Knights-Errant: The Roberts Court and Erroneous Fact-Finding

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This Article examines the Supreme Court's recent penchant for fact-finding, both in light of traditional views of where fact-finding belongs in the judiciary, and in light of our constitutional separation of powers. Generally, the federal adversarial system leaves fact-finding to trial courts. This Article contends that this assignment provides a separation of powers restraint on judicial activism, and that recent violations of that historic practice allowed extra-record judicial adventuring outside proper constitutional bounds.

In Shelby County v. Holder *and* Citizens United v. FEC*, the Court's fact-finding was not only inappropriate for a reviewing court, but also erroneous—indeed clearly so. This Article shows how events have discredited the fact-finding, and how the Court has refused to reconsider its errors. Recent decisions in* Dobbs v. Jackson Women's Health Organization, New York State Rifle & Pistol Ass'n v. Bruen, and Kennedy v. Bremerton School District *also stand on dubious fact-finding by the Court, and the former two cases invite yet further appellate fact-finding—into "history and tradition." This Article argues that false fact-finding provided the analytical means to deliver victories for identifiable partisan interests in these cases.*

These cases, the false fact-finding undergirding them, the persistence of the erroneous facts, and the policy consequences of the uncorrected errors, together create a new predicament requiring attention by academia, lower courts, and the other branches. This Article proposes theories and actions that would defend our government against a Court eager to aggrandize judicial power to political ends.

I. INTRODUCTION

The American people are engaged in a healthy and overdue dialogue about the nature of the United States Supreme Court, its proper role in a democracy, and whether reforms to the Court and its powers are needed.[1] This conversation grew from an emerging sense that the Court is using its power to further a political agenda, not fair and impartial justice.[2]

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[1] *See* NIKOLAS BOWIE, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES 1–5 (June 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [hereinafter BOWIE TESTIMONY]; NOAH FELDMAN, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., HEARING ON "THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES" 1 (June 2021) https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf (on file with the *Ohio State Law Journal*); MICHAEL W. MCCONNELL, WRITTEN TESTIMONY BEFORE THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 1–3 (June 2021) https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf (on file with the *Ohio State Law Journal*); SAMUAL MOYN, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., HEARING ON "THE COURT'S ROLE IN OUR CONSTITUTIONAL SYSTEM" 3–9 (June 2021) https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf (on file with the *Ohio State Law Journal*).

[2] *See, e.g.*, Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of the Supreme Court at New Lows, with Strong Partisan Differences Over Abortion and Gun Rights*, MARQ. L. SCH. POLL (July 20, 2022), https://law.marquette.edu/poll/2022/07/20/mlspsc09-court-press-release/ [https://perma.cc/ZZ6Q-ZFGB] (finding that "those saying that justices' decisions are

Over the past decade or so, the Supreme Court's Republican-appointed majority has had a near-uniform pattern of handing down rulings benefitting identifiable Republican donor interests.[3] These decisions have involved hot-button issues like reproductive rights,[4] immigration,[5] health care,[6] voting rights,[7] affirmative action,[8] civil rights,[9] workers' rights and union fees,[10]

based mainly on politics has increased from 35% to 52%" from September 2019 to July 2022); Domenico Montanaro, *Poll: Majorities Oppose Supreme Court's Abortion Ruling and Worry About Other Rights*, NPR (June 27, 2022), https://www.npr.org/2022/06/27/1107733632/poll-majorities-oppose-supreme-courts-abortion-ruling-and-worry-about-other-righ [https://perma.cc/P5YD-YKUN] (reporting that, "[b]y a 57%-to-36% margin, respondents said the decision [in *Dobbs v. Jackson Women's Health Organization*] was mostly based on politics as opposed to the law"); PEW RSCH. CTR., PUBLIC'S VIEWS OF SUPREME COURT TURNED MORE NEGATIVE BEFORE NEWS OF BREYER'S RETIREMENT 5 (Feb. 2022), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/02/PP_2022.02.02_views-of-SCOTUS_REPORT.pdf [https://perma.cc/XH57-Q39D] (finding that "[a]mong the overwhelming majority of adults (84%) who say Supreme Court justices should not bring their own political views into the cases they decide, just 16% say they do an excellent or good job in keeping their views out of their decisions").

[3] *See* sources cited *infra* note 14.

[4] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 132 (2007); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2368 (2018); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372–73 (2020); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530, 537 (2021); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

[5] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018); Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 4 (2019) (mem.) (Sotomayor, J., dissenting); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599 (2020) (mem.) (Gorsuch, J., concurring); Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (mem.) (Breyer, J., concurring in part and dissenting in part).

[6] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539 (2012); King v. Burwell, 576 U.S. 473, 479 (2015); Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 68 (2020) (per curiam); Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam); Chrysafis v. Marks, 141 S. Ct. 2482, 2482 (2021) (mem.); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 142 S. Ct. 661, 670 (2022) (per curiam) (Gorsuch, J., concurring).

[7] *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 536 (2013); Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1838 (2018); Abbott v. Perez, 138 S. Ct. 2305, 2313, 2335 (2018); Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019); Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (mem.) (Kavanaugh, J., concurring); Ross v. Nat'l Urb. League, 141 S. Ct. 18, 21 (2020) (mem.) (Sotomayor, J., dissenting); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021); Merrill v. Milligan, 142 S. Ct. 879, 882 (2022) (mem.) (Kavanaugh, J., concurring); Wis. Legis. v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1250–51 (2022) (per curiam).

[8] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711 (2007).

[9] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009); Connick v. Thompson, 563 U.S. 51, 54 (2011);

campaign finance,[11] "dark money,"[12] and climate change.[13] The Roberts Court from 2005 through 2019 furnished more than 80 5-4 wins for Republican donor interests—often abandoning self-professed jurisprudential principles to reach those results.[14]

Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 322 (2012); Vance v. Ball State Univ., 570 U.S. 421, 424 (2013); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013); Glossip v. Gross, 576 U.S. 863, 867 (2015); Shinn v. Ramirez, 142 S. Ct. 1718, 1739–40 (2022); Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022).

[10] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 147 (2012); Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 302 (2012); Harris v. Quinn, 573 U.S. 616, 620 (2014); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018); Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1138 (2018); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

[11] *See, e.g.*, Davis v. FEC, 554 U.S. 724, 728 (2008); Citizens United v. FEC, 558 U.S. 310, 319 (2010); Ariz. Free Enter. Club's Freedom Club v. Bennett, 564 U.S. 721, 728 (2011); Am. Tradition P'ship v. Bullock, 567 U.S. 516, 516–17 (2012) (per curiam); McCutcheon v. FEC, 572 U.S. 185, 192–93 (2014), FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1645, 1656 (2022).

[12] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379 (2021).

[13] *See* Summers v. Earth Island Inst., 555 U.S. 488, 490 (2009); Michigan v. EPA, 576 U.S. 743, 747 (2015); West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.); West Virginia v. EPA, 142 S. Ct. 2587, 2599–600, 2616 (2022).

[14] For seventy-three decisions from Chief Justice Roberts's swearing-in through the Court's 2017 Term, see SHELDON WHITEHOUSE, AM. CONST. SOC'Y, A RIGHT-WING ROUT: WHAT THE "ROBERTS FIVE" DECISIONS TELL US ABOUT THE INTEGRITY OF TODAY'S SUPREME COURT 2, app. at A1–14 (Apr. 2019), https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf [https://perma.cc/9P6D-3G4X]. More recent decisions expanding this partisan 5-4 streak to eighty include Nielsen v. Preap, 139 S. Ct. 954, 959 (2019); Bucklew v. Precythe, 139 S. Ct. 1112, 1118 (2019); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1925–26 (2019); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019); and Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019). For a discussion of the conservative justices' abandonment of self-professed conservative principles, see Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 200 (2015) [hereinafter Whitehouse, *Conservative Judicial Activism*]; Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 488–90 (2012); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 879 (2016); Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), https://blog.harvardlawreview.org/not-conservative/ [https://perma.cc/N787-YMBC]; Michael J. Klarman, *The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. (SUP. CT. 2019 TERM) 1, 10 (2019); & ILAN WURMAN, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., TESTIMONY BEFORE THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 4 (June 2021) [hereinafter WURMAN TESTIMONY] https://www.whitehouse.gov/wp-content/uploads/2021/06/Wurman-Testimony-Supreme-Court-Commission.pdf [https://perma.cc/BNH9-GUJG] (arguing that *Shelby County*'s reliance on the "equal sovereignty principle" is wrong on originalist grounds).

