputed medical facts, and then determined whether the legislation imposed an undue burden on abortion. See, e.g., *infra* text accompanying note 315.

64. A hypothetical law imposing a curfew only on African American youth illustrates how a court might apply a strict legal test while deferring to the legislature on the facts. Assume a legislature finds, based on credible evidence, that minors who stay out late at night are more likely to be harmed than those who stay home. Assume it also finds, based on wholly non-credible evidence, that African American youth are exceedingly likely to be harmed when staying out late, whereas the risks to white youth are negligible. A court granting deference would not question either premise but would presume both findings were true and would proceed to determine whether the law met a compelling state interest and, assuming it did, whether the law was narrowly tailored to meet this interest. The burden would then shift to the challenger to prove that the evidence in the legislative record was flawed.

65. This distinction is akin to that between a presumption and the burden of proof under the Federal Rules of Evidence. See FED. R. EVID. 301 ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but *does not shift to such party the burden of proof* in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." (emphasis added)); H.R. REP. NO. 93-1597, at 5 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7098, 7099 (same); Tobin, *supra* note 58, at 129-30 (distinguishing deference to fact-finding from burden of proof).

requiring them to be proved in court. But this is only a justifiable intuition if we have reason to doubt the integrity of the legislature's fact-finding. We may doubt the neutrality or reliability of the legislature's fact-finding in these circumstances. Or perhaps we do not ever particularly trust the integrity of legislative fact-finding but are particularly wary of deferring to it when the potential resulting harms are great.

Nevertheless, it is important to recognize that judicial deference to legislative fact-finding does not logically follow simply because the court is applying a strict legal standard. Conversely, if we have reason to suspect the integrity of legislative fact-finding where strict scrutiny applies, then there may be other circumstances, including cases in which rational basis review applies, in which we think a court should not grant deference.<sup>66</sup>

### *B. The Courts' Inconsistent Treatment of Legislative Fact-Finding*

Despite the confusion about what is meant by "judicial deference to legislative fact-finding," there is a distinct thread in the case law that counsels the importance of judicial deference to the legislature's collection and evaluation of empirical evidence to support a piece of legislation.<sup>67</sup> Thus, for example, in *Rostker v. Goldberg*, the Court referred distinctly to the importance of judicial deference both to Congress's policy judgments in matters of military affairs as well as to its empirical fact-finding: "In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, *or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.*"<sup>68</sup>

Deference to a legislature's fact-finding can occur regardless of whether it has formally found facts. If the legislature has not included formal findings in the statute itself, the court may presume that such facts exist, and the burden will be on the challenger to prove in court that they do not.<sup>69</sup> The legislature may have held hearings but declined to include any factual findings in the legislation, or it may not have held any hearings at all. In either case, a court could still give deference to the legislature on the relevant facts by presuming that facts supporting the need for the legislation exist, whether or not such facts were actually established in the legislative process. The 1876 decision *Munn v. Illinois*<sup>70</sup> was an early case in which the Supreme Court granted such a presumption to a state legislature. Archibald Cox attributes to that case the first "suggestion that ascertainment and characterization of facts, even when constitutionally decisive, may be a job for the legislature rather than the judiciary."<sup>71</sup>

66. See *infra* Part III.B; *infra* notes 267–69 and accompanying text.

67. See generally Solove, *supra* note 20 (reviewing history of judicial deference).

68. 453 U.S. 57, 68 (1981) (emphasis added); see *id.* at 72–74 (noting extensive evidence amassed by Congress on the issue of registering women for the draft).

69. See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that the Court will assume factual basis exists for challenged legislation and, to prevail, plaintiff must "negative every conceivable basis which might support it"); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) ("[T]he existence of that state of facts [that would sustain a law] at the time the law was enacted must be assumed.").

70. 94 U.S. 113 (1876).

71. Cox, *supra* note 41, at 207.

In *Munn*, the Court examined a state law limiting prices charged by grain elevators. The plaintiffs argued that the state regulation of prices amounted to a taking of property without just compensation. The case turned in part on a question of fact—the extent to which private grain warehouses were devoted to public use.<sup>72</sup> In deferring to the legislature on that question, the Court stated, “For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute . . . was passed.”<sup>73</sup> Cox claims that the Court “allocated the responsibility for deciding that question to the legislature, even though the constitutionality of the statute depended on the response.”<sup>74</sup> However, the Court did not examine actual fact-finding conducted by the legislature but rather simply presumed the existence of the relevant facts.

The rational basis standard has been interpreted to allow deference to constitutionally determinative facts even in the absence of express legislative fact-finding.<sup>75</sup> Courts have often repeated that under this standard of review, the legislature is under no obligation to put forward any evidence to support its policy choice.<sup>76</sup> The burden of proof is then on the plaintiff to “negative every conceivable basis which might support it.”<sup>77</sup> For example, in *Heller v. Doe*, the Supreme Court simply assumed the existence of underlying facts that would support Kentucky’s differential burden of proof requirements in involuntary commitment proceedings for people who are mentally retarded, as compared with those who are mentally ill. Thus, the Court found that “it would have been plausible for Kentucky to conclude that the dangerousness determination was more accurate as to the mentally retarded than the mentally ill” and that “most mentally retarded individuals who are committed receive treatment that is different from, and less invasive than, that to which the mentally ill are subjected.”<sup>78</sup>

Courts may also give deference to a legislature’s actual fact-finding. In such cases, a legislature does amass a factual record and reaches factual conclusions based upon that record, and a court defers to them. For example, in *Turner II*, the Court detailed the evidence before Congress and noted that “there was specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets.”<sup>79</sup> However, even in these contexts, courts have typically gone beyond the legislative record, creating an expanded body of facts at the judicial level.<sup>80</sup>

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72. *Munn*, 94 U.S. at 130–32.

73. *Id.* at 132.

74. Cox, *supra* note 41, at 207.

75. *But see infra* text accompanying notes 82–85.

76. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” (quoting *FCC v. Beach Commc’ns*, 508 U.S. 307, 315 (1993))).

77. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotation omitted); *Beach Commc’ns*, 508 U.S. at 315.

78. *Heller*, 509 U.S. at 324–26.

79. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 196–99 (1997).

80. *See id.* at 208–13; *infra* note 89 (discussing *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

At times the Court has deferred to express legislative fact-finding, but its deference has been implicit. In *Carhart II*, the Court purported not to defer to Congress's fact-finding, but its upholding of the federal abortion procedure ban was possible only because the Court in fact did implicitly defer to Congress on the key medical facts in dispute.<sup>81</sup>

The principle of deference to legislative fact-finding has been applied inconsistently. At times, the Court has suggested that judicial deference to legislative fact-finding is not warranted when specially protected rights are at stake.<sup>82</sup> But recently, the Court has declined to give deference even in the absence of specially protected rights. For example, in contrast to the Dormant Commerce Clause context, where the Supreme Court has often been deferential to state legislative fact-finding,<sup>83</sup> the Court has recently been notably loath to defer to Congress's fact-finding in cases challenging Congress's power to act under the Commerce Clause<sup>84</sup> or the Fourteenth Amendment's Enforcement Clause.<sup>85</sup>

Likewise, the courts have sometimes looked skeptically at fact-finding supporting legislation purportedly entitled to deferential review, such as sex-based classifications, and have required independent evidence to justify these classifications.<sup>86</sup> In *Lamprecht v. FCC*, the Court of Appeals for the District of Columbia Circuit stated, "although we are 'to give great weight to the decisions of Congress and to the experience of the Commission,' we are still obliged in the end to review the government's policy—both the judgment of law that the policy is constitutional *and the findings of fact that underlie it.*"<sup>87</sup> The court described the required review as deferential and not de novo, but it insisted that the meaningfulness of judicial review depended on the courts'

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81. See *infra* text accompanying notes 176, 297.

82. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (noting that despite state legislature's expertise regarding "the costs and nature of running for office," courts must conduct an independent review of the factual record to determine whether campaign contribution limits violate First Amendment); *Sable Commc'ns of Cal., Inc., v. FCC*, 492 U.S. 115, 129 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." (citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978))).

83. See, e.g., *Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 133–34, 138–39 (1968).

84. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); see also *Buzbee & Schapiro*, *supra* note 10, at 89; *Colker & Brudney*, *supra* note 10, at 97–101; *Kramer*, *supra* note 10, at 142.

85. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Buzbee & Schapiro*, *supra* note 10, at 89; *Colker & Brudney*, *supra* note 10, at 93–101; *Post & Siegel*, *supra* note 10, at 11–12.

86. See, e.g., *Lamprecht v. FCC*, 958 F.2d 382, 393 & n.3 (D.C. Cir. 1992) ("Any 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence." (citing *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)); cf. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (invalidating city's denial of special use permit for group home for mentally retarded due to lack of evidence to justify city's action).

87. *Lamprecht*, 958 F.2d at 391 (internal quotation omitted) (emphasis added).

entitlement to “review a legislature’s judgment that the facts exist.”<sup>88</sup> It then reviewed the legislative judgment that women who own radio or television stations are more likely than white men to broadcast distinct types of programming and found there was insufficient evidence to support this judgment.<sup>89</sup>

Before we can determine whether and in what circumstances a court should defer to legislative fact-finding, we must examine the historical reasons for such deference. Case law and commentators have suggested that the reasons for giving deference to legislative fact-finding include both concerns about the respective roles and powers of the legislatures and the judiciary—which body holds the authority to engage in fact-finding—as well as a more practical concern about which institution does a better job of fact-finding.<sup>90</sup> These considerations are often framed in terms of legitimacy, on the one hand, and competence (or capacity) on the other.<sup>91</sup>

### *C. Institutional Legitimacy as Grounds for Judicial Deference to Legislative Fact-Finding*

Some court opinions suggest that our constitutional structure provides the stronger of the two rationales for deferring to legislative fact-finding. For example, in *Oregon v. Mitchell*, the Court held unconstitutional, as applied to state elections, Congress’s attempt to lower the minimum voting age to eighteen years.<sup>92</sup> In his concurring opinion, Justice Harlan stated that judgments “of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary.”<sup>93</sup> He asserted that “[j]udicial deference is based, *not on relative factfinding competence*, but on due regard for the decision of the body constitutionally appointed to decide.”<sup>94</sup>

Even in *Turner II*, where the Court emphasized Congress’s superiority in fact-finding, the Court was also careful to note the separation of powers concerns supporting the principle of deference it applied. Thus, the Court asserted,

We owe Congress’ findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional

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88. *Id.* at 392 n.2.

89. *See id.* at 392–98. Similarly, in *Metro Broadcasting*, the Supreme Court purported to “give great weight” to Congress’s determination that minority-owned broadcast outlets would lead to greater broadcasting diversity. 497 U.S. at 579. Nevertheless, in concluding that this determination was supported by a “host of empirical evidence,” the Court seemed to find it necessary to go beyond the legislative record in order to corroborate Congress’s conclusion. *Id.* at 580.

90. Yet a third reason may be that the Court’s rationales for granting or denying deference are merely a pretext allowing the Court to reach the substantive result it wants. *See Solove, supra* note 20, at 945.

91. *See, e.g.,* HOROWITZ, *supra* note 8, at 18–19.

92. *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

93. *Id.* at 206–07 (1970) (Harlan, J., concurring).

94. *Id.* at 207 (Harlan, J., concurring) (emphasis added).



legislative authority to make predictive judgments when enacting nationwide regulatory policy.<sup>95</sup>

Likewise, in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, the Court deferred to the Arkansas legislature's decision to increase safety by requiring full train crews, asserting that this was not a decision appropriately left to the courts.<sup>96</sup> The Court reprimanded the district court for substituting its judgment for the legislature's concerning how much safety was required.<sup>97</sup> Because of the Court's strong view that the policy judgment was for the legislature to make, the Court found that where evidence was debatable or inconclusive, deference should be given to the legislature's factual assumptions.<sup>98</sup>

Some commentators have asserted that, when the Court decides whether to defer to a legislature's fact-finding based on the supposed sufficiency or insufficiency of the legislative record, the Court is in fact more concerned with which institution is the most appropriate ultimate decision maker.<sup>99</sup> This assertion is supported by the Court's opinion in *City of Boerne v. Flores*.<sup>100</sup> There, Congress's fact-finding bore on the issue of whether Congress had the power to act pursuant to the Enforcement Clause of the Fourteenth Amendment. The Court looked to whether the congressional record demonstrated a need for Congress to intervene to prevent states from enacting generally applicable laws that burdened religious practices.<sup>101</sup> The Court found the factual showing lacking, but it expressed even greater concern about what it perceived as Congress's improper meddling in determining the scope of constitutional rights:

Th[e] lack of support in the legislative record . . . is not RFRA's [Religious Freedom Restoration Act of 1993] most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." . . . *Regardless of the state of the legislative record*, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. . . . It appears, instead, to attempt a substantive change in constitutional protections.<sup>102</sup>

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95. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 196 (1997).

96. 393 U.S. 129, 136–38 (1968).

97. *See id.* at 136.

98. *See id.* at 138–39 ("The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.'").

99. *See Kramer, supra* note 10, at 142 (asserting that in *United States v. Morrison*, the Court "did not actually care how good a factual record Congress had compiled" but was instead concerned with solidifying its own power); Pilchen, *supra* note 22, at 338. *But see* Devins, *supra* note 22, at 1177 (arguing that the Court may depict issues as questions of law, rather than fact, when it is skeptical of Congress's fact-finding but does not want to lose public acceptance by appearing to usurp Congress's fact-finding function).

100. 521 U.S. 507 (1997).

101. *See id.* at 514.

102. *Id.* at 531–32 (emphasis added).

The Court has indicated that comity and institutional legitimacy may demand greater deference to legislative fact-finding in particular contexts. For example, the Court has held that when Congress exercises its constitutional authority over national defense and military affairs, the call for judicial deference is “at its apogee.”<sup>103</sup>

*D. Superior Legislative Competence as Grounds for Judicial Deference to Legislative Fact-Finding*

Elsewhere, courts have suggested that judicial deference to legislative fact-finding is warranted because legislatures excel in their capacity for fact-finding, as compared with the courts. The traditionalist view of social fact-finding, as Neal Devins has concisely summarized it, holds that “Congress can do it; courts cannot.”<sup>104</sup> In judicial opinions, the claim is generally stated in conclusory fashion, without illuminating why this should be so. For example, in *Turner II*, the Supreme Court declared, “We owe Congress’ findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”<sup>105</sup> Justice Souter made a similar assertion in *United States v. Morrison*, where he argued in dissent that the Court should defer to Congress’s fact-finding:

Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact.<sup>106</sup>

The Court’s self-confessed inferiority in social fact-finding is not limited to federal legislation. The Court has also described state legislatures as superior fact-finders due to their greater flexibility and their sensitivity to local conditions. For example, in *McKleskey v. Kemp*, the Court found that state “[l]egislatures . . . are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’”<sup>107</sup> In

103. *Rostker v. Goldberg*, 453 U.S. 57, 65, 70–71 (1981). In addition to separation of powers concerns, the Court in *Rostker* also noted that the courts’ “lack of competence” in military matters is “marked.” *Id.* at 65.

104. Devins, *supra* note 22, at 1178. *But see* FAIGMAN, *supra* note 24, at 114–15 (arguing that “the factor of institutional competence is not very important for a comprehensive theory of constitutional facts”).

105. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 195 (1997); *see also* *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985); *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

106. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) (citations omitted).