Off-pattern decisions like *Obergefell v. Hodges*[15] and *Bostock v. Clayton County, Georgia*[16] were rare even before the retirement of Justice Anthony Kennedy, the death of Justice Ruth Bader Ginsburg, and the appointment of Justice Amy Coney Barrett. [17] In the October 2021 term, the new 6-3 right-wing supermajority returned to pattern with major victories for Republican donor interests by eliminating the constitutional right to abortion,[18] eroding the separation between church and state,[19] inhibiting common-sense gun-safety regulations,[20] and hobbling government regulation of corporations.[21] Tellingly, the supermajority also eroded transparency requirements for political spending, laying the groundwork for a new constitutional right to anonymity for big donors seeking to influence our politics.[22]

During the Trump administration, a cadre of extremely wealthy, partisan donors funneled hundreds of millions of dollars into an effort to pack the Supreme Court with new right-wing justices.[23] They chose nominees, ran ad campaigns for them, and supported epublican senators who confirmed them.[24] Dark money fueled this campaign, with identity-laundering front groups obscuring the real donors.[25] Many of these groups also fund the manufacture

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[15] Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[16] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[17] *See* Jane S. Schacter, *Bostock and Changes of the Guard at the Supreme Court*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (June 15, 2020), https://law.stanford.edu/2020/06/15/bostock-and-changes-of-the-guard-at-the-supreme-court/ [https://perma.cc/GR2W-87Z4]; Danaya Wright, *The Surprises in the Supreme Court's Same-Sex Marriage Decision*, CONVERSATION (June 29, 2015), https://theconversation.com/the-surprises-in-the-supreme-courts-same-sex-marriage-decision-43684 [https://perma.cc/2F39-X5YY].

[18] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[19] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022).

[20] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

[21] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[22] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

[23] *See* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141, 153–55 (2021) [hereinafter Whitehouse, *Flood of Judicial Lobbying*]; Evan Vorpahl, *Leonard Leo's Court Capture Web Raised Nearly $600 Million Before Biden Won; Now It's Spending Untold Millions from Secret Sources to Attack Judge Ketanji Brown Jackson*, TRUE N. RSCH. (Mar. 22, 2022), https://truenorthresearch.org/2022/03/leonard-leos-court-capture-web-raised-nearly-600-million-before-biden-won-now-its-spending-untold-millions-from-secret-sources-to-attack-judge-ketanji-brown-jackson [https://perma.cc/U93P-VHGL].

[24] *See* DEBBIE STABENOW, CHUCK SCHUMER & SHELDON WHITEHOUSE, DEMOCRATIC POL'Y & COMMC'NS COMM., CAPTURED COURTS: THE GOP'S BIG MONEY ASSAULT ON THE CONSTITUTION, OUR INDEPENDENT JUDICIARY, AND THE RULE OF LAW 19–23 (May 2020), https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf [https://perma.cc/RKM6-G44X].

[25] *See id.*; Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-

of novel legal arguments via results-oriented "scholarship," and then fund litigant groups and supportive amici curiae to give Republican-appointed justices the roadmap to incorporate these arguments into law.[26] Against this backdrop, it is no surprise that public faith in the Supreme Court is at an all-time low.[27]

One overlooked feature of the Republican appointees' results-oriented jurisprudence is their handling of the facts. This Article will look at their pattern of extra-record fact-finding, and assess it against the constitutional restraints designed to curtail an activist judiciary. Longstanding rules limit reviewing courts' power to engage in free-range fact-finding.[28] An appellate court, unmoored from the factual record developed in the trial court, may aggrandize its power like "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."[29] A Supreme Court untethered from the fact-finding of the trial court (or the fact-finding of Congress) can craft facts that let it roam widely into policymaking. Dubious fact-finding figured in several high-profile decisions from this last term, including *Dobbs v. Jackson Women's Health Organization*,[30] *New York State Rifle & Pistol Association v. Bruen*,[31] and *Kennedy v. Bremerton School District*.[32] But the right-wing justices started down this path over a decade ago, in cases striking down the core of the Voting Rights Act, *Shelby County v. Holder*,[33] and a key provision of the Bipartisan Campaign Reform Act, *Citizens United v. Federal Election Commission*.[34]

Shelby County and *Citizens United* were telling. In both cases, the Court gutted bipartisan legislation, replacing Congress's copious and meticulously compiled findings with its own extra-record fact-finding.[35] Similarly, it

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society-courts/?itid=lk_inline_manual_8 [https://perma.cc/4KXG-FMSA]; Vorpahl, *supra* note 23.

[26] *See* Whitehouse, *Flood of Judicial Lobbying*, *supra* note 23, at 153–56; *see also* Brief of U.S. Senators Sheldon Whitehouse, Richard Blumenthal, Bernie Sanders & Elizabeth Warren as Amici Curiae Supporting Respondents at 2, 10, 13, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530).

[27] Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/R4LM-CD55].

[28] *See, e.g.*, Brief of Former Federal District Judges as Amici Curiae Supporting Respondents at 3, Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (No. 18-966).

[29] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

[30] *See infra* Part III.B.1.a.

[31] *See infra* Part III.B.1.b.

[32] *See infra* Part III.B.2.

[33] Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

[34] Citizens United v. FEC, 558 U.S. 310, 372 (2010).

[35] *See id.* at 411–12 (Stevens, J., concurring in part and dissenting in part); *Shelby Cnty.*, 570 U.S. at 580, 593 (Ginsburg, J., dissenting).

dodged around record facts in those cases.[36] In both decisions, the facts found were not just drive-by errors, but essential to the result the Court reached.[37] And in both cases, the facts were false.[38] The result of those decisions was rampant voter suppression and unlimited political spending by unaccountable special interests, to the immediate partisan benefit of Republican political interests.[39]

This article examines how judicial overreach is enabled by false appellate fact-finding, how that false fact-finding violates rules and principles of appellate adjudication, and how we should respond to judicial precedent that stands on a demonstrably false factual predicate. Parts I and II review and build on existing debates over what kinds of reforms the Supreme Court might need. Part I analyzes the rules that have traditionally restrained appellate fact-finding and the structural principles that undergird them—including the constitutional separation of powers. Part II explores how the Court has strayed from these longstanding restraints on appellate fact-finding to support its desired outcomes in major cases like *Shelby County* and *Citizens United*. Part II also adds discussion on how cases from this past term—*Dobbs*, *Bruen*, and *Bremerton*—exacerbate the pattern of erroneous fact-finding. Part III considers reforms that might curb this errant practice, and asks what the other branches should do about decisions based on demonstrably false facts. Congress has a particular stake where the Supreme Court has rejected actual congressional fact-finding in favor of its own factual inventions.

II. OVERVIEW OF JUDICIAL FACT-FINDING

Over nearly 250 years, the federal judiciary has developed a well-documented body of rules and norms governing when and how courts may properly find facts. Limitations on judicial fact-finding, like many other rules governing the judiciary, respect "the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[40] They preserve the separation of powers, provide clear limits on courts' authority, and prevent courts from usurping functions, like policymaking, reserved to the political branches.[41] These limitations, when honored, in turn safeguard the federal judiciary's legitimacy.

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[36] *See Citizens United*, 558 U.S. at 414, 455 (Steven, J., concurring in part and dissenting in part); *Shelby Cnty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

[37] *See* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 28 (2011); *see also Shelby Cnty.*, 570 U.S. at 580 (Ginsburg, J., dissenting).

[38] *See Citizens United*, 558 U.S. at 455 (Stevens, J., concurring in part and dissenting in part); *Shelby Cnty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

[39] Klarman, *supra* note 14, at 183–84, 206.

[40] Gorod, *supra* note 37, at 16 (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).

[41] *Id.* at 15.

A. *Structural Guardrails on Judicial Power*

The foundation of our democratic republic is majority rule. In a country of more than 300 million people, elections carry out the majority's will.[42] At all levels of government, voters weigh in on policies and ideas by casting votes for candidates who share their views and values. If the candidates do not, voters have redress at the polls. [43]

Some disputes are not settled by majority rule. Animating the Framers' choices in setting up the Republic was a desire to defend against (as Madison explained in *Federalist No. 10*) "the superior force of an interested and overbearing majority."[44] One protection is an independent judiciary, insulated from the political process governing the other branches.[45] Instead of merely hoping that judges will have "an uncommon portion of fortitude,"[46] the Framers included in the Constitution features like the Good Behavior Clause,[47] restrictions on the ability to reduce judges' salaries,[48] and judicial selection through appointments instead of elections,[49] intended to promote "inflexible and uniform adherence to the rights of the Constitution" by protecting judges against political reprisal.[50] The Constitution encourages Article III courts to act as "bulwarks of a limited Constitution against legislative encroachments."[51]

At the same time, the Framers recognized the danger of judges who are not accountable to the people. At the Constitutional Convention, delegates rejected proposals to give judges veto power over federal legislation[52] and to permit the Supreme Court to issue advisory opinions on "important questions of law" at the request of the President or Congress.[53] They limited federal judicial power to cases "of a Judiciary Nature,"[54] to actual "Cases" and "Controversies."[55] In

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[42] *See The U.S. Election System*, ADELPHI UNIV. LIBRS., https://libguides.adelphi.edu/c.php?g=745658&p=5340353 [https://perma.cc/X4ZZ-DJLQ].

[43] *See id.*; *Plurality and Majority Systems*, BRITANNICA, https://www.britannica.com/topic/election-political-science/Plurality-and-majority-systems [https://perma.cc/6Y42-P7W3].

[44] THE FEDERALIST NO. 10 (James Madison).

[45] THE FEDERALIST NO. 78 (Alexander Hamilton).

[46] *Id.*

[47] U.S. CONST. art. III, § 1.

[48] *Id.*

[49] *Id.* art. II, § 2.

[50] THE FEDERALIST NO. 78 (Alexander Hamilton).

[51] *Id.*

[52] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 294–95 (Max Farrand ed., Yale Univ. Press 1911) (1787).

[53] *Id.* at 341.

[54] *Id.* at 430.

a speech before the House of Representatives, John Marshall, later to become Chief Justice, recognized the importance of this guardrail:

> If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary.[56]

Without such restrictions (to return to Justice Benjamin Cardozo's famous observation), a judge can act as "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."[57]

Congress has a big say here. Article III, section 1 of the Constitution authorizes Congress to "ordain and establish" lower federal courts.[58] Congress, in the Judiciary Act of 1789, created the two-tiered structure of district courts and circuit courts that survives to this day.[59] In case of a runaway judiciary, the Constitution empowers Congress to alter the jurisdiction and structure of the federal courts. Article III, section 2 limits the Supreme Court's original jurisdiction to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[60] Over all other cases, the Supreme Court has appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make,"[61] a clause the Supreme Court concedes lets Congress define the extent of the Court's appellate jurisdiction.[62]

Unlike its coequal branches, the judiciary does not enjoy the natural legitimacy afforded by democratic election.[63] The judiciary acts with "neither

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[55] U.S. CONST. art. III, § 2, cl. 1; THE FEDERALIST NO. 83 (Alexander Hamilton) ("The expression of [] cases [delineated by the Constitution] marks the precise limits beyond which the federal courts cannot extend their jurisdiction. . . .").

[56] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (emphasis added); *see also* 4 THE PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen & Leslie Tobias eds., 1984).

[57] CARDOZO, *supra* note 29, at 141.

[58] U.S. CONST. art. III, § 1.

[59] Judiciary Act of 1789, ch. 20, §§ 1–4, 1 Stat. 73, 73–75 (1789).

[60] U.S. CONST. art. III, § 2.

[61] *Id.*

[62] *See, e.g.*, Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Elsworth, C.J.) ("If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."); Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847) ("[T]he Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress . . . .").

[63] *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U. S., DRAFT FINAL REPORT 21–22 (Dec. 2021) [hereinafter FINAL REPORT], https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf [https://perma.cc/4YBL-PCDB].

force nor will," and can wield neither "the sword [n]or the purse."[64] Rather, the judiciary preserves its authority by cultivating public faith in its "judgment."[65] Guardrails limiting the judiciary's reach actually strengthen that faith, by bolstering public confidence that federal judges are not wielding their power to achieve unwelcome political objectives.[66] One of those guardrails is the assignment within the judicial branch of the fact-finding function.

B. *Constraints on Judicial Fact-Finding*

Rogue judicial fact-finding can be a tool for ambitious judges to jump the guardrails, so our system checks judicial power by limiting and dividing judges' authority to find facts.[67] Fact-finding mischief at the trial court level is constrained by a slew of doctrine, not relevant to this article. Appellate courts have oversight to make sure district judges do not misuse their fact-finding function.[68] But for good reasons, appellate courts are tethered to the fact-finding of the district courts (or in certain circumstances, of Congress), absent misuse.[69] This separation of functions assists the separation of powers in restricting judicial power to actual cases or controversies—not to their general topics, but to their actual facts.[70] Absent that check, unbridled fact-finding opens the gate to political adventure and unbridled policymaking.[71]

Before going further, it is necessary to start by defining "fact." Distinguishing between "fact" and "law" in judicial opinions can be troublesome, and in certain instances, nearly impossible. But Allison Orr Larsen has offered a definition of "fact" that helps clarify this distinction, at least in many cases. To Larsen, factual assertions have two key elements: they "can be falsified (at least theoretically)"[72] and they are "typically followed by evidence,"[73] instead of being supported only by "tools of the legal trade, such as analogies, logical reasoning, common sense, and . . . normative

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[64] THE FEDERALIST NO. 78 (Alexander Hamilton).

[65] *Id.*

[66] *See* Brief of Former Federal District Judges, *supra* note 28, at 2.

[67] *See id.* at 4.

[68] *See id.* at 11–12.

[69] *See id.* at 12–13.

[70] *See id.* at 19–20.

[71] *See* Brief of Former Federal District Judges, *supra* note 28 at 19–20 (discussing the role of limiting appellate court fact-finding in preserving judicial legitimacy); *see also* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1087 ("If Rule 52(a) and fact typology are treated in a principled manner, the possibility or perception of bias can be mitigated and their effectiveness as an ideological weapon dulled.").

[72] Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 69 (2013) [hereinafter Larsen, *Factual Precedents*].

[73] Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 185 (2018) [hereinafter Larsen, *Constitutional*].

judgments."[74] Not everyone will agree that every Supreme Court assertion described below is a purely "factual" claim. But each one, at minimum, has factual qualities that warrant careful scrutiny given the concerns about Supreme Court fact-finding raised here.

1. *Formal Constraints*

The American adversarial system generally limits appellate judges' consideration of the facts to review of the record developed at trial by the parties.[75] Unlike judges in civil law systems, who assemble the factual record themselves, American judges have no investigatory role.[76] Instead, federal trial judges "rely on the parties to frame the issues for decision," operating on "the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."[77] This system promotes fairness by giving each party the "opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention."[78] This process, policed and administered by the trial court, builds the record upon which appellate courts must rely, and it builds it in the daylight of adversarial process.[79]

Appellate courts are kept out of fact-finding.[80] First, they are less equipped to find facts than lower courts.[81] Trial courts are often steeped in the facts of a case for months or years, and can competently assess credibility from seeing firsthand the testimony of experts and percipient witnesses.[82] Assigning fact-finding responsibility to trial courts fosters attentive consideration of the facts by judges, and a "sharpe[r] . . . presentation" of the facts and issues by

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[74] Larsen, *Factual Precedents*, *supra* note 72, at 70.

[75] *See* Brief of Former Federal District Judges, *supra* note 28 at 12–13.

[76] VIVIENNE O'CONNOR, INT'L NETWORK TO PROMOTE THE RULE OF L., COMMON LAW AND CIVIL LAW TRADITIONS 17–18 (Mar. 2012), https://ssrn.com/abstract=2665675 [https://perma.cc/2RZG-NHPT].