107. 481 U.S. 279, 319 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)); *see*

*Rast v. Van Deman & Lewis Co.*, the Court, in deciding the constitutionality of a Florida statute, declared that the factual underpinnings of state legislation, even where “opposed by argument and opinion of serious strength,” were “not within the competency of the courts to arbitrate.”<sup>108</sup> Similarly, in *Carhart I*, Justice Kennedy argued in dissent that the courts lack the capacity to assess factual questions concerning abortion procedures, noting that “[t]he legislatures of the several States have superior factfinding capabilities in this regard.”<sup>109</sup>

The courts have sometimes tied Congress’s allegedly superior competence to certain fact-finding contexts. For example, Congress is purportedly better suited than the courts to gather and analyze “predictive facts” in the course of national regulatory policy making and possesses special competence to resolve factual questions with economic and technological implications.<sup>110</sup> The Court has deferred to Congress’s supposed expertise in military matters.<sup>111</sup> In *Randall v. Sorrell*, the Court noted that “legislators have ‘particular expertise’ in matters related to the costs and nature of running for office.”<sup>112</sup> Similar context-specific claims are made about state legislative capacity for fact-finding. For instance, state legislatures allegedly possess particular fact-finding competence in the economic arena<sup>113</sup> and in evaluating medical procedures.<sup>114</sup>

In contrast, the courts are often portrayed as relatively poor fact-finders, especially with respect to complex factual issues. Justice Brennan, dissenting in *Oregon v. Mitchell*, stated, “The nature of the judicial process makes it an inappropriate forum for

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also *Washington v. Glucksberg*, 521 U.S. 707, 788 (1997) (Souter, J., concurring) (asserting that legislatures “have more flexible mechanisms for factfinding than the Judiciary,” and have “the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions”).

108. 240 U.S. 342, 357 (1916).

109. *Stenberg v. Carhart*, 530 U.S. 914, 968 (Kennedy, J., dissenting); see also *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 456 n.4 (1983) (O’Connor, J., dissenting) (noting that state legislatures, “with their superior fact-finding capabilities, are certainly better able to make the necessary judgments [about abortion procedures] than are the courts”).

110. *Turner II*, 520 U.S. at 199 (“[C]ourts must accord substantial deference to the predictive judgments of Congress. . . . This principle has special significance in cases, like this one, involving congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change.” (citations omitted)). Nevertheless, in its recent Commerce Clause decisions, the Court has refused to defer to Congress’s predictive judgments concerning the need for legislation under the Fourteenth Amendment or the impact of various regulations on interstate commerce. See *Bryant & Simeone*, *supra* note 10; *Colker & Brudney*, *supra* note 10; *Post & Siegel*, *supra* note 10.

111. See *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

112. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 137 (2003)) (declining, nevertheless, to defer to Vermont’s factual assumptions underlying its campaign contribution limits).

113. See, e.g., *Tyson v. Tyson*, 727 P.2d 226, 237 (1986) (Utter, J., dissenting).

114. See, e.g., *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 968–71 (2000) (Kennedy, J., dissenting); *City of Akron*, 462 U.S. at 456 & n.4 (O’Connor, J., dissenting).

the determination of complex factual questions of the kind so often involved in constitutional adjudication.”<sup>115</sup>

Commentators have focused more extensively on relative institutional competence and the rationales underlying the belief that legislatures are superior fact-finders. Some of the arguments for superior legislative competence are specific to Congress, but many apply to state legislatures as well.<sup>116</sup> Because legislatures are less insulated from the public, some commentators suggest that they may have a more immediate connection to and awareness of the social circumstances that call for legislative solutions.<sup>117</sup> Legislators’ diversity of backgrounds and experience is seen as giving legislative bodies a broader understanding of the social and economic conditions relevant to legislation.<sup>118</sup>

It is often pointed out that, particularly in Congress, committee members tend to specialize, whereas judges are generalists.<sup>119</sup> Therefore, it is claimed, legislators possess valuable expertise that makes them better fact-finders, at least in certain contexts.<sup>120</sup> Also, because litigation is tied to a specific issue and to particular litigants who are directly affected by that issue, some point out that courts’ decisions will have a narrow factual focus, whereas legislatures are more likely to consider the broad swath of social facts relevant to a particular law. More formally, courts are bound by “case or controversy” requirements, *stare decisis*, and other doctrines that limit their inquiry in ways not applicable to legislatures.

As fact-finders, commentators have noted, courts are also generally at the mercy of whatever facts are put before them by the litigants.<sup>121</sup> If the litigants lack the resources

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115. 400 U.S. 112, 247–48 (1970) (Brennan, J., dissenting).

116. The Florida Senate’s Web site contains a section describing the committee process, which is representative of that employed by many states. It observes, “The committee is the heart of the legislative process. Committees can and should do the fact-finding groundwork.” Florida Senate, The Committee Process, [http://www.flsenate.gov/cgi-bin/View\\_Page.pl?Tab=info\\_center&Submenu=1&File=process.html&Directory=Info\\_Center/about\\_legislature/&Location=app&Title=-%3EHow\\_The\\_Committee\\_Process\\_Works](http://www.flsenate.gov/cgi-bin/View_Page.pl?Tab=info_center&Submenu=1&File=process.html&Directory=Info_Center/about_legislature/&Location=app&Title=-%3EHow_The_Committee_Process_Works). It goes on to note that the committee may consult the opinion of “interested persons” outside of the legislature; subpoena witnesses or records; use the legislature’s research facilities to “analyze the situation here and in other states”; and hear the testimony of citizens. *Id.*

117. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 68 (1999); Devins, *supra* note 22, at 1179. *But see* DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 79 (1974) (quoting former Congressman Clem Miller on serving in the House: “[w]e live in a cocoon of good feeling”).

118. See Devins, *supra* note 22, at 1179.

119. See HOROWITZ, *supra* note 8, at 28–29; Pilchen, *supra* note 22, at 365.

120. See HOROWITZ, *supra* note 8, at 28–29; Solove, *supra* note 20, at 1005–06.

121. Strictly speaking, this constraint applies only to adjudicative facts. As to social facts (the kinds of facts legislatures also consider), judges may independently consult and rely on sources outside the record developed by the litigants, see Kenneth Culp Davis, *supra* note 8, at 402–07; Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 321–22 (2005), but they may not always take advantage of this opportunity. See Devins, *supra* note 22, at 1181; see also Buzbee & Schapiro, *supra* note 10, at 92 (“Judges may draw on their knowledge and experience and other matters not formally presented. However, judges operate under an institutional constraint that formally confines their decision making to materials compiled in the record.”).

or incentives to present all of the relevant evidence, some fear, the courts' fact-finding will suffer. And, although the parties may employ specialists to help develop the factual record, these experts cannot "speak for themselves" in court; instead, the information is filtered through the medium of the litigator and the rules of evidence.<sup>122</sup> Congress, on the other hand, is renowned for its broad subpoena power, which many assume Congress will use to examine topics more sweepingly.<sup>123</sup> Beyond this, it is noted, Congress has access to a broad range of informal sources of information that assist it in understanding the relevant factual context.<sup>124</sup>

## II. CASE STUDIES

Notwithstanding the theoretical arguments supporting deference to legislative fact-finding, this Article argues that legislatures are poor fact-finders, especially when compared to federal trial courts, and when addressing legislation that infringes controversial or minority rights. This Part offers three case studies that cast doubt upon the theory that legislatures are superior fact-finders. Part III, then, revisits and critiques the structural arguments in favor of judicial deference laid out in Part I.

The shortcomings of the legislative fact-finding process, whether at the federal or state level, tend to be revealed quickly when one examines the legislative record underlying nearly any proposal that implicates basic individual rights and arises in a contentious or controversial setting. The following case studies offer striking examples of poor fact-finding by legislatures in such contexts. In some instances, the legislatures did not engage in any fact-finding at all, assuming wholly without inquiry the facts allegedly calling for regulation, despite the controversial nature of the subjects they were addressing. The case studies also demonstrate the decisive role played by the courts' willingness or refusal to defer to the legislature on the key factual issues in each case.

### A. "Partial-Birth Abortion"

Abortion is a topic that arouses high passions in legislative debates, and the "partial-birth abortion" debate, which preoccupied nearly every state legislature as well as Congress in the 1990s, was especially fraught. The campaign to ban so-called "partial-birth abortion" began as a collaboration between a National Right to Life Committee (NRLC) lobbyist, Douglas Johnson, and Charles Canady, a Republican congressman from Florida.<sup>125</sup> The anti-abortion-rights movement had failed to see *Roe v. Wade* overturned in the 1980s and early 1990s. In response to its decisive defeat in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>126</sup> the movement shifted its focus to passing incremental restrictions that would gradually undermine the right to

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122. HOROWITZ, *supra* note 8, at 25–26; *see id.* at 47–49.

123. *See* Devins, *supra* note 22, at 1178–79.

124. *See* HOROWITZ, *supra* note 8, at 30; Devins, *supra* note 22, at 1179.

125. *See* Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything To Lose*, HARPER'S MAG., Nov. 2004, at 33, 38; Nadine Strossen & Caitlin Borgmann, *The Carefully Orchestrated Campaign*, 3 NEXUS 3, 5–6 (1998).

126. 505 U.S. 833 (1992).

abortion.<sup>127</sup> When Dr. Martin Haskell presented a lecture at a national conference of abortion providers, describing a new variation on the most common method of second- and third-trimester surgical abortions,<sup>128</sup> Johnson and Canady seized upon it. They believed that the method was a perfect vehicle to provoke moral outrage at abortion generally. A description of this procedure would arrest the public's attention, in part because it was not so disturbing as to cause the public to avert its eyes.<sup>129</sup> Johnson and Canady coined a deliberately incendiary term for Haskell's method, "partial-birth abortion." Pursuant to Johnson and Canady's plan, the NRLC circulated model legislation, along with strategic advice, to all of its state chapters. The state and federal bans that followed were thus a product of this carefully orchestrated public relations campaign.<sup>130</sup>

The state legislative response mirrored the trajectory of the public debate. The first ban used medical terminology and did not adhere to the NRLC model.<sup>131</sup> But the term "partial-birth abortion" soon took hold in the public discourse and became a lightning rod in the broader debate over abortion. A wave of "partial-birth abortion" bans swept through state legislatures, where the legislative testimony and floor debates revealed how effectively the NRLC's public relations campaign had lit the public's imagination.<sup>132</sup> Eventually, all but three states introduced bans, and thirty-three states enacted at least one ban.<sup>133</sup>

Most states do not keep a comprehensive legislative history of their statutes; many keep no legislative history at all. The Alaska State Legislature, however, maintains nearly verbatim summaries of its committees' hearings. The testimony given on Alaska HB 65, "An Act Related to 'Partial-Birth Abortions,'" in March of 1997<sup>134</sup> is representative of what other state legislative committees across the nation heard.<sup>135</sup>

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127. See Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 675–79, 688, 716 (2004).

128. Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortion*, Presentation at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992).

129. See Gorney, *supra* note 125, at 38 (comparing the campaign's depictions of the targeted procedure, which were "gruesome but not gory," with past unsuccessful reliance on images of mutilated fetuses, which "never worked quite the way they were supposed to" because they were too "sickening"); see also WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR* 233 (2003).

130. Strossen & Borgmann, *supra* note 125, at 5–6.

131. See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 190–91 (6th Cir. 1997).

132. The bans appeared to respond to public outrage over the procedure. However, in the three states in which bans were proposed through ballot initiatives (Colorado, Maine, and Washington), voters rejected the bans. See, e.g., Colorado General Assembly 1998 Ballot Proposals, Amendment 11: Partial-Birth Abortion, available at [http://www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/ballot/text-11.htm](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/ballot/text-11.htm).

133. The vast majority enacted bans that closely followed the NRLC model. See Am. Civil Liberties Union, *supra* note 1 (offering a comprehensive list of state abortion bans along with citations to litigation challenging the bans).

134. *An Act Relating to Partial-Birth Abortions: H. Judiciary Comm. Meeting on H.B. 65*, 20th Leg. (Alaska 1997), available at [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=H&beg\\_line=0965&end\\_line=2183&session=20&comm=JUD&date=19970307&time=1308](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=0965&end_line=2183&session=20&comm=JUD&date=19970307&time=1308) [hereinafter *Alaska Comm. Meeting*].

135. See, e.g., *Partial Birth Abortions; Prohibition: H.R. Comm. on Government Reform &*

The House Judiciary Committee hearings on the Alaska bill included seventeen witnesses who testified in support of the ban and five who opposed it. Many of the witnesses testified by telephone, an option not uncommon in rural states. The witnesses supporting the ban included the committee chair, the bill's sponsor and his legislative aide, nine concerned citizens, two officials of the Alaska Republican party (one of whom testified "as a parent and a grandparent"),<sup>136</sup> two representatives of Alaska Right to Life, and one former "post-abortion" counselor.<sup>137</sup> Witnesses opposing the ban included two representatives of the Alaska Civil Liberties Union, one physician who did not perform abortions, a representative of the Alaska Women's Lobby, and one concerned citizen.<sup>138</sup>

The hearings elicited virtually no reliable medical testimony about abortion procedures. Committee members directed many medically related questions to one of the Alaska Civil Liberties Union representatives, who repeatedly reminded the committee that she was not a physician.<sup>139</sup> The sole doctor to testify was not able to speak to all of the relevant medical issues, since he did not himself provide abortions.<sup>140</sup> The lone citizen to testify against the ban asked the committee whether any doctors in Alaska performed the targeted procedure, but none could answer that question.<sup>141</sup>

Most of the medically related testimony that the committee did hear reflected bald hearsay, clearly drawn from what witnesses had learned through the media or NRLC campaign materials. For example, one Republican party official "shared a story of a woman who gave birth to a child with multiple impairments" who was "alive and well" and "a joy to his mother."<sup>142</sup> She also "referred to an article in the 'Wall Street Journal'" that she said "contains some of the [medical] truths about partial-birth abortions."<sup>143</sup> The Executive Director of Alaska Right to Life "offered \$500, out of his pocket, to the first person" to give evidence of a case in which the targeted procedure was necessary to save a woman's life or health.<sup>144</sup> A citizen testified that the medical profession had "cut its own throat" because it allowed abortion providers to "perform unjustified abortions" and "falsify the patient's records" in order to secure a "pre-arranged convenience for the mother and a financial benefit for the doctor."<sup>145</sup> Yet another citizen suggested that the medical protocol of the targeted procedure called for manipulating the fetus into a breech (feet-first) position "so that it will not scream before the procedure is completed."<sup>146</sup>

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*States' Rights Meeting on H.B. 2191*, 43rd Leg., 1st Sess. (Ariz. 1997), available at [http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm\\_min/House/0211%2D1%2DEGRS.htm](http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0211%2D1%2DEGRS.htm).

136. See *Alaska Comm. Meeting*, *supra* note 134 (testimony of Barbara Rawalt, Financial Chair, District 35, Republican Party of Alaska).

137. See *Alaska Comm. Meeting*, *supra* note 134.

138. See *id.*

139. See *id.* (testimony of Amy Skilbred, Alaska Civil Liberties Union).

140. See *id.* (testimony of Dr. Peter Nakamura, Director, Division of Public Health, Department of Health and Social Services).

141. See *id.* (testimony of Ernie Line).

142. *Id.* (testimony of Debra Joslin, Chair, District 35, Republican Party of Alaska).

143. *Id.*

144. *Id.* (testimony of Art Hippler, Executive Director, Alaska Right to Life).

145. *Id.* (testimony of Sharylee Zachary).

146. *Id.* (testimony of Sid Heidersdorf).