[77] Greenlaw v. United States, 554 U.S. 237, 243–44 (2008).

[78] FED. R. EVID. 201(b), advisory committee's note on proposed rules (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVES OF LAW 69, 93 (Roscoe Pound, Erwin N. Griswold & Arthur E. Sutherland eds., 1964)) ("The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.").

[79] *See* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 126 (2008).

[80] *See* Brief of Former Federal District Judges, *supra* note 28 at 12–13.

[81] *See* FAIGMAN, *supra* note 79, at 125.

[82] Brief of Former Federal District Judges, *supra* note 28, at 14–15; Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1202 (2013); James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 907–13 (2000).

parties,[83] "who know that they will not have any significant second chance to convince another tribunal on the facts."[84] Appellate courts see only a cold record, and have no procedural role to retry the case or hold additional hearings to consider more evidence.[85] This assignment of responsibilities encourages "efficiency, stability, and institutional competence" by preventing re-litigation of every factual dispute at each level of the judiciary, "leav[ing] appellate courts free to focus on legal issues," thereby bolstering "public confidence in trial courts' decisions."[86]

This assignment of responsibilities is reflected in well-established appellate deference to a district court's factual conclusions.[87] Appellate courts can overturn a trial court's finding of fact only when that finding is "clearly erroneous," a daunting standard of review, requiring "the *definite and firm conviction* that a mistake has been committed."[88] Absent clear error, reviewing courts are generally bound to the record assembled below.[89] When a reviewing court finds fault with a trial court's fact-finding, the ordinary and proper remedy is not to substitute its own fact-finding, but to honor this division of responsibilities and "remand the case to the trial court for further factual development."[90]

The assignment of fact-finding to trial courts, and away from appellate courts, provides more than convenience of administration. It provides a protection against judicial mischief that reinforces the goal of the Constitution's "cases or controversies" requirement. At the trial court, free-range factual adventuring is constrained by the challenges of the adversaries, the rules of evidence, and the prospect of appeal; at the more dangerous appellate level, free-range factual adventuring is constrained by denying appellate courts a fact-finding role.[91] Under this divided system, a false fact would have to be agreed on by both the trial and appellate court, after adversarial challenge, dramatically reducing the prospect of such a misadventure.

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[83] Brief of Former Federal District Judges, *supra* note 28, at 15–16; Pendergrass v. N.Y. Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950) ("The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.").

[84] Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 652 (1988).

[85] *See* FAIGMAN, *supra* note 79, at 127.

[86] Borgmann, *supra* note 82, at 1201.

[87] Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 476 (1988); *see also* Brief of Former Federal District Judges, *supra* note 28, at 5–13 (reviewing the history of deference to district courts' fact-finding).

[88] United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (emphasis added).

[89] Borgmann, *supra* note 82, at 1199.

[90] *Id.* at 1214.

[91] *See id.* at 1190.

There is little point to the Constitution snubbing an unelected judiciary down to actual "cases or controversies" if judges are free to define the facts surrounding the case or controversy as they see fit. On the road from an actual constitutional case or controversy to an unconstitutional advisory opinion, freedom to manufacture facts—particularly large-scale "legislative facts"—can take you a long way. Specificity matters. A proper "case or controversy" does not introduce a general topic for judicial policymaking; it presents actual specific facts that limit the range of judicial adventure.[92]

2. *The Nature of Fact-Finding*

Courts should deviate from these traditional fact-finding constraints only in rare circumstances.[93] One way that courts deviate is through "judicial notice," which allows courts to accept into evidence facts that have not been submitted through ordinary procedures.[94] To be formally noticed under the Federal Rules of Evidence, facts must not be "subject to reasonable dispute."[95] That usually means uncontestable facts, like the day of the week Christmas falls on in a given year.[96] As a result, such "noticed" facts present little danger.

Fact-finding under the Federal Rules ordinarily involves adjudicative facts, which are "facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were."[97] Adjudicative facts are most often adduced via testimony and exhibits presented at trial,[98] are subject to scrutiny and challenge,[99] are protected by ordinary clear error review on appeal,[100] and present the common run of the fact-finding mill.

More troublesome are "legislative" facts.[101] "A legislative fact is not case-specific, but is rather a generalized claim about the state of the world."[102]

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[92] Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

[93] *See* John C. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 376–79 (1982) (rebutting the argument that appellate courts may never conduct fact-finding).

[94] *See* FED R. EVID. 201(b)–(c).

[95] FED. R. EVID. 201(b).

[96] FED. R. EVID. 201(a) advisory committee's note on proposed rules.

[97] Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

[98] FED. R. EVID. 201(a) advisory committee's note on proposed rules.

[99] FED. R. EVID. 201(e).

[100] Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016).

[101] *See* FED. R. EVID. 201(a) advisory committee's note on proposed rules.

[102] Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1774 (2014) [hereinafter Larsen, *Trouble*]; *see also* Larsen, *Factual Precedents*, *supra* note 72, at 71 ("A legislative fact . . . is a generalized fact about the world, as opposed to a 'whodunit' fact relating to the parties before a court in any one case."). For a discussion of the origins of the term and alternative definitions, see *id.* at 71 n.57.

Unlike adjudicative facts, legislative facts can enter the case through avenues "ranging from legislative hearing transcripts to independent judicial research."[103] Sometimes, legislative facts are based on not much at all. Justice Kennedy asserted in *Gonzales v. Carhart* that "some women come to regret their choice" to have an abortion, despite having "no reliable data" to back up the assertion.[104]

Because "legislative" facts are so different, and so dangerous, legislative facts found by trial courts are treated with less deference on appeal than adjudicative facts: "it is widely believed that [legislative] facts are not subject" to the "'clearly erroneous'" standard of review, and instead "that appellate courts should review them independently."[105] That's well and good for trial court fact-finding adventures, but it leaves the danger of appellate "legislative fact-finding," where review is not a robust corrective—or in the case of the Supreme Court, not a corrective at all.[106]

Constitutional questions open another door to fact-finding by courts. Assessing the meaning of the Constitution can entail finding a variety of facts, from historical analysis to observations about social values.[107] The Supreme Court has developed a somewhat ill-defined and inconsistently applied "constitutional fact doctrine," which "holds that, in order to retain authority over constitutional interpretation, appellate courts must review independently all factual determinations that are dispositive of the ultimate constitutional question in a case."[108] Here again, the danger of free-range fact-finding is acknowledged by a lowered level of deference to the trial court fact-finder, but what about appellate adventuring? Where are those constraints?

Constitutional decisions have special import. Such cases often involve questions about fundamental rights or the power of the people to act through their government, so the stakes for society can be very high.[109] Constitutional decisions of the Supreme Court can be corrected only by constitutional amendment, or by the Court itself.[110] The prospect of repairing the error via democratic process is largely forfeit, so the danger of errant appellate fact-finding is particularly grave. A false fact baked into a Supreme Court decision has no natural repair.

In sum, there is a constitutional fact-finding "danger zone" for the judiciary at the intersection of three problematic behaviors: (a) sweeping or determinative fact-finding, (b) of legislative or constitutional "facts," (c)

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[103] FAIGMAN, *supra* note 79, at 45.

[104] Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

[105] Borgmann, *supra* note 82, at 1188 (quoting FED. R. CIV. P. 52(a)(6)).

[106] *Id.* at 1190–91.

[107] *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 553 (1991).

[108] Borgmann, *supra* note 82, at 1206.

[109] *See* Faigman, *supra* note 107, at 610–11.

[110] *See* U.S. CONST. art. V; Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

occurring at the appellate level, or worse, at the Supreme Court. It is into that danger zone we proceed.

3. *Dangers of Unconstrained Judicial Fact-Finding*

Unbridled judicial fact-finding at the appellate or Supreme Court level is a danger both to judicial legitimacy and the separation of powers. It is a danger because it escapes the testing of the adversarial process, and it is a danger because it narrows or eliminates the prospect of review by other courts.