Much of the testimony addressed moral, rather than medical, concerns.<sup>147</sup> Many witnesses confessed moral outrage at the targeted procedure. A Republican party official and Right to Life representative claimed that “[i]f people attempted to do this procedure on a rat, animal rights activists would say it was inhumane.”<sup>148</sup> Two citizens testified that the targeted procedure reminded them of the Nazi Holocaust.<sup>149</sup> Another citizen urged that the procedure be called “partial-birth infanticide,” as it amounted to “the murdering of a defenseless baby.”<sup>150</sup>

This spectacle contrasted sharply with the sober, medically oriented trial court proceedings on the bans. Out of twenty-two trial courts to consider “partial-birth abortion” bans, twenty invalidated them as unconstitutional on the grounds that they were vague, lacked a health exception, and/or imposed an undue burden.<sup>151</sup> Virtually all of the witnesses who testified in these trials were doctors, clinic directors, and other medical personnel. For example, in the federal challenge to Rhode Island’s ban, the court determined the medical facts by relying “primarily on the testimony of three doctors who were certified as experts in abortion practice” and on the defendant’s witness, also a physician.<sup>152</sup>

In contrast to the legislators who enacted the bans, the judges who considered the legal challenges received a considerable education in medical practice and terminology in general, and in obstetric and gynecological practice in particular. The trajectory of their learning is evidenced in the trial transcripts. In the trial challenging Michigan’s “partial-birth abortion” ban, the first such trial in the country, Judge Gerald E. Rosen of the United States District Court for the Eastern District of Michigan began with a limited knowledge of female anatomy. Early in the trial he agreed that it would be helpful if plaintiff Dr. Mark Evans were to draw a diagram of a uterus on an easel. When Dr. Evans sketched a very large uterus, the judge asked, “Can you give me some idea what the scale—I’m sure that’s not to scale. Can you give me some idea . . .” Dr. Evans responded, to courtroom laughter, “Perhaps in an elephant.”<sup>153</sup>

Like the other trial judges, Judge Rosen was subjected to a barrage of medical evidence. The plaintiffs’ experts testified in detail about how they performed abortions, explaining and using medical terminology and oftentimes illustrating with sketches, medical instruments, or plastic models of the female reproductive organs. The following testimony from Dr. Evans in the Michigan trial is representative:

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147. *See id.*

148. *Id.* (testimony of Virginia Phillips, Spokesperson for American Indians and Alaska Natives, National Right to Life, Chair, District 2, Republican Party of Alaska).

149. *See id.* (testimony of Bachar Ben’Israel; testimony of Sid Heidersdorf).

150. *Id.* (testimony of Tom Gordy).

151. *See* Am. Civil Liberties Union, *supra* note 1 (summarizing and citing cases). This number includes one ban, Ohio’s, that did not use the term “partial-birth abortion.” *See id.* A twenty-first trial court, in Georgia, approved a settlement limiting the ban’s application to post-viability abortions. *See id.* Only the federal district court in Wisconsin refused to enjoin that state’s ban. *See id.*

152. *R.I. Med. Soc’y v. Whitehouse*, 66 F. Supp. 2d 288, 295 (D.R.I. 1999), *aff’d*, 239 F.3d 104 (1st Cir. 2001).

153. Trial Transcript at 115, *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997) (No. 97-71246) (transcribing proceedings on May 5, 1997). He then explained that in humans a non-pregnant, adult uterus is only about two to three inches long, and even at twenty weeks of pregnancy is only about ten to twelve inches long. *Id.* at 116.



I'm now going to show you the cervix head on. Okay, we started out looking at a cervix that was like that. Okay? And with the dilipan, we can enlarge it to something like that. So the opening is now an inch and a half or two inches wide. And again, depending upon the gestational age will determine how much we need. If I'm doing a 10 week suction abortion, I only need half an inch; okay? If I'm doing a twenty week D&E, I'd generally like the biggest dilatation I can get, which fundamentally I like an inch and a half to two inches, which we can do with dilators if the dilipan haven't gotten us up quite as far as we need to.<sup>154</sup>

Judge Rosen, like many of the judges, showed significant engagement with the issues, initiating long colloquies with the witnesses. He hired his own independent expert, Dr. Timothy Johnson, to help him better understand the medical issues at stake.

When the Supreme Court decided Nebraska's ban in *Stenberg v. Carhart*,<sup>155</sup> the Court did not even consider deferring to the legislature on the disputed facts, instead relying extensively, and exclusively, on the trial record.<sup>156</sup> The Court's disregard of the legislative record in a majority opinion joined by Justice O'Connor contrasted notably with Justice O'Connor's earlier claim in *City of Akron v. Akron Center for Reproductive Health* that the state legislatures are adept at evaluating abortion procedures. In her dissenting opinion in *Akron*, Justice O'Connor had argued that state legislatures were better positioned to assess the medical facts surrounding abortion as compared with the Court, which lacked "the resources available to those bodies entrusted with making legislative choices."<sup>157</sup>

The congressional hearings, which took place over a period of eight years, were more extensive than those held in the states and included more testimony by medical professionals. However, they added nothing significant to the evidence heard in the approximately two-week-long trials.<sup>158</sup> Moreover, the congressional hearings included inflammatory, non-medical testimony from lay witnesses on both sides.<sup>159</sup> Testimony against the ban included women who had terminated wanted pregnancies under tragic circumstances.<sup>160</sup> Testimony for the ban included that of a nurse who claimed to have worked for Dr. Haskell and to have observed a twenty-six-week-old fetus in distress

154. *Id.* at 116.

155. *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914 (2000).

156. *See id.* at 921–46.

157. 462 U.S. 416, 456 & n.4 (1983) (O'Connor, J., dissenting). Justice O'Connor's confidence in state legislatures' fact-finding competence is particularly noteworthy in light of her tenure in the Arizona Senate.

158. *See Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 482 (S.D.N.Y. 2004) (noting that the district court "heard more evidence during its trial than Congress heard over the span of eight years").

159. *See Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004) (stating that "the oral testimony before Congress was not only unbalanced, but intentionally polemic"); Brief of Amici Curiae, 52 Members of Congress in Support of Planned Parenthood Federation, Inc., et al., and Motion for Leave to File Brief Out of Time in Support of Respondents LeRoy Carhart, M.D., et al., In Related Case No. 05-380 at 9–10, *Gonzales v. Carhart* (*Carhart II*), 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380), 2006 WL 2736635 (noting that congressional "findings" in the federal ban were drafted by the majority before additional hearings were held, and the subsequent testimony "was politically biased and transparently partisan, calculated to highlight testimony from supporters of the ban").

160. *See Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1015–16.

during one of his abortions.<sup>161</sup> The medical evidence in support of the ban, upon which Congress relied exclusively for its findings, came from physicians who had never performed the targeted procedure and many of whom had never performed an abortion.<sup>162</sup> Much testimony was devoted to issues legally irrelevant but emotionally laden, such as whether fetuses feel pain during abortion procedures.<sup>163</sup>

As with the state bans, the court proceedings on the federal ban played out very differently. Free of the advocacy-oriented rhetoric that punctuated the congressional hearings, the parties enjoyed the comparative luxury of a fair process and the court's serious attention to the factual issues. In *Carhart v. Gonzales*, the trial took place over two weeks. The district court heard testimony from twenty-three physicians, nineteen of whom testified about the relative safety of the banned procedures. Two medical organizations, including the American College of Obstetricians and Gynecologists, testified by deposition.<sup>164</sup> Also before the district court (but not Congress) was a peer-reviewed study that found intact D&E procedures were just as safe as traditional procedures.<sup>165</sup> The district court's opinion was 474 pages long and summarized both the trial record and the entire congressional record on the ban.<sup>166</sup>

In a second, parallel challenge to the federal ban,<sup>167</sup> the trial testimony was just as detailed. A reporter described some of the testimony:

[Plaintiffs' attorney] asked [Dr. Maureen] Paul to explain the steps in a typical dilation and evacuation, which is the most common method for second-trimester abortion, and is generally referred to as D&E. "Can I use the diagram?" Paul asked. Propped beside the witness stand was a large cross-section of the female reproductive organs. Paul indicated the cervix, the uterine opening, where, in a D&E patient, several dilators called laminaria would have been inserted the day before and left to swell. "I use a small forceps to remove the laminaria, if they are in place," she said, and then explained how that was done. "I break the bag of water, either by just breaking it and allowing it to drain—the fluid to drain out—or using suction."<sup>168</sup>

In the trial court proceedings on both the state and federal bans, the fact that the judges were obliged to sit through the trials, and were not responding to the testimony with politically driven sound bites meant to influence colleagues and impress lobbyists or

161. *Id.* at 1015 (discussing testimony of Brenda Pratt Shafer).

162. *See id.* at 1018–19.

163. *See id.* at 1019 n.44. This hotly contested issue was not relevant, and the trial courts therefore did not consider it, because the Act claimed to ban only one procedure while permitting others, and there was no claim that the permitted methods would be less painful.

164. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 809, 852 & n. 28 (D. Neb. 2004), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007).

165. Stephen T. Chasen, Robin B. Kalish, Meruka Gupta, Jane E. Kaufman, William K. Rashbaum & Frank A. Chervenak, *Dilation and Evacuation at ≥ 20 Weeks: Comparison of Operative Techniques*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1180, 1180–83 (2004).

166. *See Carhart*, 331 F. Supp. 2d at 1012. The trial court found that both the trial record and "the record Congress itself compiled" disproved Congress's finding of a "medical consensus" that intact D&Es were never necessary. *Id.* at 1012.

167. *See Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d 957.

168. Gorney, *supra* note 125, at 34.

the public, gave the plaintiffs sufficient confidence to put difficult and explicit medical evidence before the courts. The plaintiffs' willingness to do so evidenced a remarkable trust in the judicial process and the judges' ability to view the evidence impartially.

Even the appellate arguments reflected a sophisticated level of attention to the medical facts. As Linda Greenhouse wrote about the oral arguments on the federal ban in the Supreme Court:

There were moments . . . [when] the proceedings seemed more like a medical school seminar than an appellate argument. Such familiar constitutional concepts as the right to privacy were not mentioned during the two hours, but the methods doctors use to dilate a pregnant woman's cervix were discussed in detail, repeatedly.<sup>169</sup>

The disparity in the level of attention paid to the medical facts by courts and legislatures considering the "partial-birth abortion" bans cannot be attributed to politics. The judges who presided over the "partial-birth abortion" trials were far from uniformly liberal. In fact, of the thirteen federal district judges to have enjoined "partial-birth abortion" bans as of 1998, six (including Judge Rosen) were appointed by Republican presidents.<sup>170</sup> Some expressed personal revulsion, or at least reservations, about the topic they were addressing. Judge Casey, for example, wrote, "The Court finds that the testimony at trial and before Congress establishes that [the targeted procedure is] gruesome, brutal, barbaric, and uncivilized . . ." <sup>171</sup> Nevertheless, despite his obvious personal opposition to abortion, Judge Casey joined the two other federal trial judges in declaring the federal Partial-Birth Abortion Ban Act of 2003 unconstitutional.<sup>172</sup>

When it considered the federal ban, however, the Supreme Court declined to defer to the trial court's findings.<sup>173</sup> Justice Kennedy conceded that Congress's formal findings of fact were riddled with errors, and therefore he disavowed deferring to them completely.<sup>174</sup> In fact, he recognized that "[t]he Court retains an independent

169. Linda Greenhouse, *Justices Hear Arguments on Late-Term Abortion*, N.Y. TIMES, Nov. 9, 2006, at A25.

170. Strossen & Borgmann, *supra* note 125, at 19 n.4. Judge Rosen was appointed by President George H. W. Bush and served on the Board of Directors of the Michigan Chapter of the Federalist Society. United States District Court for the Eastern District of Michigan, Judge Gerald E. Rosen Biography, [http://www.mied.uscourts.gov/Judges/guidelines/topic.cfm?topic\\_id=229](http://www.mied.uscourts.gov/Judges/guidelines/topic.cfm?topic_id=229).

171. *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004). The Associated Press reported that, during the trial, "Judge Casey asked a doctor if doctors ever hear a baby cry during an abortion. He asked the same doctor if a mother can detect in advance that a baby will be born blind." Associated Press, *Richard Conway Casey, 74, Blind Federal Judge, Dies*, N.Y. TIMES, Mar. 24, 2007, at B7.

172. *See Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 493; *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1047 (D. Neb. 2004), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007); *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1034–35 (striking down federal ban in response to separate challenges to it).

173. *See Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1646 (2007) (Ginsburg, J., dissenting) (criticizing majority's failure to defer to trial court's factual findings).

174. *See id.* at 1637–38.

constitutional duty to review factual findings where constitutional rights are at stake.”<sup>175</sup> Yet the Court’s ultimate factual conclusion, that credible medical authority was evenly divided as to whether the banned methods were the safest in some circumstances, did not match what the trial court had found. As David Faigman notes, despite the agreement of all three lower courts regarding the health risks imposed by the ban, Justice Kennedy found that there was substantial medical disagreement over this question:

In truth, however, this so-called medical disagreement was on the level of such scientific disagreements as evolution versus intelligent design and the reality of global warming. . . . The “scientific” debate over this procedure was largely manufactured by Congress. . . . Nonetheless, Kennedy relied on this “uncertainty” to support his conclusion that “the Act can survive this facial attack.”<sup>176</sup>

The Court’s decision to give equal weight to Congress’s assessment of the medical facts provided the crucial factor distinguishing the outcomes in *Carhart I* and *Carhart II*.

### *B. Sexual Orientation and Parenting*

Society’s treatment of gay parenting is a controversial issue that has appeared in legislatures and courts in the context of bans on same-sex marriage and on adoption by prospective gay and lesbian parents. The outcomes for plaintiffs challenging these laws have turned in large measure on whether the courts deferred to the actual or presumed legislative fact-finding supporting the laws.

Many of the laws that prohibit marriage or adoption by gay people existed long before they were challenged and lack a legislative record for the courts to consider. Courts examining them, however, have sometimes credited the legislatures with enacting the laws based upon “rational” factual assumptions having nothing to do with bias against gay and lesbian people, rather than (1) entertaining the possibility that animus or ignorance may have played a role and (2) conducting any serious inquiry into the key factual issues.

Not only have some courts willingly supplied a potentially pretextual rationale for the legislatures’ choices, but they have seemed unconcerned about whether this rationale was grounded in fact. In *Hernandez v. Robles*, New York’s highest court recently held that the state’s failure to allow same-sex marriage did not violate the New

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175. *Id.* at 1637 (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)).

176. FAIGMAN, *supra* note 24, at 60; *see also* Tobin, *supra* note 58, at 134 (noting that for the Court in *Carhart II*, “the question was not so much one of whether particular findings were correct, but of leaving to [Congress] “[c]onsiderations of marginal safety, including the balance of risks”” (quoting *Carhart II*, 550 U.S. 124) (second alteration in original)). Faigman elsewhere describes Kennedy’s deferential approach as “moving the frame of reference from reviewable [(i.e., social)] facts to case-specific [(i.e., adjudicative)] facts,” a shift that effectively renders it impossible to mount a successful challenge. FAIGMAN, *supra* note 24, at 85; *see also* B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 323 (2007) (making a similar point concerning the Court’s rejection of a facial attack in favor of as-applied challenges).