Misuse of "legislative" facts elevates these dangers because such facts can veer outside the specific, contested details of the case.[111] "Constitutional" fact-finding, like "legislative" fact-finding, also increases the danger that appellate courts will overstep their constitutional role.[112] The findings can reach far beyond the facts of the case, and can elude correction via democratic process.[113]

These constitutional dangers implicate the separation of powers most clearly when courts review duly enacted statutes passed by Congress, and dismiss a factual record compiled by Congress. Congress is a coequal and popularly elected branch with a constitutional fact-finding prerogative of its own.[114] Disregard by appellate courts of congressionally found facts directly arrogates power to the judiciary and away from Congress, contravening the principle that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process."[115] Indeed, the ordinary rule is that courts are "not to 'reweigh the evidence *de novo*, or to replace Congress' factual predictions with [their] own.'"[116]

The Constitution assigns a fact-finding power to Congress for good reasons. First, "the federal judiciary does not possess either the expertise or the constitutional authority to determine which problems require legislative attention. Moreover, the people elect members of Congress to represent their normative views and address the nation's problems."[117] Thus, the Court degrades the Constitution's separation of powers (and its own legitimacy)

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[111] *See* FED. R. EVID. 201(a) advisory committee's note on proposed rules; *see also* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1293–95 (2012) [hereinafter Larson, *Confronting*].

[112] *See* Faigman, *supra* note 107, at 547–48.

[113] *See id.*

[114] *See* Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 768 (2008).

[115] Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 199 (1997); *see also* Note, *supra* note 114, at 775 ("By choosing to conduct its own factual review, the Court necessarily exercises power assigned by the Constitution to Congress, thereby enhancing its own authority . . . .").

[116] *Turner II*, 520 U.S. at 211 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994)).

[117] Eric Berger, *When Facts Don't Matter*, 2017 BYU L. REV. 525, 590–91 (2017).

when it "retains for itself the power to decide not only the content of the law but also the fundamental facts about the world in which we live."[118] Second, Congress is better able to remedy its errors, subject to popular governance; judicial error can persist indefinitely behind fortifications designed to protect judicial independence.[119] A Court misusing its defenses to persist in error dishonors and misuses those protections.

There seems to be a lot of this going on, with worse to come. This past term, the Supreme Court opened the door to especially dangerous fact-finding by defining certain constitutional rights using the Nation's "history and tradition."[120] This inquiry into history and tradition presents a marked shift from traditional "means-end" scrutiny long used to determine when a law encroaches on a constitutional right.[121] Instead of assessing the government's interest in the regulation, and whether the law is sufficiently tailored to achieve that interest, federal judges are now asked to undertake historical expeditions into bygone legal regimes, the intent of long-dead legislators, public opinion in past eras, and other such areas of oft-disputed "fact."[122]

This sea change gives ambitious judges further opportunity to knight-errant through sweeping "factual" determinations that they are ill-equipped to make, and that sometimes cannot be made definitively or objectively at all.[123] It is one thing, under the "means-end" test, for appellate court judges to reach for and assess facts about the world in which they live. It is another thing entirely to rely on judges' evaluation of facts about *past* worlds that are harder to pin down. District Judge Carlton Reeves recently asked whether he should appoint a professional historian to aid the court's "history and tradition" analysis in a Second Amendment case:

> This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform.[124]

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[118] *Id.* at 592.

[119] *See* Note, *supra* note 114, at 786.

[120] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2128–31; *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 ("[T]his Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (citations omitted)); *Id.* at 2434 (Sotomayor, J., dissenting).

[121] *See Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

[122] *See, e.g.*, *id.* at 2130–31 (majority opinion).

[123] *Id.* at 2177 (Breyer, J., dissenting); Stephen A. Siegel, *How Many Critiques Must Historians Write?*, 45 TULSA L. REV. 823, 823–24 (2011).

[124] United States v. Bullock, No. 3:18-CR-165-CWR-FKB, slip op. at 3 (S.D. Miss. Oct. 27, 2022).

Straying far from uncontested "judicial notice," and well into the danger zone of "legislative" or "constitutional" facts, judges who fact-find their way through history risk turning the courtroom into an "echo chamber where the history the [judges] cite is the history pressed to them by the groups and lawyers they trust."[125] The elusive quest for historical facts lends itself to courts adopting those facts "which conveniently comport[] with their preexisting worldviews and normative priors."[126]

No matter the test used, unconstrained fact-finding at the appellate or Supreme Court level opens up the judicial process to manipulation. Supreme Court justices increasingly rely on legislative facts offered by a rapidly expanding community of amici curiae.[127] As the body of amicus briefs grows, so does the number of briefs containing "eleventh-hour, untested, advocacy-motivated claims of factual expertise."[128] This danger is worsened by the Court's disclosure rules, which let amici obscure even the most egregious coordination with parties they support.[129] The Court's willingness to engage in fact-finding adventures encourages amici to present "facts" that may be made up entirely, that are not subject to adversarial testing, and that come via anonymously funded front groups.[130] Parachuting "facts" into a Supreme Court opinion allows amici to avoid the adversarial and appellate processes of traditional judicial fact-finding. When the funders of these groups have contributed large sums of money to support confirmation of the justices,[131] the peril to public confidence in the Court and to the rights of the parties ought to

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[125] Allison Orr Larsen, Opinion, *The Supreme Court Decisions on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022), https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249 [https://perma.cc/VH4S-BXZE].

[126] *Id*.

[127] *See* Larsen, *Trouble*, *supra* note 102, at 1768.

[128] *Id.* at 1757.

[129] *See* Whitehouse, *Flood of Judicial Lobbying*, *supra* note 23, at 153, 159–60. For a particularly disturbing example of this trend, see Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/ [https://perma.cc/RT3S-T9KX].

[130] *See* Larsen, *Trouble*, *supra* note 94, at 1763–64; Allison Orr Larsen, *Judicial Factfinding in an Age of Rapid Change: Creative Reforms from Abroad*, 130 HARV. L. REV. F. 316, 317–20 (2017) (discussing the problem of relying on *amicus* facts and proposing solutions); Whitehouse, *Flood of Judicial Lobbying*, *supra* note 23, at 153–54, 157–58.

[131] *See* Whitehouse, *Flood of Judicial Lobbying*, *supra* note 23, at 151.

be obvious,[132] and the danger to the Court of accepting their extremely convenient "facts" becomes acute.[133]

Which brings us to the unfortunate but necessary question: What is to be done when a decision of the Court hinges on its view of "fundamental facts about the world in which we live,"[134] and the Court's view is indisputably factually wrong? Let's review some recent examples.

III. THE COURT'S FACT-FINDING MESS

The Roberts Court has regularly indulged in free-range fact-finding. One 2017 study found seven instances of flatly wrong "legislative" facts out of twenty-four Supreme Court decisions.[135] Some "involved a core aspect of the [C]ourt's ruling."[136] These cases addressed constitutional issues like protections against searches and seizures by law enforcement,[137] the Fifth Amendment right against self-incrimination (and the application of the *Ex Post Facto* Clause),[138] and the policing of immigrants by state law enforcement.[139]

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[132] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009) ("[T]here is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

[133] Whitehouse, *Flood of Judicial Lobbying*, *supra* note 23, at 151, 157–58.

[134] Berger, *supra* note 117, at 592.

[135] Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find/amp [https://perma.cc/CZ8L-XH43].

[136] *Id.*

[137] *Id.*; *see also* Florida v. Harris, 568 U.S. 237, 246–47 (2013). The Court relied upon evidence from outside the record in concluding that the certification of a drug-sniffing dog is evidence of the low risk of "false positives" by the dog, but few certifying organizations include this consideration in their reliability determinations. *See id.* at 246 & n.3; Gabrielson, *supra* note 135.

[138] Gabrielson, *supra* note 135; *see also* McKune v. Lile, 536 U.S. 24, 29 (2002); Smith v. Doe, 538 U.S. 84, 89 (2003). In *McKune*, the Court cited a magazine article for the proposition that "the rate of recidivism of untreated [sex] offenders has been estimated to be as high as 80%." *McKune*, 536 U.S. at 33. The Court later cited to this statement in *Smith v. Doe* to support its assertion that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' *Smith*, 538 U.S. at 103. However, that magazine article provided no empirical support for its assertion, and most studies show much lower recidivism rates. *See* Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of* Doe v. Snyder, 58 B.C. L. REV. E. SUPP. 34, 36, 38–39 (2017); Gabrielson, *supra* note 135; Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html [https://perma.cc/HX9Y-V4V4].