York Constitution.<sup>177</sup> The court first speculated why the legislature might have limited the privilege of marriage to heterosexual couples. It hypothesized that “[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”<sup>178</sup>

The court was ready to accept this hypothetical rationale, even though it might have been based on nothing more than personal impressions, noting, “*Intuition and experience* suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”<sup>179</sup> Although the plaintiffs and supporting amici argued otherwise and offered social science studies debunking any advantage to heterosexual parenting, the court was unmoved. The court recognized that this critical factual issue was in dispute, yet it sided with the legislature. Moreover, far from requiring the government to establish a legitimate factual basis for the legislation, the court held the plaintiffs to an impossible standard, observing that the plaintiffs’ studies “on their face do not establish *beyond doubt* that children fare equally well in same-sex and opposite-sex households” and that “[p]laintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, *based solely on ignorance and prejudice* against homosexuals.”<sup>180</sup>

A challenge to Florida’s prohibition on adoption by gay parents met a similar fate in federal court.<sup>181</sup> In *Lofton v. Secretary of Department of Children and Family Services*, both the trial and appellate courts deferred to the legislature on the factual issue central to the challenge: whether any facts supported the law’s purported goal of protecting children and providing them with stable homes.<sup>182</sup> The district court granted summary judgment to the defendants, finding that “it is ‘arguable’ that placing children in married homes is in the best interest of Florida’s children for the reasons stated by Defendants” and that it was irrelevant if this assumption were false.<sup>183</sup>

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177. See *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

178. *Id.* at 7.

179. *Id.* (emphasis added); see also *id.* (“In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.”). Chief Judge Kaye objected to the court’s reliance on intuition, noting that “[j]ust 10 years before *Loving* declared unconstitutional state laws banning marriage between persons of different races, 96% of Americans were opposed to interracial marriage” on the grounds that it was “unnatural” and dangerous to civilization. *Id.* at 24–25 (Kaye, C.J., dissenting).

180. *Id.* at 8 (emphasis added). The court conceded that “[i]f we were convinced that the restriction plaintiffs attack were founded on nothing but prejudice . . . we would hold it invalid, no matter how long its history.” *Id.*

181. According to the district court, “In 1977, Florida became the first state to statutorily ban adoption by gay or lesbian adults by enacting the homosexual adoption provision. Currently, it is the only state with such a prohibition.” *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1374 n.1 (S.D. Fla. 2001), *aff’d sub nom. Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

182. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 826 (11th Cir. 2004) (agreeing with trial court’s decision to defer to legislature), *aff’g Lofton*, 157 F. Supp. 2d at 1372.

183. *Lofton*, 157 F. Supp. 2d at 1383–84 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 320 (1993)).

The district court reached this conclusion despite the governing standard for summary judgment, which it recognized placed the burden of demonstrating the absence of a genuine issue of material fact upon the defendants and required the court to “view the evidence in the light most favorable to the nonmoving party.”<sup>184</sup> The defendants conceded that, with respect to “what material fact issues exist, Plaintiffs are entitled to have their evidence taken as true and also to all reasonable inferences flowing from it.”<sup>185</sup> The Eleventh Circuit too claimed that it would “view all evidence and factual inferences” in favor of the plaintiffs.<sup>186</sup> In the end, however, both courts ignored the significance of the case’s procedural posture and took the rational basis standard to mean that they must side with the government on the facts.

For example, the Eleventh Circuit panel stated that “appellants have offered no competent evidence” to show the falsity of Florida’s premise that “the marital family structure is more stable than other household arrangements and that children benefit from the presence of both a father and a mother in the home.”<sup>187</sup> Indeed, the court characterized the state’s premise as an “unprovable assumption[.]”<sup>188</sup> However, the court had before it evidence discrediting the assertion that adoption by lesbian or gay parents harms children.<sup>189</sup>

Faced with material facts clearly in dispute, the court abdicated responsibility for resolving the factual question, concluding that this task was one for the legislature: “Although the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models are matters of ongoing debate, they ultimately involve *empirical disputes not readily amenable to judicial resolution*—as well as policy judgments best exercised in the legislative arena.”<sup>190</sup> The court thus seemed to suggest that legislatures, rather than courts, are the proper venues for resolving empirical disputes, even where important individual rights are at stake.<sup>191</sup> The court’s lumping of “empirical disputes” (or at least certain kinds of “empirical disputes”) with “policy judgments” helped bolster the apparent appropriateness of leaving the dispute to the legislature.<sup>192</sup>

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184. *Id.* at 1377.

185. Brief of Appellees at 13, *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD), 2002 WL 32868748.

186. *Lofton*, 358 F.3d at 809.

187. *Id.* at 819.

188. *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62–63).

189. Appellants’ Reply Brief at 3, *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD).

190. *Lofton*, 358 F.3d at 822 (emphasis added).

191. The court implied that only certain kinds of empirical disputes—those subject to “ongoing debate”—fall within the category of disputes best left to the legislature. It is unclear what the court means by this. The word “dispute” itself implies that a question is unsettled, so “ongoing debate” adds little clarification. But, given its reference to policy judgments, and the types of factual issues in dispute here, the court was likely referring to general, presumably controversial, social or behavioral science issues. *See infra* text accompanying note 299 (discussion refuting idea that legislatures are better at resolving the empirical aspects of these disputes).

192. *See generally supra* text accompanying notes 37–41 (distinguishing between legislatures’ policymaking and empirical fact-finding). Despite this assertion, the court did go on to resolve the factual issues, discrediting plaintiffs’ evidence with studies not relied upon by

A contrasting conclusion on the issue of gay parenting, however, was reached by the Arkansas courts in *Department of Human Services v. Howard*.<sup>193</sup> In *Howard*, plaintiffs successfully challenged an Arkansas regulation enacted by the state's Child Welfare Agency Review Board that prohibited gay people from becoming foster parents.<sup>194</sup> In this case, the state trial court did not presume that a factual basis for the restriction existed. Because it was reviewing the action of an administrative agency, the court had to determine whether the agency acted within its "authority to enact rules and regulations that promote the health, safety, and welfare of children."<sup>195</sup> The trial court issued numerous factual findings, which included the following: that "[b]ased on its foster care statistics the defendants do not know of any reason that lesbians and gay men would be unsuitable to be foster parents"; that "the blanket exclusion may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents"; and that being raised by gay parents does not increase the risk of "problems in adjustment," "psychological problems," "behavioral problems," "academic problems," "or gender identity problems."<sup>196</sup>

The Arkansas Supreme Court affirmed, holding that defendants' argument "that the regulation protects the healthy [sic], safety, and welfare of foster children . . . flies in the face of the evidence presented by Appellees' experts and the [trial] court's findings of fact."<sup>197</sup> Because the trial court did not presume that a factual basis for the legislation existed, but instead conducted an independent review of the facts, it ruled against the defendants even though it applied a rational basis standard of review. The Arkansas Supreme Court credited the trial court's fact-finding, rather than deferring to the administrative agency's view of the facts, and affirmed the ruling of unconstitutionality.<sup>198</sup> The courts' refusal to defer to the lawmakers' fact-finding was essential to plaintiffs' victory in *Howard* and led to an outcome directly counter to the results in *Lofton* and *Hernandez*.<sup>199</sup>

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either party. *Lofton*, 358 F.3d at 825 nn.24–25.

193. *Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

194. *Id.*

195. *Id.* at 6.

196. *Id.* at 7 (referencing trial court's findings of fact).

197. *Id.*

198. *Id.* at 7–8.

199. Shortly before this Article went to press, a state trial court in Florida ruled that the state's law barring lesbians and gay men from adopting violates the Florida Constitution by singling out gay people, and children raised by them, for different treatment without rational basis. *In re Adoption of John Doe and James Doe*, slip op. at 51–52 (Fla. Cir. Ct. Nov. 25, 2008) (case number redacted). Unlike the federal district court in *Lofton*, which deferred to the legislature's findings and declined to review the relevant facts independently, the state court held a four-day trial in which it heard from numerous experts on children's health and development. *Id.* at 2–3, 10–30. In light of this evidence, the court rejected the factual assumptions the state offered to justify the ban. The court found that many reports and studies, "adopted and ratified by the American Psychological Association, the American Psychiatry Association, the American Pediatric Association, the American Academy of Pediatrics, the Child Welfare League of America, and the National Association of Social Workers," demonstrate "beyond dispute that . . . the best interests of children are not preserved by prohibiting homosexual adoption." *Id.* at 35–37.

An opinion by a Hawaii state trial court, declaring unconstitutional the state's prohibition on same-sex marriage,<sup>200</sup> further demonstrates the decisive role played by judicial fact-finding in the context of gay parenting. In *Baehr v. Miike*, the state asserted a compelling interest, among others, "in protecting the health and welfare of children."<sup>201</sup> The court heard testimony from expert witnesses on both sides, including psychiatrists, psychologists, and sociologists, who testified about child development, "demographics related to family and children," and related topics.<sup>202</sup> The court's opinion included a detailed summary of this testimony, followed by twenty-five numbered findings of fact. These findings included the court's conclusions that "[g]ay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children."<sup>203</sup> The court found that "[g]ay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples."<sup>204</sup> In short, the court concluded, "Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage."<sup>205</sup>

### C. Children and "Indecency" on the Internet

"Indecency" on the Internet is yet another provocative topic that reveals a marked contrast between legislation enacted without serious regard for the relevant factual issues and a court's independent and thorough investigation of those issues. *American Civil Liberties Union v. Reno*<sup>206</sup> addressed provisions of the Communications Decency

Act of 1996 (CDA),<sup>207</sup> which criminalized knowingly making, creating, soliciting, or initiating the transmission of any "indecent" or "patently offensive" communication to a minor "by means of a telecommunications device."<sup>208</sup>

The paucity of the legislative record supporting the CDA suggests that the Act was motivated by public fear and political pressure, and not by any empirically based assessment of the issue.<sup>209</sup> One commentator describes the bill's history and the

200. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). As directed by the Hawaii Supreme Court, see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the trial court applied strict scrutiny to the statute, which was challenged under the state constitution. *Baehr*, 1996 WL 694235, at \*2. Hawaii voters later approved a Defense of Marriage constitutional amendment, mooting the lawsuit. National Conference of State Legislatures, Same Sex Marriage, <http://www.ncsl.org/programs/cyf/samesex.htm>.

201. *Baehr*, 1996 WL 694235, at \*3.

202. *Id.* at \*4-16.

203. *Id.* at \*17.

204. *Id.*

205. *Id.* at \*18.

206. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (2007). The lower court decision was issued by a three-judge panel pursuant to 28 U.S.C. § 2284 (2000).

207. 47 U.S.C. § 223 (2000).

208. *Reno*, 929 F. Supp. at 828-29 (citing 47 U.S.C. § 223(a)(1)(B), (d)(1)).

209. For a detailed recounting of the legislative path of the CDA, and the context in which it was enacted, see MICHAEL A. BAMBERGER, RECKLESS LEGISLATION: HOW LAWMAKERS IGNORE



Senate's failure to conduct any real investigation into the factual issues raised by the bill:

During [the entire time the bill was under discussion,] there were no hearings to collect information, to hear from experts on the Internet regarding its operation and capabilities, to find out how the bill would affect protected speech and communication, or to ascertain whether the perceived dangers could be countered by other means. Rather, there were extensive private discussions held with, and pressure imposed by, both the religious right-wing groups who were actively supporting the CDA, on the one hand, and a combination of liberal and media groups opposing the CDA, on the other.<sup>210</sup>

The final version of the CDA was proposed in the Senate on June 14, 1995.<sup>211</sup> Two hours of debate were allotted.<sup>212</sup> In introducing the amendment, Senator Exon of Nebraska referred to the “blue book” of pornographic online images he had compiled, offering it to his colleagues for inspection.<sup>213</sup> In the course of the debate, senators supporting and opposing the bill offered petitions, letters from advocacy groups, and newspaper articles into the record.<sup>214</sup> When the bill moved to the House, a different version excluding the prohibitory provisions of the CDA was approved. Following the appointment of a conference committee, Congress finally passed the Telecommunications Act of 1996, which included prohibitions similar to those originally approved by the Senate.<sup>215</sup>

On July 24, 1995—shortly after the CDA's passage in the Senate, but included in the legislative history of the Telecommunications Act—the Senate Judiciary Committee held a hearing in connection with the Protection of Children from Computer Pornography Act of 1995.<sup>216</sup> The witnesses included a stalker victim; “two mothers of children exposed to computer pornography,” each of whom testified about their personal negative experiences with internet pornography; an investigative journalist who testified about the availability of pornography on the internet; and the Executive Director of Enough is Enough, an advocacy group committed to the “enactment of new laws to stop the sexual exploitation and victimization of children using the Internet.”<sup>217</sup>

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THE CONSTITUTION 42–50 (2000).

210. *Id.* at 46.

211. *See* 141 CONG. REC. 16,006 (1995).

212. *Id.* at 16,008.

213. *Id.* at 16,009.

214. *See id.* at 16,010–26. At the end of the debate, the CDA was added to the Telecommunications Act by a vote of eighty-four to sixteen. *Id.* at 16,026. The next day, the Senate passed the Telecommunications Act. *Id.* at 16,242.

215. BAMBERGER, *supra* note 209, at 47.

216. *See Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing on S. 892 Before the S. Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Cyberporn and Children*]. This bill did not pass, and the hearing was the last action taken on it.

217. *Id.* at 38, 55, 111; Enough is Enough: Protecting Our Children Online, <http://www.enough.org/inside.php?id=E7A5VT6VM>. When Congress revisited the issue of protecting children from harm on the Internet, through the Child Online Protection Act (COPA), 47 U.S.C. § 231 (2000), it again failed to hold hearings. Following protracted litigation, a federal district court permanently enjoined COPA from enforcement. *See* *ACLU v. Gonzales*,

In *American Civil Liberties Union v. Reno*, plaintiffs challenged the prohibitory provisions of the CDA under the First Amendment.<sup>218</sup> After holding “extensive evidentiary hearings” on a motion for preliminary injunction, the three-judge panel issued 123 findings of fact.<sup>219</sup> The panel’s findings contradicted many of the government’s factual assertions. For example, the government argued that the CDA offered Internet content providers three defenses to prosecution: “credit card verification, adult verification by password or adult identification number, and ‘tagging.’”<sup>220</sup> But the panel found that these defenses were for the most part neither technically nor economically feasible.<sup>221</sup>

Relying on the court’s findings of fact, then-Chief Judge Sloviter found that the plaintiffs met their burden under the preliminary injunction standard by demonstrating that the challenged provisions of the CDA were facially unconstitutional.<sup>222</sup> Because the prohibition was “patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated ‘indecent’ or ‘patently offensive,’ is entitled to constitutional protection,” the court applied strict scrutiny.<sup>223</sup> Judge Sloviter rejected the government’s assertion that the court should defer to the legislature’s factual conclusions, noting that “[w]hatever deference is due legislative findings [cannot] foreclose our independent judgment of the facts.”<sup>224</sup> She rejected legislative “findings” upon which the government relied, noting that they primarily consisted of legislators’ statements about obscenity and pornography, not “indecent” or “patently offensive” content, and thus were not material to the legal issues before the court.<sup>225</sup>

The Supreme Court relied extensively upon the district court’s findings of fact in affirming the panel’s ruling<sup>226</sup> and declined to defer to the legislature on disputed issues of fact.<sup>227</sup> Writing for the seven-Justice majority, Justice Stevens noted that the court’s “extensive findings of fact . . . describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications” and observed that the factual findings “provide the underpinnings for the legal issues.”<sup>228</sup> In contrast, Justice Stevens noted the incongruity between the importance of the

478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff’d*, 534 F.3d 181 (3d Cir. 2008).

218. *ACLU v. Reno*, 929 F. Supp. 824, 826 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). The lower court decision was issued by a three-judge panel pursuant to 28 U.S.C. § 2284 (2000).

219. *See Reno*, 929 F. Supp. at 830–49.

220. *Id.* at 846.

221. *See id.* at 846–47.

222. *See id.* at 849.

223. *Id.* at 851 (opinion of Sloviter, C.J.).

224. *Id.* at 853 (opinion of Sloviter, C.J.) (internal quotation omitted) (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

225. *Id.* at 853 (opinion of Sloviter, C.J.).

226. *See Reno v. ACLU*, 521 U.S. 844 (1997) (citing panel’s findings of fact twenty-two times).

227. *See, e.g., id.* at 876 (“In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable.”).

228. *Id.* at 849.

Telecommunications Act and Congress's cavalier attitude toward the factual issues underlying the CDA.<sup>229</sup>

As in the Arkansas and Hawaii decisions addressing gay parenting, the courts' refusal to defer to the legislature's assessment of the constitutionally-significant facts in *Reno* was critical to the plaintiffs' victory. The case again demonstrates the courts' marked superiority over the legislatures in fact-finding. It also underscores the pivotal role played by courts' determinations over whether to defer to legislative fact-finding.

### III. A CRITIQUE OF JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING

The courts' reluctance to engage in independent fact-finding is unfounded when a law threatens essential individual rights and liberties. The courts play a vital role within the constitutional structure in protecting basic individual rights, especially minority and unpopular rights, from majoritarian power. In order to play this role effectively, they must be unconstrained in their ability to ascertain the factual basis for legislation. And, as it happens, courts possess institutional advantages over legislatures in fact-finding, especially in this context. They are better positioned to conduct fact-finding with integrity, producing a more reliable and less biased factual record.

#### *A. Institutional Legitimacy*

Independent judicial review of constitutionally-significant facts goes in tandem with the importance of judicial review more generally when basic personal liberties are at issue. The courts provide a critical backstop when legislatures act to restrict such rights. This is especially so when laws intrude upon the rights of unpopular or dispossessed minorities. The courts have reason in this context to be suspicious of the legislature's motives. As part of the courts' responsibility to protect such interests from the tyranny of the majority, they must satisfy themselves that the factual premises supporting the legislation are sound. As Jesse Choper has written:

Since, almost by definition, the processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism.<sup>230</sup>

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229. *See id.* at 858 n.24. The Court quoted Senator Leahy's observation:

It really struck me . . . that it is the first ever hearing, and . . . yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change—some would say even wreak havoc—on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor.

*Id.* (quoting *Cyberporn and Children*, *supra* note 216, at 7–8); *see also id.* at 875 n.41.

230. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 68 (1980); *see also* FAIGMAN, *supra* note 24, at 175–76; Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 801 (2006); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706–08 (2008); Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L.

Of course, how one defines “basic individual rights” is an important and difficult question, a detailed exploration of which is beyond the scope of this Article. As Choper points out, “The principled delineation and interpretation of the judicially enforceable constitutional rights held by individuals against popular government is an awesomely perplexing responsibility for the Court. Yet determining its competence to do so vis-à-vis other institutions of state and national government probably represents the Court’s most profound obligation.”<sup>231</sup> The federal courts should not be obligated to conduct an independent review of the facts any time a person alleges her personal rights are violated by a law no matter how trivial the right asserted. Important or basic individual rights should include something like what Amartya Sen, Martha Nussbaum, and others building upon their work have called “capabilities,” the conditions necessary for a good human life or for “human flourishing.”<sup>232</sup> Fleshing out exactly what is necessary for human flourishing will itself be complex and controversial.<sup>233</sup> For example, one might ask whether all claims under the Takings Clause of the Fifth Amendment should qualify as “basic individual rights.” Some such claims may qualify, while others may not. The taking of homes owned by individuals of modest means and turning those properties over to a private developer seems plausibly to implicate rights necessary for human flourishing.<sup>234</sup> On the other hand, it is far less clear that restricting uses of property intended to be developed for commercial gain to

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REV. 1, 13 (2006); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1174 (reviewing MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005)).

231. CHOPER, *supra* note 230, at 77–78.

232. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 11–15 (2000); Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 47 (Martha C. Nussbaum & Amartya Sen eds., 1993). *See generally* *THE QUALITY OF LIFE, supra*. Martha Nussbaum’s theory builds upon, and gives more substance to, the rights set forth in the Universal Declaration of Human Rights. *See* Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 94–101 (2007).

233. *See* Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI., 24, 32–34 (2006); *cf.* Stein, *supra* note 232 (amending and critiquing Nussbaum’s capabilities approach in articulating disability human rights paradigm).

234. *But see* *Kelo v. City of New London*, 545 U.S. 469, 488 (2005) (upholding such a taking and declaring, “[w]hen the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that *empirical debates over the wisdom of takings*—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”) (internal quotation marks omitted) (emphasis added). Justice O’Connor’s dissent in *Kelo* saw the problem posed to basic individual rights by unqualified deference to legislatures in all Takings Clause cases. She objected, “Where is the line between ‘public’ and ‘private’ property use? We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.” *Id.* at 497 (O’Connor, J., dissenting). She further noted,

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

*Id.* at 505 (O’Connor, J., dissenting).

protect the environment, or to save lives and property, intrudes upon a basic individual right.<sup>235</sup>

The categories of rights established by the Supreme Court as “fundamental,” or as otherwise specially protected, are not a reliable measure of basic individual rights, or of when the courts should defer to legislative fact-finding. First, the set of rights the Court has formally recognized as fundamental or specially protected does not encompass all of the basic individual rights and liberties necessary for human flourishing. This is only natural, since the rights essential to human flourishing are not static or ahistorical.<sup>236</sup> A paradigm of judicial deference to legislative fact-finding must be sufficiently flexible to account for evolving rights. It must ensure at least a minimum protection for such rights, even as their formal legal status remains undeveloped or uncertain.

Second, the Court itself has moved progressively away from a formal categorization of rights and corresponding levels of legal scrutiny.<sup>237</sup> It is therefore hazardous to rely upon such categories to determine whether rights should be protected by independent judicial review of social facts. The Court may be uncertain as to how it should characterize a particular right or classification. It may be reluctant to pronounce certain rights, especially those that are controversial or emerging, as “fundamental” rights, or to apply strict or heightened scrutiny to laws infringing them. Yet, even in such cases, the Supreme Court often seems to recognize that a basic human value is at stake. Thus, in cases like *Lawrence v. Texas*,<sup>238</sup> the Court has refrained from identifying the status of the right at issue or the level of scrutiny it has applied, while still acknowledging that important human values are implicated. In *Lawrence*, for example, the Court noted that a ban on same-sex intimacy implicated individuals’ “dignity as free persons” and observed that, “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”<sup>239</sup> Similarly, the Court’s traditional two tiers of review (strict scrutiny and rational basis) have blossomed into a plethora of tests that sometimes view legislation strictly even when the legal standard on its face is a lenient one.<sup>240</sup> This again is not surprising given the ever-evolving quality of basic individual rights. But if the courts at least exercise their responsibility to examine rigorously the social facts relevant to laws affecting these rights, then the rights will remain better protected and will have the chance to take root in constitutional jurisprudence.

Wherever the precise boundaries of basic individual rights lie, it is critical that the federal courts retain the authority to examine the relevant facts independently when legislatures pass laws that intrude on such rights. While legislatures may be the more

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235. *But see* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992) (deeming such an action to be a “taking” requiring government compensation).

236. *See generally* NUSSBAUM, *supra* note 232; Sen, *supra* note 232.

237. *See* FAIGMAN, *supra* note 24, at 130.

238. *Lawrence v. Texas*, 539 U.S. 558 (2003).

239. *Id.* at 567.

240. *See, e.g.*, FAIGMAN, *supra* note 24, at 102 (noting that in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court did not want to “extend stricter scrutiny to the mentally retarded as a class,” yet also did not want to “uphold a law possibly motivated by prejudice,” and therefore shifted the burden of proof to the government without formally changing the applicable level of scrutiny).

appropriate bodies to formulate broad social policies, their susceptibility to political influence makes it inappropriate for courts to rely upon them to resolve conflicting facts when a legislative proposal curtails basic individual rights. In such cases, legislatures are motivated as always by the political climate and the demands of constituents and interest groups, but it is precisely when this kind of political pressure is directed at limiting others' rights that the courts' role becomes vital. It is in these settings that the courts must step in to guard against the harmful tendencies of the democratic process. Here, institutional respect for the legislative process weighs less heavily against the substantial concerns of important individual rights.<sup>241</sup>

In other contexts, it is not as clear that a court possesses greater institutional legitimacy to review the factual support for a statute. In particular, where Congress or a state legislature seeks to create or protect, rather than curtail, individual rights, there is less compelling justification for the courts to intercede.<sup>242</sup> In these circumstances, courts may have good reason to grant deference to the legislature's policy choices without concern as to whether those policy choices rest upon a sound factual footing.<sup>243</sup> Under our constitutional structure, Congress too plays an important role in protecting individual rights through the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>244</sup> In the same way that judicial review reflects a distrust of legislative power, these constitutional provisions reflect a "distrust of the ability or willingness of courts to enforce fully the constitutional commands."<sup>245</sup> Moreover, in such contexts, a legislature is not acting in the direct interests of the majority or the politically influential and is, by definition, not motivated by bias against an unpopular or politically powerless minority.<sup>246</sup> Thus, it may be appropriate for a court to defer to a legislature's judgments both "about the state of the world and about appropriate responses to the societal conditions triggering political action."<sup>247</sup>

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241. Cf. Post, *supra* note 233, at 32–34 (arguing that, rather than being fundamentally at odds as is often claimed, "strong egalitarian principles can establish a dynamic and dialectical relationship to democracy" in which "visible and oppressive" inequities "prepare the way for the eventual emergence of democracy-based arguments for the amelioration of these inequities"). See generally CHOPER, *supra* note 230.

242. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (finding "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights" inapplicable to the Voting Rights Act, which "does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law").

243. See *id.* at 653 (arguing that where a majority legislatively imposes burdens on itself to benefit a minority, the same strict scrutiny should not be applied as when the majority burdens the rights of a minority).

244. See Buzbee & Schapiro, *supra* note 10, at 140–41; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L. J. 441, 513–22 (2000).

245. Buzbee & Schapiro, *supra* note 10, at 142 (citing Post & Siegel, *supra* note 244, at 501, 513–22).

246. See Fallon, *supra* note 230, at 1712–13. Rather, in such cases, a legislature may well be acting to ameliorate societal and government-inflicted harm to minorities. See, e.g., Kramer, *supra* note 10, at 148–50 (describing "massive" congressional record supporting the Americans with Disabilities Act and revealing "pandemic, society-wide discrimination" and "pervasive mistreatment by state and local governments").

247. Buzbee & Schapiro, *supra* note 10, at 120.

Of course, not all laws will clearly fall into either the category of protecting or enhancing basic rights, or of infringing them. Indeed, some laws may create, expand, or bolster certain individual rights at the expense of others. Where such a law intended to protect basic individual rights also clearly intrudes on others, the courts should conduct an independent review of the facts. We should not tolerate laws based on erroneous or disingenuous fact-finding simply because a legislature's intentions are good. For example, assume a legislature passes a law forbidding hate speech directed against a defined group of people. If the legislature makes a wholly speculative and unsupported factual finding that members of the protected group are ten times more likely to seek counseling for emotional trauma after confronting the forbidden kinds of speech, it would not be acceptable for a court to uphold the law on this supposed factual basis. The law may still be upheld if the government offers other valid grounds for the law in court. But because the law implicates the basic constitutional right to free speech, it is the courts' duty to ensure that the law is premised on something other than a bogus factual foundation.

Other conflicts may be harder to sort out. If a legislature passes an affirmative action law, and a white student claims she was not admitted to the college of her choice because of the law, should the court be obligated to review the facts independently? Here the legislature has acted in a rights-protective way, but it is less clear that it has infringed the rights of a particular white student.<sup>248</sup> Even if it has, one might ask whether it matters if the law has only indirectly infringed the student's rights, as opposed to doing so directly. Certainly where basic individual rights are clearly and directly restricted, even when due to a legislature's effort to protect other rights, the courts should independently review the facts to be sure the law rests upon a legitimate factual basis, rather than purely upon bias or upon unsupported or untested assumptions.

Beyond the context of individual rights, commentators have raised arguments in favor of deference to legislative fact-finding that may apply more broadly when basic individual rights are not infringed.<sup>249</sup> If courts were to scrutinize closely as a routine matter the factual bases for all exercises of legislative power, the principle of separation of powers could be undermined and the legislatures' ability to act unduly hampered.<sup>250</sup> Moreover, the nature of the legislative process may make it hopeless to expect that every piece of legislation will be based upon a close review of the facts.<sup>251</sup> The pursuit of a perfect factual foundation in the legislative setting may simply be too

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248. *See generally* Grutter v. Bollinger, 539 U.S. 306, 336–39 (2003).

249. *See, e.g.*, Bryant & Simeone, *supra* note 10; Buzbee & Schapiro, *supra* note 10, at 90–91, 120, 135 (arguing the Court's recent refusal to defer to congressional fact-finding in Enforcement and Commerce Clause cases amounts to an "unworkable judicial arrogation of legislative authority" and may detrimentally formalize the process of legislating); Colker & Brudney, *supra* note 10. *But see* McGinnis & Mulaney, *supra* note 12, at 16–17 (arguing that courts should never defer to congressional fact-finding). David Faigman argues for a theory of judicial deference that is tailored to how "deeply constitutional values are implicated." FAIGMAN, *supra* note 24, at 130. Thus, he argues, for example, that federal courts should defer when Congress exercises its powers under the Commerce Clause, but not when states defend their laws as permissible under the Dormant Commerce Clause. *See id.* at 20.

250. Buzbee & Schapiro, *supra* note 10, at 129.

251. *See* MAYHEW, *supra* note 117, at 122–25.

unrealistic and too costly.<sup>252</sup> Under this view, if democratically elected officials want to take action based on an imperfect assessment of the relevant facts, then so be it. This may be a cost of the democratic process that we are obliged to accept.<sup>253</sup> This Article does not answer these questions, however, for my concern here is with the comparative merits of legislative and judicial fact-finding where basic individual rights are at stake. I merely note that the paradigm of selective independent judicial review is flexible enough to accommodate these concerns.

### B. Competence

Superior legislative fact-finding competence is a chimera, especially when a legislature considers a proposal that will restrict basic individual rights in a controversial context.<sup>254</sup> The problem is multi-layered. At the first level lie significant structural issues. Legislators are subject to political pressures beyond their control that are markedly different from those faced by courts, and these pressures profoundly affect the nature of legislative fact-finding. The second level of difficulty is legislatures' frequent failure to seize whatever opportunities and advantages they do possess to conduct dispassionate and rigorous fact-finding. Finally, the combination of these two problems impairs legislators' cognitive judgment, engendering mistakes in evaluating facts. Legislatures take non-facts for facts, or they dwell on insignificant facts. These tendencies are exacerbated when legislators consider hot-button social issues, as the case studies in Part II demonstrate. Courts of course face their own obstacles in evaluating facts, and their fact-finding is far from perfect.<sup>255</sup> But in important cases they have proven to do a better job than the legislatures, justifying a reevaluation of deference to legislative fact-finding in these contexts.