[139] Gabrielson, *supra* note 135*; see also* Arizona v. United States, 567 U.S. 387, 394, 398 (2012). The Court struck down in part and upheld in part an Arizona law adopting a state immigration policy of "attrition through enforcement." *Id.* at 392 (citation omitted). In upholding a provision that required state law enforcement to check the citizenship status of

Last term, the Court's right-wing justices pushed fact-finding boundaries in politically charged decisions like *Dobbs v. Jackson Women's Health Organization* (in which the Court overruled *Roe v. Wade*'s longstanding recognition of a right to abortion);[140] *New York State Rifle & Pistol Ass'n v. Bruen* (in which the Court struck down a 100-year-old state concealed-carry licensing regime);[141] and *Kennedy v. Bremerton School District* (in which the Court sanctioned coach-led prayer at a public school).[142] In each of these cases, the Court found its own version of relevant facts, either through its new history-and-tradition fact-finding, or by simply ignoring record facts altogether.[143] Given the political charge of the cases, and the nature of the outcomes, the shadow of political purpose looms over this adventuresome fact-finding.

In its worst departures from the factual record, in *Shelby County v. Holder* and in *Citizens United v. FEC*, the Supreme Court displaced both facts found by Congress and facts available in the judicial record. These cases are at the epicenter of the constitutional fact-finding "danger zone" described above. The political charge of these cases and the nature of the outcomes again cast the shadow of political purpose. Facts are notoriously stubborn things, and the Court's factual conclusions in those cases were then, and have since been proven indisputably by events to be (to borrow a phrase), "egregiously wrong."[144] Yet the Court has persistently refused to correct its errors. The failure to correct adds a further shadow of political purpose over the original error.

Let's look more closely.

A. *Judicial Fact-Finding at the Expense of Congress:* Shelby County v. Holder *and* Citizens United v. FEC

Until recently, the customary baseline for the Supreme Court was to defer to Congress's fact-finding, out of comity and respect for Congress's coequal prerogative to legislate. Less than thirty years ago, the Supreme Court required

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arrested or detained individuals, the Court wrote that undocumented immigrants "are reported to be responsible for a disproportionate share of serious crime," citing a report from outside the record. *Id.* at 398. However, that report misstated statistics from the study on which the report's statistics were based, and the original study depended in part on one prosecutor's aggressive prosecution of certain misdemeanor offenses as felonies, which no other state prosecutor did. *See* Gabrielson, *supra* note 135. That prosecutor and author of the study was disbarred for misconduct involving "dishonesty, fraud, and deceit" five weeks before the Court's *Arizona* decision. *See id.*

[140] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[141] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[142] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022).

[143] *See id.* at 2421; *Dobbs*, 142 S. Ct. at 2242; *Bruen*, 142 S. Ct. at 2128.

[144] *Dobbs*, 142 S. Ct. at 2243.

"substantial deference to the predictive judgments of Congress."[145] The Court gave such deference because "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable;" and because "[a]s an institution . . . Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data'" relevant to the "complex and dynamic" issues Congress addresses through legislation.[146]

That deference began to give way under the Rehnquist Court. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act because Congress was not "express" enough in its findings regarding "the effects upon interstate commerce of gun possession in a school zone."[147] Five years later, in *United States v. Morrison*, the Supreme Court, presented with a "mountain" of data Congress had compiled to support creating a civil remedy under the Violence Against Women Act,[148] struck down that law—rejecting Congress's copious findings as insufficiently specific.[149] Scholars criticized the treatment of Congress not as "a coequal branch warranting judicial deference to an entity charged with extensive factfinding responsibilities"[150] but "like administrative agencies, which must support their decisionmaking with an adequate factual record."[151] The Court had pronounced just a year before *Lopez* that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."[152]

If it seemed like Congress was disfavored after *Lopez* and *Morrison*, things got even worse with *Shelby County v. Holder* and *Citizens United v. FEC*.

1. Shelby County v. Holder

The 15th Amendment, protecting against the denial or abridgment of voting rights "on account of race, color, or previous condition of servitude," empowers Congress to "enforce" these protections "by appropriate legislation."[153] Pursuant to this authority, Congress enacted the Voting Rights Act of 1965 (VRA) to "eliminate racial discrimination in the electoral

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[145] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 665 (1994).

[146] *Id.* at 665–66 (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).

[147] United States v. Lopez, 514 U.S. 549, 562–63 (1995).

[148] United States v. Morrison, 529 U.S. 598, 628–29 (2000) (Souter, J., dissenting).

[149] *Id.* at 614–15 (majority opinion).

[150] Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 115–16 (2001); *see also* Bertrall L. Ross II, *The State as Witness:* Windsor*,* Shelby County*, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. Rev. 2027, 2030 n.8 (2014).

[151] Ross, *supra* note 150, at 2029–30, 2030 n.9.

[152] *Turner I*, 512 U.S. at 666.

[153] U.S. CONST. amend. XV, §§ 1–2.

process."[154] Section 4 required jurisdictions with documented histories of voting discrimination to obtain federal approval to alter voting procedures.[155] This "preclearance" requirement prevented discriminatory voting laws in the first instance, rather than addressing discrimination after the fact (and likely after the election)—a perfectly reasonable policy choice.[156] Congress reauthorized the preclearance law several times: its 1970 and 1975 reauthorizations changed the formula that defined the preclearance requirement's coverage,[157] and its 1982 and 2006 reauthorizations concluded that the results under the coverage formula remained appropriate.[158]

For the 2006 reauthorization at issue in *Shelby County*, the House and Senate had held a combined 21 hearings, with testimony from dozens of leading academics, litigators, and civil rights leaders.[159] Based on this investigation, Congress found that preclearance worked—it had in fact protected minority voters in the preclearance jurisdictions, looking at metrics like turnout rates, registration rates, and the election of minority candidates[160]—a success much due to the elimination of tools of disfranchisement such as "literacy tests, poll taxes, all-white primaries, and English-only ballots."[161]

At the same time, Congress found that these improvements did not tell the whole story. Congress found "second generation barriers . . . to prevent minority voters from fully participating in the electoral process,"[162] like "at-large elections and redistricting plans that keep minorities' voting strength weak."[163] Accordingly, Congress determined that preclearance remained the appropriate and necessary policy in the covered jurisdictions,[164] indeed that overlooking the second-generation barriers threatened to "turn[] the Voting Rights Act into a farce."[165] Congress left covered jurisdictions a judicial path to exit preclearance,[166] but based on "more than 15,000 pages" of factual

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[154] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1396 (2015).

[155] Shelby Cnty. v. Holder, 570 U.S. 529, 535–37 (2013).

[156] *Id.* at 561–62 (Ginsburg, J., dissenting).

[157] KEVIN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 18–20 (2015).

[158] *Shelby Cnty.*, 570 U.S. at 564–65 (Ginsburg, J., dissenting).

[159] 152 CONG. REC. S7950 (daily ed. July 20, 2006) (statement of Sen. Specter).

[160] 52 U.S.C. § 10301(b)(1).

[161] Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006); 52 U.S.C. § 10301(b)(1).

[162] 52 U.S.C. § 10301(b)(2); *see also Shelby Cnty.*, 570 U.S. at 565–66 (Ginsburg, J., dissenting).

[163] Tokaji, *supra* note 161, at 691.

[164] *Shelby Cnty.*, 570 U.S. at 566 (Ginsburg, J., dissenting).