A fundamental strain imposed on the legislative fact-finding process is the politically driven and controlled legislative agenda. The conventional wisdom that the courts are more reactive than the legislatures does not reflect political reality, whether in the states or in Congress. Legislatures simply face different causal pressures. Legislators are driven, some argue almost exclusively, by the desire for reelection.<sup>256</sup> They are disproportionately influenced by interest groups, and must also respond to constituents, their party, and the President. This naturally limits their incentives to determine which problems really need a legislative response. Instead, in setting their agenda, they tend to focus on "problems" that further their political interests. They are

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252. See McGinnis & Mulaney, *supra* note 12, at 3 ("As an elected body, Congress is designed to respond to its constituents; subjective desires, not to the objective facts of the world.").

253. Cf. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 731–32 (1974) (noting that where legislative classifications are not influenced by prejudices, "imperfect-but-plausible statistical generalizations" are "usually sufficient" for a court to credit).

254. For an excellent summary of the forces that produce inferior fact-finding in the legislative realm, see Laycock, *supra* note 230, at 1172–77.

255. See Solove, *supra* note 20, at 1021.

256. See MAYHEW, *supra* note 117, at 7–33 (explaining that as members of the most professionalized legislature in the world, members of Congress must constantly focus on reelection in order to continue their careers).



likely to craft “solutions” to hot-button issues that will garner them prominent and positive press coverage and placate clamoring special interests.<sup>257</sup>

Once the legislative agenda is thus set, the train is in motion, and legislators have little incentive to stop it in the fact-finding process. The fact-finding they conduct through committee hearings is much less a search for the truth than a carefully choreographed dance designed to maximize whatever benefits the legislator stands to reap,<sup>258</sup> whether advertising, credit-claiming, or position-taking (which often includes expressing public approbation or outrage over an issue).<sup>259</sup> Legislative fact-finding therefore too readily mirrors unreasoned public hysteria and fear. As Justice Brandeis, cautioning against ready acceptance of a law’s factual basis in the face of widespread public fear, reminded, “[m]en feared witches and burnt women.”<sup>260</sup> The very conduct of the committee hearings undermines any serious examination of the facts; attendance is often poor, and during the testimony legislators frequently talk to one another, wander in and out to take phone calls, and engage in side conversations with their staff.<sup>261</sup>

Because courts do not set their own agendas, they have less reason to stage a predetermined factual outcome. This is particularly true of the federal trial judges, whose role is not to establish or revisit precedent, but to apply it.<sup>262</sup> Thus, far from undermining the integrity of their fact-finding, the reactive nature of the trial courts frees them from a slavish devotion to a pre-set political agenda.<sup>263</sup> It also makes the courts more responsive. As one commentator notes, in the judicial setting, “questions get answers.”<sup>264</sup> Moreover, federal judges’ life-tenure appointments insulate them from concern that the public will not agree with their factual determinations. Of course, judges can be opinionated and result-driven, especially when confronted with controversial topics. But the question raised by the doctrine of judicial deference is whether they are more or less so than legislators. The case studies confirm that they are, on the whole, less so.

Aside from the counterproductive force of agenda-setting, the legislative process itself impedes fair fact-finding. In a committee, the committee chair specifically, and the controlling party more generally, play both advocate and judge.<sup>265</sup> The timing and

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257. *See id.*, at 49–75 (discussing advertising and credit-claiming).

258. *See generally* ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973).

259. *See* MAYHEW, *supra* note 117, at 49, 52, 60, 106.

260. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., dissenting).

261. *See* Laycock, *supra* note 230, at 1174–75.

262. Although it too is a reactive body, the Supreme Court obviously has a greater opportunity to set its agenda through the certiorari process. This is not to suggest, however, that the federal district courts retain no discretion in applying the law. *See generally* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007).

263. *See* Ginsburg, *supra* note 230, at 1 (recounting comments by Chief Justice William H. Rehnquist comparing the role of a judge “to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it” (citing William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 229–30 (1980))).

264. HOROWITZ, *supra* note 8, at 22.

265. Legislatures are sometimes characterized as neutral because they act on behalf of their constituents. This is an idealized characterization, however. It ignores the partisan realities of

structure of the hearing, the balance of testimony on each side, and the treatment of the witnesses who testify are all subject to manipulation by the committee chair. Not only do the chair and the controlling party have a tactical advantage in the conduct of the committee hearing, but if any formal “findings” are included in the body of the legislation, they are likely the ones who will draft them. Even disregarding the issue of bias, those “findings” are part of a political process of compromise and expediency that undermines their reliability.<sup>266</sup>

While it is true that legislators, especially those serving on certain congressional committees, may specialize, this specialization is unlikely to be of help in resolving many of the factual questions raised by legislation affecting individual rights. In the three case studies presented, there was virtually no institutional advantage in terms of expertise that Congress or state legislatures, as compared with the courts, brought to bear on the deliberations. Moreover, even if legislators possess relevant expertise, they are unlikely to employ that expertise toward neutral, comprehensive fact-finding. Instead, they are much more likely to be motivated by electability and interest group pressure.<sup>267</sup> Conversely, the conception of the “generalist judge” may be overstated in today’s federal judiciary.<sup>268</sup>

Even if the committee process were to produce sound fact-finding, this fact-finding is unlikely to form the basis of decision by the entire body. Those who hear the “evidence” are a tiny percentage of those who ultimately approve the final measures, and the vast majority of legislators are unlikely to pay careful attention to committee reports and other evidence entered into the legislative record.<sup>269</sup> In fact, the more thorough the fact-finding, the less likely that legislators will take the time to absorb it.

The judicial process, in contrast, is designed to optimize fairness.<sup>270</sup> The setting is sober and respectful, in contrast to legislative hearings, and departures from judicial

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legislatures. It also overlooks the fact that legislators are often personally invested in their legislative agendas. *See generally* MAYHEW, *supra* note 117. Moreover, by acting on behalf of one set of constituents, a legislature takes sides, particularly if the measure in question implicates other constituents’ constitutional rights.

266. *See* BAMBERGER, *supra* note 209, at 9 (“A significant part of the political process is accommodation and compromise.”); Buzbee & Schapiro, *supra* note 10, at 95 (“In the legislative setting, no such unitary decision maker accepting evidence and explaining policy choices is likely to exist. The concepts of ‘admissible’ evidence or ‘ex parte’ contacts simply do not fit the kind of polycentric and informal political process that generates legislation.”).

267. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 891 (1987). *See generally* MAYHEW, *supra* note 117.

268. *See* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. (forthcoming 2009), available at [http://works.bepress.com/edward\\_cheng/1/](http://works.bepress.com/edward_cheng/1/) (arguing that empirical evidence demonstrates that “opinion specialization [is] an unmistakable part of everyday judicial practice, suggesting that the generalist judge is largely a myth”).

269. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 444–45 (1988); *see also* Buzbee & Schapiro, *supra* note 10, at 96 (“Committee hearing transcripts and reports . . . reveal little about what the enacting coalition of legislators . . . actually considered.”). Indeed, legislators often cannot even be bothered, or lack the time, to read the legislation itself in its entirety. *See, e.g.*, Robin Toner & Neil A. Lewis, *A Nation Challenged: Congress; House Passes Terrorism Bill Much Like Senate’s, but with 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6 (discussing failure of lawmakers to read USA PATRIOT Act before its passage).

270. *See* Laycock, *supra* note 230, at 1176; CHOPER, *supra* note 230, at 68–69.

norms and protocols are taken seriously.<sup>271</sup> There is no built-in opportunity for bias in the number of witnesses that may be called, the amount of time for which they may testify, the schedule the parties must follow, and so on. The process is accessible and evenhanded, and the “precise steps [are] spelled out in advance.”<sup>272</sup> When basic individual rights are targeted by legislation, those whose rights are in question tend to be in the political minority and therefore cannot count on the legislative process to protect them. To grant “unfettered deference” to legislative fact-finding in these circumstances would leave “legislative foxes guarding the constitutional henhouse.”<sup>273</sup> It is telling that, when our own rights are at stake, most of us insist upon judicial resolution of our grievances and would never think of entrusting them to a legislature.

Moreover, although some commentators emphasize the constraining nature of the rules of evidence and other judicial norms and procedures, these do serve to weed out the inflammatory rhetoric that is part and parcel of both committee proceedings and floor debates (and that grows only more frenzied when unpopular rights or minorities are implicated).<sup>274</sup> It also ensures that exogenous political influences hold less sway.<sup>275</sup> In the legislative context, the airing of public opinion and constituent input may well be healthy and valuable for other reasons. But it does not tend to make for good fact-finding, as the case studies show.

While it is true that courts are somewhat at the mercy of the evidence the parties bring to them,<sup>276</sup> it is far from clear that this system undermines judicial fact-finding, at least as compared to the legislatures. The adversary process helps to ensure that all plausible arguments, including the relevant factual support, will be brought before the court.<sup>277</sup> Furthermore, in the context of constitutional challenges alleging violations of basic individual rights, courts are not as constrained by procedural and substantive limitations as some critics claim. The facts relevant to the courts’ determinations tend overwhelmingly to be social facts. Courts commonly apply hearsay and other evidentiary rules to such evidence (and, I would argue, this is often for the better).<sup>278</sup>

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271. See Laycock, *supra* note 230.

272. HOROWITZ, *supra* note 8, at 22.

273. Faigman et al., *supra* note 11, at 84.

274. Some commentators have questioned the very notion of a “legislative record.” They argue that a “record” implies a compilation produced as the culmination of a legal process, a description that does not reflect the reality of legislative fact-finding and the legislative process in general. Buzbee & Schapiro, *supra* note 10, at 92.

275. See HOROWITZ, *supra* note 8, at 23 (noting minimal influence of the National Education Association in *Lau v. Nichols*, 414 U.S. 563 (1974), and of the National Association of Manufacturers in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

276. See FAIGMAN, *supra* note 24, at 100 (“[N]o court should rely on the parties exclusively to say what the reviewable facts are.”).

277. HOROWITZ, *supra* note 8, at 22; see also McGinnis & Mulaney, *supra* note 12, at 25–29. It has been argued that expert witnesses are inherently partisan, and that their tendency is to simplify, and even to mislead the decision maker. See HOROWITZ, *supra* note 8, at 26. But this concern is surely equally if not more apt in the legislative setting. Indeed, the rules of evidence help to ensure that, in court, the testimony of purely partisan witnesses who have little expertise or only questionable data to contribute will either be barred or be deemed not credible.

278. The rules of evidence ensure a certain minimum threshold for the reliability of testimony. Although social facts are understood to be treated more leniently than adjudicative facts under the Federal Rules of Evidence, see FED. R. EVID. 201(a) advisory committee’s note;

But they are not required to do so.<sup>279</sup> Judges may, and should, hire their own experts and consult outside sources if the parties' submissions are lacking.<sup>280</sup>

Finally, it does not even appear that legislatures are more efficient fact-finders than trial courts. Indeed, the vagaries of the political process, the flexibility inherent in legislative fact-finding, and legislators' personal and political motivations may encourage inefficiency. Congressional hearings on the federal "Partial-Birth Abortion Ban Act," spanned eight years. In contrast, many of the state ban trials took less than a week. The trial in Nebraska federal district court on the federal ban<sup>281</sup> took only two weeks and produced a factual record that not only overlapped substantially with Congress's<sup>282</sup> but in significant respects was more complete.<sup>283</sup> And while the adversarial process in the judicial setting tends to produce better fact-finding, it also

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Kenneth Culp Davis, *supra* note 8, at 402–07; Kenneth Culp Davis, *Fact in Lawmaking*, 80 COLUM. L. REV. 931, 940–41 (1980); Levin, *supra* note 121, at 321–22, trial courts often enforce the rules even with respect to evidence that qualifies as social facts. This is reflected in the transcripts of the "partial-birth abortion" ban trials. *See, e.g.*, Trial Transcript, R.I. Med. Soc'y v. Pine, No. C.A. 97-416-L (D.R.I. May 5, 1999); *see also* FAIGMAN, *supra* note 24, at 99–100 (raising the question "whether evidence of constitutional reviewable facts should be assessed for validity and, if so, by what standards this should be done" and suggesting that the *Daubert* approach "should inform judicial reception of evidence regarding constitutional reviewable facts").

It may well be that the distinct procedural treatment of social and adjudicative facts is ill-advised and less likely to produce scientifically sound fact-finding. *See, e.g.*, Monahan & Walker, *supra* note 27, at 485; Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 697–98 (1988). An extended treatment of these issues is beyond the scope of this Article. Whatever shortcomings may result from the courts' differential treatment of legislative and adjudicative facts, these limitations do not compare to the biases and inaccuracies inherent in the legislative process. *Cf.* HOROWITZ, *supra* note 8, at 24 ("The point can surely be made that, if courts cannot do certain things well, other institutions may perform the same tasks even less capably. . . . On some matters, an imperfect judicial performance may be the best that is currently available. . . .").

279. Kenneth Culp Davis, *supra* note 8, at 402–07; Levin, *supra* note 121, at 321–22; *see also* *Lamprecht v. FCC*, 958 F.2d 382, 414 (D.C. Cir. 1992) ("This Court, too, could have called for amicus briefs on the statistical question (or accepted the brief that was offered) and our failure to do so looks less than sporting, since our decision seems to turn on the absence of them.") (Mikva, J., dissenting).

280. Judicial fact-finding will also be affected to some degree by the relative resources the parties can bring to bear. However, social fact-finding in the courts often occurs in the context of facial constitutional challenges, in which public interest advocacy groups, staffed with lawyers who have experience litigating such cases, are likely to intervene. The availability of attorneys' fees to lawyers representing clients pro bono in constitutional challenges helps to alleviate the financial concern. *See* HOROWITZ, *supra* note 8, at 11. In any event, these potential shortcomings of the adversarial system are not cured in the legislative process. Federal courts observing that a disparity in resources is skewing the fact-finding again should make use of other available resources for supplementing the factual record.

281. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 809 (D. Neb. 2004).

282. *See* Brief of Respondents at 1–11, *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610 (2007) (No. 05-380), 2006 WL 2345934.

283. *See id.*; *Carhart*, 331 F. Supp. 2d at 960, 979–82 (citing both the Chasen Study and medical school data); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) (noting the district court "heard more evidence during its trial than Congress heard over the span of eight years").

can encourage the parties to stipulate to facts that are important but not in dispute, helping to establish a solid factual foundation in an efficient manner.<sup>284</sup> There is no equivalent process, and indeed no incentive for such a process, in the legislative setting.

The trial courts' advantages in fact-finding are not all replicated at the appellate level, however. Appellate courts can find themselves on thin factual ice if they misuse their freedom to rely on social facts not developed by the parties at the trial level.<sup>285</sup> For example, in most of *Carhart II*, the Court relied on the "extensive evidence" developed by the three trial courts,<sup>286</sup> and in particular upon their "exhaustive" descriptions of abortion procedures. But one section of the opinion veered onto a topic not raised by the bans and therefore not covered by the district courts' fact-finding—whether women "come to regret their choice to abort the infant life they once created and sustained" and experience "[s]evere depression and loss of esteem."<sup>287</sup> To reach this factual conclusion, Justice Kennedy resorted to an amicus brief submitted by Sandra Cano, the "Doe" of *Doe v. Bolton*<sup>288</sup> who now claimed to regret her abortion, and "180 post-abortive women who have suffered the adverse emotional and psychological effects of abortion."<sup>289</sup>

Moreover, if appellate procedural rules help to ensure a level of fairness and consistency that the legislative setting cannot provide, an appellate court's review of a dry, written record cannot match a trial court's immediate contact with the witnesses. Even with respect to social facts, witnesses' credibility is often reflected at least partly in their demeanor. Hearing the testimony live, and being able to pose questions to the witnesses if necessary, also helps the trial judge more readily absorb and internalize the information.

This advantage was demonstrated in the "partial-birth abortion" trials, where the trial judges as a whole generally grasped the significance of the bans' vague wording and the difficulties the language posed for medical practice. The Supreme Court Justices also learned a remarkable amount about abortion procedures and obstetric and gynecological practice and medical conditions, certainly more than most of the legislators who debated the bans.<sup>290</sup> Nevertheless, Justice Stevens, who had dissented

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284. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (relying upon the parties' stipulations for a significant number of the court's findings of fact).

285. See FAIGMAN, *supra* note 24, at 98 ("On appeal, . . . courts routinely accept *amicus* briefs chock-full of factual assertions from interested parties who might, or might not, have expertise on the subject. . . . Historically, there has been no practice or tradition that reviewable facts be introduced at trial and survive the rigors of the adversarial process."); Hashimoto, *supra* note 27, at 114, 149–52 (arguing that Supreme Court tends "to be result-oriented in deciding which scientific facts to include and in what manner they should be used"). For this reason, I depart from Neal Devins' suggestion that to critique Congress's fact-finding is to imply that "the *Supreme Court* is a better factfinder than Congress." Devins, *supra* note 22, at 1176 (emphasis added).

286. *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1620 (2007).

287. *Id.* at 1634.

288. *Doe v. Bolton*, 410 U.S. 179 (1973).

289. Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 2, *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610 (2007) (No. 05-380), 2006 WL 1436684; see *Carhart II*, 127 S. Ct. at 1634; *infra* text accompanying note 294.

290. Compare *supra* text accompanying notes 149–50, with *supra* text accompanying notes

vigorously from the majority's upholding of the federal "Partial Birth Abortion Ban Act" in *Gonzales v. Carhart*, made a revealing comment in an interview following the Court's decision. Asked about the federal ban's impact, "Stevens . . . noted that the real-world effect of the defeat was minimal because of the widespread availability of alternative abortion procedures. 'The statute is a *silly* statute,' he said . . . , but what we decided isn't all that important."<sup>291</sup> This remark contrasts sharply with the concerns of those who represent abortion providers that the threat of criminal liability and uncertainty about the ban's meaning will create a chilling effect on doctors that will ultimately harm women.<sup>292</sup>

#### IV. REEVALUATING JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING WHEN BASIC INDIVIDUAL RIGHTS ARE AT STAKE

##### *A. A Paradigm of Selective Independent Judicial Review*

Commentators who recognize the shortcomings of legislative fact-finding have proposed solutions that vary widely in how far they deviate from current practice.<sup>293</sup> There has been scant focus, however, on the particular competence of trial courts (as contrasted with appellate courts), and on the particular importance of judicial fact-finding in the context of all basic individual rights, including emerging rights not accorded strict scrutiny. Moreover, some commentators, viewing deference as an all or nothing proposition, fear that blanket independent judicial review will unduly hamper Congress and the legislatures.<sup>294</sup> I propose a paradigm of selective independent judicial review that addresses all of these concerns.

Scholars have often pointed out that the divide between law and fact is problematic, and some have linked this observation to a critique of deference to legislative fact-

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126–40, 149–54.

291. See Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, §6 (Magazine), at 50 (interview of Justice John Paul Stevens) (emphasis added).

292. E.g., Megan Hughes, *Reproductive Rights Litigator Discusses Carhart's Impact*, HARV. L. REC., Oct. 4, 2007, available at <http://media.www.hlrecord.org/media/storage/paper609/news/2007/10/04/News/Reproductive.Rights.Litigator.Discusses.Carharts.Impact-3015481.shtml> (summarizing a talk by Priscilla Smith, lead attorney for plaintiff in *Carhart II*).

293. See, e.g., FAIGMAN, *supra* note 24, at 132–33 (court should review legislature's constitutional fact-finding where "basic constitutional values," including "basic liberties" and "structural barriers," are implicated); Devins, *supra* note 22, at 1176 (noting that Court should "act cautiously before embracing fact-dependent standards of review"); Faigman, et al., *supra* note 11, at 82 (arguing that court should not defer where strict or heightened scrutiny applies or when "specially protected rights" are burdened); Hill, *supra* note 176, at 337–41 ("[C]ourts should not defer to legislative findings of medical fact."); McGinnis & Mulaney, *supra* note 12, at 43 (stating that courts should never defer to legislative fact-finding, and both trial and appellate courts should conduct de novo review of all social facts); Tobin, *supra* note 58, at 139 (noting that judicial deference "should not be applied when the substance of abortion informed consent laws are challenged"); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312 (1998) (noting that in First Amendment context, Court properly defers to fact-finding where heightened scrutiny applies but not where strict scrutiny applies).

294. See Solove, *supra* note 20, at 1004–05 (describing arguments).

finding.<sup>295</sup> But these scholars' arguments do not focus specifically upon dispositive social facts.<sup>296</sup> I argue that courts are better at evaluating the dispositive social facts underlying laws that infringe basic individual rights. In the "partial-birth abortion" context, Congress's conclusions that its ban needed no health exception and did not impose an undue burden rested upon factual assumptions about the relative safety and availability of abortion procedures and other issues. As the "partial-birth abortion" ban trials demonstrated, the trial courts did a far better job of amassing and analyzing these kinds of empirical facts. The trial courts' superior competence in dispositive social fact-finding demonstrates how important it is that they independently review such facts where significant individual rights are at stake. Had the Supreme Court given adequate weight to the trial courts' fact-finding on the federal abortion ban—which led all three district courts to declare the ban unconstitutional—it would almost certainly have reached a different outcome.<sup>297</sup>

Under the paradigm of selective independent judicial review, trial courts should conduct a *de novo* review of the underlying social facts whenever a plaintiff claims that legislation violates her basic individual rights.<sup>298</sup> Thus, the government should be required to present, in court, evidence demonstrating the claimed factual basis for the law. If the government chooses, it may rely upon the legislative record in lieu of presenting witnesses and introducing documentary evidence. And a court should always be free to consider the legislative record, if there is one, for what it is worth. But evidence from the legislative record should never be considered presumptively valid. Instead, the court should review the record skeptically and with attention to the legislative context and procedural particularities that are likely to affect the reliability of the evidence.

Appellate courts applying selective independent review should give great weight to the factual determinations of the trial court, applying something akin to the clearly erroneous standard. Although this standard technically does not apply to a trial court's determinations of social facts, appellate courts nonetheless often employ it anyway.<sup>299</sup> Of course, if an appellate court is presented with an issue that different trial courts have resolved differently, it will be impossible to apply this standard to both courts, and the court will need to undertake a more independent review of the facts.<sup>300</sup>

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295. See, e.g., Devins, *supra* note 22 (arguing that, because line separating law from fact is "indeterminate," and because Court is unlikely to depart from traditionalist view that places finding of social facts within the realm of lawmaking power, Court should embrace fact-dependent standards of review with caution); McGinnis & Mulaney, *supra* note 12 (arguing that law is a social fact and thus, since courts should not defer in matters of legal interpretation, they should not defer on any social fact-finding); Pilchen, *supra* note 22; *supra* text accompanying notes 20–23.

296. See *supra* text accompanying notes 22–23.

297. Compare *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610 (2007), with *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000).

298. See *supra* Part III.A.

299. See, e.g., *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 723 (8th Cir. 2006) (applying clearly erroneous standard in context of facial challenge to "informed consent" law for abortion), *rev'd en banc on other grounds*, 530 F.3d 724 (8th Cir. 2008); see also *Carhart II*, 127 S. Ct. at 1640 (Ginsburg, J., dissenting) (referencing clearly erroneous standard in discussing trial court findings).

300. Bias can of course occur at the trial level, and a trial court may exploit flexible concepts

Courts applying selective independent judicial review should refuse to defer to legislative fact-finding whenever a basic individual right is directly implicated, regardless of whether the Supreme Court has described the right as “fundamental” and regardless of the tier of constitutional review it occupies. Because the paradigm does not address the correct legal standard a court should apply, the government would still enjoy the benefit of rational basis review where the Court has traditionally applied it. The paradigm would, however, slightly change the defendant’s burden under rational basis review. Rather than assigning a plaintiff the impossible task of disproving every conceivable factual basis for a law, the paradigm would require the government to submit evidence to support the factual basis for its policy choice. The application of a lenient legal standard would continue to give the government a decided advantage in defending a law.<sup>301</sup> Still, uncoupling legal standards of review from deference to legislative fact-finding would ensure that, whatever legal standard a court applied to determine whether basic individual rights were violated, that standard was applied to a sound factual record. Misguided laws that irrationally infringe individual rights like those of lesbian and gay parents would more likely be halted.<sup>302</sup>

The paradigm of selective independent judicial review does not require legislatures to make findings or develop a legislative record for every piece of legislation. It thus should assuage concerns that the courts’ failure to defer will corrupt the salutary aspects of the legislative process.<sup>303</sup> Refusing to give deference to the legislature’s fact-finding does not mean that a court should invalidate a law simply because a thorough legislative record was not compiled. Rather, when a law is challenged as infringing on individual rights, a court should independently review the constitutionally relevant facts. If the legislature should manage to engage in thorough, unbiased fact-finding, the worst that will happen is that the factual record developed in court will mirror its legislative counterpart. But such occasional overlap is a small price to pay to ensure that important individual rights are fairly protected.<sup>304</sup> Indeed, if

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such as determinations of credibility in order to reach a desired outcome. *See* HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* (2007) (discussing decisions on minors’ judicial bypass hearings, in which trial judges routinely characterize minors as lacking maturity despite strong evidence to the contrary). Appellate courts should, as always, disregard clearly false or biased trial court findings. Because procedures for admission of evidence at the trial court level are inherently fairer and more predictable than in the legislative setting, however, appellate courts will still gain a sounder grasp of the relevant facts by reviewing the trial court record than by either deferring to the legislative record or straying beyond either of these sources. *See* Pine, *supra* note 278, at 667.

301. For example, if a plaintiff driver filed an Equal Protection challenge to a requirement that seatbelts be worn in the front seats of automobiles, the government would need to submit some evidence that wearing seatbelts increases safety. It would not then be sufficient for the plaintiff to prove that passengers sitting in the rear seats of cars also suffer harm. The law’s under-inclusiveness would not be constitutionally fatal under rational basis review. Moreover, proof of a relatively modest increase in safety for front seat passengers might be sufficient.

302. *See supra* text accompanying notes 181–84.

303. *See* Buzbee & Schapiro, *supra* note 10, at 94.

304. *Cf.* *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 (1985) (“Because we do not believe the record in the District Court contradicted [the Senate Committee’s] findings, however, we need not rely on them, or determine what deference must be afforded on this congressional record; we mention the Committee’s findings only because they are entirely consistent with our understanding of the record developed in the District Court.”).



legislatures are encouraged to act more cautiously and fairly before treading on basic personal rights, so much the better.<sup>305</sup>

The case studies demonstrate what happens when courts defer blindly to a legislature on the facts. Even when they raise obvious fact issues in the context of a defendant's summary judgment motion, plaintiffs lose all opportunity to rebut a potentially meritless "factual" claim. Moreover, particularly because legislatures are—even under rational basis review—prohibited to enact laws based purely on animus or a bare desire to harm a politically unpopular group,<sup>306</sup> they are all the more likely to articulate pretextual reasons for passing the legislation. Knowing they will receive blind deference under rational basis review will only encourage legislatures to act on pretext and without concern for the facts.

This cannot be what the Constitution condones. If we have reason to distrust Congress's fact-finding in the context of free speech cases, then we have no more reason to trust it in the context of other infringements on basic individual rights. Courts cannot fulfill their duty to protect individuals from majoritarian power without the freedom to examine the facts independently.<sup>307</sup> And it is unrealistic and unfair to expect legislatures consistently to buck the political pressures of the present system and dispassionately examine social facts in order to act as protectors of individual rights. Where a law infringes important rights, a court should ensure that its conclusions about the law's constitutionality rest upon a solid factual footing. Even when an asserted basic individual right receives only rational basis review, the entire legal inquiry is a sham if the court reaches its legal conclusions through resort to a wholly speculative set of facts.<sup>308</sup>

Paradoxically, the Supreme Court's approach to congressional fact-finding recently has been directly counter to what I propose. The Court has viewed congressional factual records with greater skepticism in cases where Congress has sought to protect or enhance individual rights. In *Board of Trustees of University of Alabama v. Garrett*, for example, Justice Breyer argued in dissent that the Court should have deferred to Congress's decision to allow individuals to sue states for money damages in federal

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305. See CHOPER, *supra* note 230, at 64–70. See generally J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* (2004) (arguing that judicial review encourages Congress to take more seriously constitutional issues implicated by proposed legislation).

306. See, e.g., *Romer v. Evans*, 517 U.S. 620, 633 (1995); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 473 (1985).

307. See Faigman, et al., *supra* note 11, at 90–91; McGinnis & Mulaney, *supra* note 12, at 9–10.

308. Although it may appear that this proposal would open the door to searching review of the factual basis for litigation in countless cases, this concern is unwarranted. As some commentators have pointed out:

[M]any scholars conclude that the Court rarely intervenes on behalf of minorities against the majority's will. Whether judicial review protects minority rights well or poorly, most matters of government policy do not involve fundamental constitutional rights or provable discrimination and are therefore subject to unrestricted majoritarian control. . . . The Federal Constitution as interpreted by the Supreme Court, leaves even discrete and insular minorities to fight [most policy issues] out in the majoritarian political process.

Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 74–75 (2008) (citation omitted).

court under the Americans with Disabilities Act, noting that the ADA “does not discriminate against anyone, nor does it pose any threat to basic liberty.”<sup>309</sup> Conversely, in *Carhart II*, the Supreme Court implicitly deferred to Congress’s fact-finding, even though the federal ban implicated a woman’s right to abortion.<sup>310</sup> In Part IV.B, I demonstrate how the paradigm of selective independent judicial review might affect the Supreme Court’s approach to legislative fact-finding.

### B. Applying the Paradigm

The federal “Partial-Birth Abortion Ban Act” provides a helpful model to illustrate the “selective” aspect of my proposed paradigm. In *Carhart II*, plaintiffs’ claim addressed only whether Congress, in enacting the federal abortion procedure ban, had violated the right to abortion. The plaintiffs did not challenge Congress’s authority to act,<sup>311</sup> and the Court avoided the issue in its decision.<sup>312</sup> Under the paradigm of selective independent judicial review, were the Court to decide this question, it might still defer to the factual underpinnings of Congress’s judgment concerning the appropriate exercise of its power.<sup>313</sup>

As to the medical facts underlying the actual challenge, however, the *Carhart II* Court should not have implicitly deferred to Congress, since the decision implicated essential individual rights of women and physicians.<sup>314</sup> The majority opinion’s long description of abortion procedures incorporated the factual findings of the three trial courts. But its ultimate conclusions did not. While Justice Kennedy did not fully credit Congress’s findings (since some of them had been proven false), he essentially called a draw, and then sided as a legal matter with Congress, allowing the ban to be upheld. Had the Court not deferred to Congress, the weight of the evidence clearly would have favored the plaintiffs, and the Court would have been compelled to reach a decision consonant with its ruling invalidating the Nebraska ban in *Carhart I*.

*Carhart II* raises other possible applications for selective independent judicial review. While the federal ban was being litigated, *Planned Parenthood Minnesota v. Rounds*<sup>315</sup> was filed challenging a South Dakota “informed consent” law that requires physicians to tell their abortion patients that the fetus is a “whole, separate, unique, living human being” and that abortion carries a significant risk of psychological trauma to the woman.<sup>316</sup> The law was enacted as part of a concerted campaign in South

309. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 387 (2001) (Breyer, J., dissenting).