[165] 152 CONG. REC. H5181 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

[166] Under Section 4(a) of the VRA, jurisdictions subject to preclearance can be released from preclearance through a "bailout" process requiring a showing to a three-

record,[167] Congress determined to keep the preclearance requirements—knowing that the metrics defining those jurisdictions were now outdated, but finding that preclearance was nevertheless still appropriate.[168] The 2006 VRA reauthorization passed on a near-unanimous bipartisan basis in both chambers of Congress.[169]

To the Republican majority on the Court, none of that mattered. The 5–4 majority opinion by Chief Justice Roberts flatly disagreed with Congress's factual conclusions, declaring (with what one reviewer called "blithe confidence")[170] that "things have changed dramatically" since the VRA was first enacted.[171] The Court had its own opinions: that increases in minority participation in the political process should have prompted Congress to update the coverage formula and perhaps even "ease[]" or "narrow[]" the VRA's protections.[172] Thus, according to the Court's view that "things have changed," the Act's "current burdens" were no longer "justified by 'current needs'" and the coverage formula must be thrown out.[173]

I should note that the Republican majority fabricated, almost out of thin air,[174] a new constitutional test to apply: "the principle that all States enjoy equal sovereignty."[175] As Justice Ginsburg's dissent noted, the Supreme Court had already held that this "equal sovereignty principle" did not apply in this context.[176] By applying this new test, not the prior "rational means" test,[177] the Court gave itself scope to second-guess Congress's findings more easily.

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judge panel in the D.C. District Court that the jurisdiction has met certain criteria. H.R. REP. No. 109-478, at 25, 98 (2006).

[167] *Shelby Cnty.*, 570 U.S. at 565 (Ginsburg, J., dissenting).

[168] 152 CONG. REC. S7950 (daily ed. July 20, 2006) (statement of Sen. Schumer).

[169] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, 109th Cong.; 152 CONG. REC. D771, D808 (July 13, 2006).

[170] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2355 (2021) (Kagan, J., dissenting).

[171] *Shelby Cnty.*, 570 U.S. at 547.

[172] *Id.* at 549, 557.

[173] *Id.* at 547, 550–51 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

[174] Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court*, NPR (July 5, 2013), http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back [https://perma.cc/WM7A-P7T4] (quoting Michael McConnell's statement that the equal sovereignty principle is "made up" and "doesn't seem to be in the Constitution").

[175] *Shelby Cnty.*, 570 U.S. at 535.

[176] *Shelby Cnty.*, 570 U.S. at 587–88 (Ginsburg, J., dissenting); *see also* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1215 (2016) (reviewing the Court's jurisprudence on the equal sovereignty principle and arguing against its application in *Shelby County*); Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 733 (2014) ("Further, even granted the ability of the Court to 'make up' a new standard, doing so is unjustified in the case of Congress's power to prevent race discrimination in voting granted by the Civil Rights amendments . . . "); Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 382 n.123 (2013).

Instead of deference, the Court treated Congress's findings as pretextual, articulated *post hoc* to justify the formula already selected.[178] Not only was this smug assertion factually unsupported and incorrect; it ignored the nature of legislative fact-finding in aid of legislation.[179] Fact-finding begins long before Congress articulates its findings in legislative text or a committee report. Members of Congress regularly "me[e]t with constituents, interest groups, lobbyists, experts, and each other informally and formally" to gather facts and inform policy decisions well before any formal record is assembled.[180] The fact-finding by Congress that the Court dismissed was the ordinary end result of an orderly and customary investigation by Congress.[181] It is an irony of the decision that it (wrongly) imputed false fact-finding to Congress to open the path for false fact-finding by the Court.

In the background of this case was a substantial district court record of voter suppression in Shelby County and in Alabama.[182] The Court maneuvered to avoid that record, too: The Court chose to hear the case as a facial challenge to the VRA's provisions, as opposed to an as-applied challenge.[183] The Court had previously "disfavored" facial challenges because they "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."[184] Election law scholars had noted the particular *dis*favor of facial challenges in election law disputes.[185]

But a facial challenge allows the Court to look at statutory language in isolation, freeing the majority to roam unhinged from the damning trial record of modern discrimination both in Shelby County and in Alabama as whole.[186] Posit a Court that for ulterior reasons wanted to upend preclearance, and all this behavior starts to make sense. Otherwise it is hard to justify.

There was abundant evidence from Congress's record and the trial court record that the majority's "things have changed" finding about "current needs" was a false justification for upending preclearance.[187] Yes, obviously, things had changed—that's a truism; but had they changed enough to justify

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[177] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[178] *See Shelby Cnty.*, 570 U.S. at 554; *see also* Ross, *supra* note 150, at 2062–63; Margaret B. Kwoka, *Setting Congress Up to Fail*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 97, 97–98 (2015).

[179] *See* Kwoka, *supra* note 178, at 101.

[180] *See id.* at 102.

[181] *Id.*

[182] Berger, *supra* note 117, at 553.

[183] *Id.* at 528–29.

[184] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008).

[185] *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 99 & n.159 (2009).

[186] Berger, *supra* note 117, at 552–53.

[187] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 580 (2013) (Ginsburg, J., dissenting).

eradicating preclearance? The record at the time suggested not, and time and events thereafter have not been kind.[188]

Shelby County launched immediate discrimination. Within hours of the *Shelby County* opinion, Texas announced it would push forward with a photo ID law that had failed preclearance.[189] Ditto Mississippi and Alabama's subsequent voter ID laws;[190] and North Carolina's photo ID bill—a law that, according to the Fourth Circuit, was the "most restrictive voting legislation seen in North Carolina since the enactment of the Voting Rights Act of 1965,"[191] and which "target[ed] African Americans with almost surgical precision."[192] Just as Congress feared, subsequent judicial decisions invalidating these laws came only after elections in which votes had been suppressed.[193]

It was an avalanche. From January through April 2021, states previously covered by preclearance "introduced or enacted at least 108 bills . . . that would restrict voting rights."[194] Jurisdictions "redistricted—drawing new boundary lines or replacing neighborhood-based seats with at-large seats—in ways guaranteed to reduce minority representation."[195] They purged voters from voter rolls at "significantly higher" rates than other jurisdictions (leading to approximately three million more voters purged between 2012 and 2018 than would have been under preclearance).[196] Covered jurisdictions closed

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[188] *Id.* at 534 (majority opinion); *see, e.g.*, Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN (June 25, 2013), https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision [https://perma.cc/JW7W-FN96].

[189] Pilkington, *supra* note 188; Julián Aguilar, *D.C. Court Strikes Down Texas' Voter ID Law*, TEX. TRIB. (Aug. 30, 2012), https://www.texastribune.org/2012/08/30/dc-court-rejects-voter-id-law/ [https://perma.cc/CCA7-YJDW].

[190] Delbert Hosemann, *Not Our Grandfathers' Mississippi Anymore: Implementing Mississippi's Voter Identification Requirement*, 85 MISS. L.J. 1053, 1074 (2017); Kim Chandler, *State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011*, ADVANCE LOC. (June 12, 2013), https://www.al.com/wire/2013/06/photo_voter_id.html [https://perma.cc/67JR-MDU7].

[191] N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 227 (4th Cir. 2016).

[192] *Id.* at 214.

[193] Veasey v. Perry, 769 F.3d 890, 895–96 (5th Cir. 2014) (allowing Texas's 2014 election to be held under the challenged voter ID law); Gary D. Robertson, *North Carolina Judges Strike Down State's Voter ID Law*, ASSOCIATED PRESS (Sept. 17, 2021), https://apnews.com/article/north-carolina-25c1633fd815ae57ca6c703a45c9d636 [https://perma.cc/AJ57-7U2G] (noting that the law was carried out during the 2016 primary).

[194] Supreme Court Fact-Finding and the Distortion of American Democracy: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. of the S. Comm. on the Judiciary, 117th Cong. 32 (statement of Paul M. Smith) [hereinafter Smith Testimony].

[195] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2355 (2021).

[196] JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (July

1,173 polling places between 2014 and 2018.[197] The avalanche targeted, suppressed and disproportionately harmed minority voters.[198]

The story of *Shelby County* is a story of false facts. The Court found as a fact that "things have changed dramatically" in the pre-clearance states, such that the protections were no longer "justified by current needs."[199] The outcome hung on that factual predicate. But it ran counter to the facts Congress had found, and to the facts evident in the trial record, so the Court turned its gaze away from the real facts and imagined its own "generalized claim about the state of the world,"[200] its own "fundamental facts about the world in which we live."[201] Subsequent events revealed the Court's factual misadventure to be clearly and demonstrably erroneous—even "egregiously wrong."[202] Nonetheless, the Court has refused all opportunities to correct these mistakes.[203] That leaves *Shelby County* in legal limbo, no longer supported by

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2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf [https://perma.cc/BN8L-SBPB]; Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds [https://perma.cc/Q9FA-5BUJ].