310. *See supra* text accompanying notes 155–57.

311. Some amicus briefs did address the issue. *See, e.g.*, Brief of Amicus Curiae California Medical Association in Support of Respondents, *Gonzales v. Planned Parenthood*, 547 U.S. 1205 (2006) (No. 05-1382), 2006 WL 2725689 (arguing that Congress exceeded its powers under the Commerce Clause in enacting the ban).

312. *But see* *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1640 (2007) (Thomas, J., concurring).

313. *See* Pilchen, *supra* note 22, at 384–85 (arguing that whether an activity is sufficiently tied to interstate commerce is more a question of policy than of fact).

314. The physicians alleged that the criminal ban violated their rights to due process because it was unconstitutionally vague. *See Carhart II*, 127 S. Ct. at 1614.

315. *Planned Parenthood Minn. v. Rounds*, 375 F. Supp. 2d 881 (D.S.D. 2005), *vacated and remanded by* *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc).

316. S.D. CODIFIED LAWS § 34-23A-10.1 (2005); *see* Reva B. Siegel, *The New Politics of*

Dakota to introduce legislation premised on abortion's harm to women.<sup>317</sup> As part of these efforts, the South Dakota legislature also appointed a task force to conduct fact-finding documenting alleged abortion-related emotional trauma.<sup>318</sup> The work of this task force was alarmingly biased, so much so that even the anti-abortion chair of the task force "voted against [it] to publicize her objections".<sup>319</sup> A panel of the Eighth Circuit Court of Appeals affirmed the district court's ruling that the ban was unconstitutional, but the court granted en banc review. The en banc court had not yet decided *Rounds* when the Supreme Court issued its opinion in *Carhart II*.<sup>320</sup>

In *Carhart II*, a portion of Justice Kennedy's opinion seemed to signal to the Eighth Circuit the Supreme Court's receptiveness to the South Dakota law, even though the issue was not before the Court.<sup>321</sup> The opinion claimed that it was "unexceptionable" to conclude that abortion could cause "[s]evere depression and loss of [self] esteem," although it conceded that the Court had seen "no reliable data to measure the phenomenon."<sup>322</sup> In fact, Justice Kennedy in essence gave deference to the fact-finding of South Dakota's task force, relying on an amicus brief submitted in *Carhart II* that contained testimonials also featured in the task force's report.<sup>323</sup>

*Rounds* presents an interesting example for testing the paradigm of selective independent judicial review. By forcing physicians to deliver an ideological message to their patients, the South Dakota law implicates physicians' First Amendment rights to free speech.<sup>324</sup> The state argued that the required statements about the embryo or fetus were purely scientific, but the Eighth Circuit panel refused to defer to this claim, finding that it was the district court's obligation to decide "the objective scientific and medical accuracy of the statements in the required disclosures."<sup>325</sup> The panel concluded that the message consisted of ideological views susceptible of empirical proof.<sup>326</sup> The panel also declined to defer to the legislature's claims that the law was

*Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1006–14 (describing South Dakota task force findings that the South Dakota legislature relied upon in enacting an abortion ban); Reva B. Siegel & Sarah Blustain, *Mommy Dearest?*, AM. PROSPECT, Oct. 21, 2006, at 22. See generally Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (discussing the South Dakota statute).

317. See Siegel, *supra* note 316; Siegel & Blustain, *supra* note 316.

318. H.B. 1233, 80th Leg. Assemb., Reg. Sess. (S.D. 2005); S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at [http://www.voteyesforlife.com/docs/Task\\_Force\\_Report.pdf](http://www.voteyesforlife.com/docs/Task_Force_Report.pdf); see also Siegel, *supra* note 316, at 1011; Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1644–51 (2008); Siegel & Blustain, *supra* note 316.

319. Siegel, *supra* note 316, at 1681.

320. The en banc court heard oral arguments in *Rounds* on April 11, 2007, one week before the Supreme Court issued its decision in *Carhart II*. The *Rounds* court issued its en banc decision June 27, 2008. *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

321. *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1634 (2007).

322. *Id.*

323. See *id.* at 1645.

324. See *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 727 (8th Cir. 2006), *rev'd en banc*, 530 F.3d 724 (8th Cir. 2008); see also Post, *supra* note 316, at 957–60.

325. *Rounds*, 467 F.3d at 723.

326. All the same, "the state officials characterized these three challenged disclosures as statements of medical and scientific fact which are necessary to give complete and accurate

necessary to protect “maternal psychological health.”<sup>327</sup> Yet *Carhart II* seemed to encourage the Eighth Circuit en banc court to accept unblinkingly the South Dakota task force’s conclusions.

Indeed, when the Eighth Circuit issued its en banc ruling,<sup>328</sup> it followed the Supreme Court’s encouragement. The en banc court purported to issue a decision based simply on an “error of law” the district court committed when it ignored the statutory definition of “human being” in deciding that the state-imposed lecture violated physicians’ free speech rights. But to find that the mandated script consisted of medical facts, not ideology, the court could not avoid delving into the factual issues. The court first quoted at length Justice Kennedy’s passage in *Carhart II* (which relied upon the South Dakota task force’s narratives) averring that women require certain information about abortion in order to avoid “severe depression and loss of esteem.”<sup>329</sup> The Eighth Circuit then stated that, “while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide *truthful, non-misleading information* relevant to a patient’s decision to have an abortion.”<sup>330</sup> In deciding whether the required statement was truthful and non-misleading, the court deferred to the state, finding that “the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician.”<sup>331</sup> The court further found that “this biological information about the fetus is . . . relevant to the patient’s decision to have an abortion.”<sup>332</sup>

The dissent criticized the majority’s deference to the legislature on both points. It argued that the majority should not have deferred to the legislature’s dubious findings regarding the psychological consequences of abortion:

Although legislative factfinding is reviewed under a deferential standard, courts retain “an independent constitutional duty to review factual findings where constitutional rights are at stake.” The legislative determinations with respect to the state’s view that abortion results in significantly increased risks of depression or even suicide are highly questionable in light of medical studies in the United States and abroad which have refuted the theory that women undergoing abortions suffer from long term emotional harm or are more at risk than women who carry their pregnancy to term.<sup>333</sup>

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information to women contemplating abortion.” *Id.* at 720; *see also* Goldberg, *supra* note 47, at 1974 (discussing how courts and litigants often blur the lines between empirical “thin” facts and morally laden “thick” facts).

327. *See Rounds*, 467 F.3d at 724, 728 (discounting relevance of the testimony of former abortion patients before the South Dakota legislature). The court did not probe deeply into the state’s assertion that, without the state-mandated information, abortion patients would suffer psychological trauma. The court was addressing whether a preliminary injunction issued by the district court was proper, and the procedural posture of the case limited the court of appeals’ inquiry. *See id.* at 723.

328. *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

329. *Id.* at 734 (quoting *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1634 (2007)).

330. *Id.* at 734–35 (emphasis added).

331. *Id.* at 736.

332. *Id.*

333. *Id.* at 750 (quoting *Carhart II*, 127 S. Ct. at 1637).

It also bemoaned the court's assumption that the required language conveyed plainly biological information and nothing more. The plaintiffs' witnesses had testified that there was no "medical consensus that a full set of DNA constitutes a 'whole, separate, unique, living human being.'"<sup>334</sup> But the majority improperly ignored this testimony in its haste to defer to the legislature's questionable "factual" claim. As the dissent emphasized,

[a]lthough a legislature may choose to give words its own unique definition, it cannot establish by fiat that the term "human being" has only biological connotations, for the constitutional analysis of whether the mandated statements convey factual truths or contestable ideology is not controlled by the wording of the Act. It is the role of the judiciary, rather than the legislature, to determine whether speech and speech regulations implicate the First Amendment.<sup>335</sup>

Voter identification laws present another occasion for considering the paradigm of selective independent judicial review. In *Crawford v. Marion County Election Board*,<sup>336</sup> the Supreme Court upheld an Indiana law that requires voters to show government-issued photo identification when voting in person.<sup>337</sup> The purported basis for the law—and presumably the public concern raised in the legislative proceedings—was the need to prevent voter fraud.<sup>338</sup>

At both the trial and appellate levels, the courts simply assumed that voter fraud among in-person voters was an actual problem in Indiana.<sup>339</sup> The district court granted summary judgment for the defendants, summarizing in a seventy-page opinion the "deluge of data" both sides submitted to support their respective cross motions.<sup>340</sup> However, even though the court found that this data "paint[ed] contrasting pictures" concerning the key factual issue—"whether in-person voter fraud is or should be a concern in Indiana"<sup>341</sup>—it deferred to the defendants' version and granted their motion for summary judgment, rejecting plaintiffs' plea that the court scrutinize the government's facts more closely. Plaintiffs, who filed a cross claim for summary judgment, asserted that many of the defendants' exhibits lacked credibility because they were unsworn, unauthenticated, and contained hearsay.<sup>342</sup> Judge Wood,

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334. *Id.* at 744 (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

335. *Id.* at 744–45 (Murphy, J., dissenting) (citation omitted).

336. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

337. *Id.*

338. Indiana does not keep legislative histories of its statutes. Telephone Interview with Indiana Legislative Services, State of Indiana: Legislative Services Agency (Jan. 24, 2008). The Indiana Secretary of State issued a press release upon the bill's passage claiming credit for advocating for the law and announcing that it "is aimed at preserving voter confidence and promoting integrity in elections." Press Release, Indiana Secretary of State Todd Rokita, Rokita Applauds Passage of Photo Identification Bill and Absentee Ballot Reform (Apr. 12, 2005), available at <http://www.in.gov/sos/press/2005/04122005b.html>.

339. See *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'g* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *reh'g denied*, 484 F.3d 486 (7th Cir. 2007).

340. *Rokita*, 458 F. Supp. 2d at 784, *aff'd*, *Crawford*, 472 F.3d 949.

341. *Rokita*, 458 F. Supp. 2d at 792.

342. *Id.* at 843.

dissenting from the Seventh Circuit's later denial of rehearing en banc, objected to the district court's deferential approach:

The state's justification for the new voting requirement is voter fraud [among in-person voters]. Yet the record shows that the existence of this problem is . . . a "genuine issue of material fact" that may not be resolved in favor of the state in ruling on the state's own motion for summary judgment. In fact, it appears that no one has ever, in Indiana's history, been charged with voter fraud. . . . [I]n this case, the "facts" asserted by the state in support of its voter fraud justification were taken as true without any examination to see if they reflected reality.<sup>343</sup>

Indeed, the district judge not only dismissed the need for such a searching review but appeared persuaded by precisely the kind of undisciplined, politically driven public rhetoric that influences legislatures and makes their fact-finding unreliable.<sup>344</sup>

The Indiana law is a prime example of a political majority using its influence to intrude on a basic individual right, the right to vote. The fact that there had never been a single recorded instance of in-person voter fraud in Indiana underscored the probability that the law was actually intended to disenfranchise certain types of voters seen as unlikely to support the Republican Party.<sup>345</sup> The courts should have required the state to come forward with evidence of fraud to support its asserted interest, and its failure to do so should have been taken into account in the balancing test the courts applied. Instead, the Supreme Court joined the lower courts in simply assuming the validity of the state's asserted interest in fraud prevention. It admitted that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."<sup>346</sup> But, shunning its responsibility to protect "the right that is 'preservative of all rights'"<sup>347</sup> from majoritarian oppression, the Court showed no interest in ascertaining whether the law was based on a sound factual footing.

Like *Lofton*, *Crawford* reflects a common pattern in which courts subordinate the procedural requirements of a summary judgment motion to deference to a legislature's

343. *Crawford*, 484 F.3d at 438–39 (Wood, J., dissenting). In his dissent from the Seventh Circuit's panel decision, Judge Evans also took issue with the court's deference to the government's factual justification:

The fig leaf of respectability providing the motive behind this law is that it is necessary to prevent voter fraud—a person showing up at the polls pretending to be someone else. But where is the evidence of that kind of voter fraud in this record? . . . [T]he defenders of this law candidly acknowledged that no one—in the history of Indiana—had ever been charged with violating that law. Nationwide, a preliminary report to the U.S. Election Assistance Commission has found little evidence of the type of polling-place fraud that photo ID laws seek to stop.

*Crawford*, 472 F.3d at 955 (Evans, J., dissenting).

344. *Rokita*, 458 F. Supp. at 845 (noting the "patently obvious facts" that "voter fraud has been a topic of national concern and that photo identification requirements . . . are becoming ubiquitous," and asserting that "the Court could almost take judicial notice that the topics of voter fraud and voter suppression have been widely discussed in the national media").

345. See *Crawford*, 472 F.3d at 956 (Evans, J., dissenting).

346. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1619 (2008).

347. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

view of the constitutionally relevant facts.<sup>348</sup> Here, the government clearly did not meet its burden under the summary judgment standard. But, equally important, the courts should not have deferred blindly to the legislature's fact-finding because the law implicated the individual right to vote, a "fundamental political right."<sup>349</sup> By failing to demand evidence to show that in-person voter fraud was a problem in Indiana, the courts abdicated their responsibility to protect the important individual rights at stake in this case. This abdication placed its mark on the May elections that followed the Supreme Court's decision: would-be voters whose identity was never in doubt, including some twelve elderly nuns, were turned away for failure to present proper identification.<sup>350</sup> While here the right in question merited a strict legal standard of review, basic individual rights of all stripes should be protected from laws that are based on nothing more than a factual "fig leaf."<sup>351</sup>

#### CONCLUSION

Our judicial system of fact-finding is not perfect, but it is the one we created to protect basic individual rights, and it is the one we insist upon when our own rights are at stake. When a legislature seeks to restrict important personal rights, it possesses neither the institutional legitimacy nor the superior competence that would justify judicial deference to its fact-finding. In contexts ranging from abortion to gay parenting to indecency on the Internet, legislatures and courts tend to reach strikingly divergent outcomes when they evaluate the facts that underlie rights-infringing laws. This should not surprise us. Legislative fact-finding is, at bottom, nothing more than advocacy. Where facts are relevant to determining whether a law violates personal rights, the Constitution demands a more dispassionate factual assessment that only the courts can provide.

This Article has proposed a paradigm of selective independent judicial review of constitutionally significant social facts that would ensure rigorous, impartial fact-finding whenever basic individual rights are at stake. The paradigm takes into account the particular competence that trial courts (as contrasted with appellate courts) bring to bear on their fact-finding. It also recognizes the decisive role that fact-finding plays in the context of all basic individual rights and liberties (not just those accorded strict scrutiny). It therefore ensures that emerging rights receive at least minimal protection from irrational laws based not upon fact but upon political expediency and majoritarian passions. Finally, because the paradigm does not apply across the board to

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348. See *supra* text accompanying notes 174–79. In *Turner II*, Justice O'Connor criticized the majority for ignoring key disputed facts in that case and upholding summary judgment for the government. See *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 236 (1997) (O'Connor, J., dissenting) (noting the existence of disputed factual issues and remarking, "[w]e are not . . . at liberty to substitute speculation for evidence or to ignore factual disputes that call the reasonableness of Congress' findings into question.").

349. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

350. See Deborah Hastings, *New ID Law Keeps Nuns from Voting*, S. BEND TRIB., May 7, 2008, at B1.

351. See *Crawford v. Marion County Election Bd. (Crawford I)*, 472 F.3d 949, 955 (7th Cir. 2007) (Evans, J., dissenting).

constitutional determinations, it allows courts to defer to legislative fact-finding in other areas in which deference may be more appropriate. In particular, courts may still show deference when legislatures seek to create or protect, rather than restrict, individual rights.