[197] LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 10 (Sept. 2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf [https://perma.cc/2PN7-QCRH].

[198] *See* Danielle Root & Liz Kennedy, *Voter Purges Prevent Eligible Americans from Voting*, CTR. FOR AM. PROGRESS (Jan. 4, 2018), https://www.americanprogress.org/article/voter-purges-prevent-eligible-americans-voting/ [https://perma.cc/CBL3-W94A]; Cecilia Rouse, Matthew Maury & Jeffery Zhang, *The Importance of Protecting Voting Rights for Voter Turnout and Economic Well-Being*, WHITE HOUSE (Aug. 16, 2021), https://www.whitehouse.gov/cea/blog/2021/08/16/the-importance-of-protecting-voting-rights-for-voter-turnout-and-economic-well-being/ [https://perma.cc/W4PG-2LG4]; *see also* Brief for the Leadership Conf. on Civ. & Hum. Rts. et al. as Amici Curiae Supporting Respondents at 6–7, 9–16, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (No. 19-1257); *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/R6WX-ZKWU]; Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression [https://perma.cc/APR7-MWAH]; Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527–28 (2017).

[199] Shelby Cnty. v. Holder, 570 U.S. 529, 547, 550–51(2013) (internal citation omitted).

[200] Larsen, *Trouble*, *supra* note 102, at 1759, 1774.

[201] Berger, *supra* note 117, at 592.

[202] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2354–56 (2021) (Kagan, J., dissenting).

[203] *See id.* at 2341 (majority opinion) (taking issue with the dissent's criticism of *Shelby County*); Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 279 (2015) (refusing to decide whether compliance with § 5 of the VRA is a compelling government interest in

the facts that were essential to its outcome, yet still hanging there unsupported as precedent to be followed.

2. Citizens United v. FEC

In *Citizens United v. FEC*, a 5–4 Supreme Court struck down a key provision of the Bipartisan Campaign Reform Act of 2002 (BCRA).[204] For decades, Congress had regulated campaign spending to reduce "the disproportionate influence" that came with the "ability to accumulate large amounts of funds."[205] To deter the corrupting influence of this big-dollar spending, Congress restricted big donors' ability to contribute to candidates.[206] Congress later "extended the prohibition . . . to cover . . . independent expenditures as well" because donors were "easily able" to circumvent contribution restrictions."[207]

Atop a "virtual mountain" of congressional findings, Congress passed BCRA to close loopholes used to get around those restrictions, including the independent-expenditure rule.[208] The Senate Committee on Government Affairs spent nine-and-a-half months investigating suspect campaign finance practices during the 1996 election cycle.[209] "[T]he Committee issued 427 subpoenas," reviewed "over 1,500,000 pages of documents," "held 32 days of hearings," "took 200 depositions and conducted over 200 witness interviews."[210] Democrats and Republicans on the Committee agreed that closing these loopholes was crucial to fixing a "meltdown of the campaign finance system."[211]

The Supreme Court disregarded Congress's extensive factual findings. The Republican majority decided that Congress was wrong that unlimited political expenditures would lead to corruption, or even to the public perception that such spending would "buy access to officeholders" and "cause the electorate to lose faith in our democracy."[212] The Court offered two rationales, both conclusions of fact, not law. First, the Court asserted,

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redistricting after *Shelby County*); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 795 (2017) (discussing the impact of *Shelby County* on legislative redistricting); Abbott v. Perez, 138 S. Ct. 2305, 2317–18 (2018) (discussing the impact of *Shelby County* on legislative redistricting maps).

[204] Citizens United v. FEC, 558 U.S. 310, 372 (2010).

[205] S. REP. NO. 105-167, at 4486 (1998).

[206] *Id.* at 4460.

[207] *Citizens United*, 558 U.S. at 434 (Stevens, J., concurring in part and dissenting in part).

[208] *Id.* at 400; *see also* McConnell v. FEC, 540 U.S. 93, 132 (2003).

[209] S. REP. NO. 105-167, at 14 (1998).

[210] *Id.* at 15.

[211] *Id.* at 4611; *McConnell*, 540 U.S. at 129.

[212] S. REP. NO. 105-167, at 4559 (1998); *Citizens United*, 558 U.S. at 360.

unlimited expenditures would be "independent" of campaigns.[213] According to the Court, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" because they are "political speech presented to the electorate that is not coordinated with a candidate."[214] As Senator McCain and I reminded the Court in a subsequent case, "[w]hether independent expenditures pose dangers of corruption or apparent corruption depends on the actual workings of the electoral system; it is a factual question . . . ."[215]

Second, the Court said donor transparency would prevent corruption; "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable."[216] Accountability would ameliorate corruption by enabling voters to "see whether elected officials are '"in the pocket" of so-called moneyed interests.'"[217] Daylight would be a cure.

Normally, facts to support such conclusions would be gathered in the district court and tested by the adversarial process through multiple rounds of argument and briefing.[218] Here, the Court dodged factual records assembled by Congress, by the lower court, and by courts in prior cases. Step one for the Republican justices, like in *Shelby County*, was—*after* briefing and arguments had concluded—to recast the case as a facial challenge, a claim already abandoned in the lower courts.[219] With no facial challenge in the courts below, there was no factual record pertinent to that question; no record to trammel the Court's later fact-free assertions about independence and transparency.[220] As a result, the record the Court relied on was "not simply incomplete or unsatisfactory; it [was] nonexistent."[221]

With no germane record, the Court could have done what an appellate court should in those circumstances: "remanded the case for findings about how BCRA operated in practice."[222] But normal fact-finding guardrails would not have let the Republican justices reach the outcome they wanted; so they jumped the guardrails.

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[213] *Citizens United*, 558 U.S. at 357.

[214] *Id.* at 357, 360.

[215] Brief of U.S. Sens. Sheldon Whitehouse & John McCain as Amici Curiae Supporting Respondents at 5, Am. Tradition P'ship v. Bullock, 567 U.S. 516 (2012) (No. 11-1179).

[216] *Citizens United*, 558 U.S. at 370.

[217] *Id.* (quoting McConnell v. FEC, 540 U.S. 93, 259 (2003) (opinion of Scalia, J.)).

[218] *See* Brief of Former Federal District Judges, *supra* note 28 at 12–13.

[219] Smith Testimony, *supra* note 194, at 9–10; *see also* Whitehouse, *Conservative Judicial Activism*, *supra* note 14, at 201; Gorod, *supra* note 37, at 31–32; Berger, *supra* note 117, at 554–55.

[220] Berger, *supra* note 117, at 555.

[221] *Citizens United*, 558 U.S. at 400 (Stevens, J., concurring in part and dissenting in part).

[222] Berger, *supra* note 117, at 588.

The invented "facts" about "independence" and "transparency" protecting against corruption were important: they disabled Congress's authority to protect against the corrupting and distorting influence of big moneyed interests.[223] There was no need for Congress to have the power to protect against corruption, since there would be no corruption in this imagined political realm, *ipse dixit*. The only government interest left was preventing *quid pro quo* corruption, criminal bribery in essence.[224] The Court could ignore the "factual evidence of corruption (understood more broadly)"[225] that Congress compiled about the "numerous findings about the corrupting consequences of . . . independent expenditures,"[226] because its own invented facts assumed away the problem. (The Court lifted from *Buckley v. Valeo* the belief that "independent" expenditures cannot corrupt, but in neither case was there evidence to support this belief.) [227]

More to the point, there was no evidence that there would actually be real "independence," and later events have shown that the ballyhooed "independence" is often a sham.[228] The assertion in *Citizens United* that there is no "prearrangement and coordination" associated with independent expenditures is tautology, in practice undeniably false.[229] Many "independent" groups are dedicated exclusively to a particular election for a particular candidate—some "independence."[230] Groups spending money on "independent" expenditures have numerous strategies for informally coordinating with campaigns.[231] A candidate's family members, former staffers, or close allies can control the group.[232] The leaders of these groups

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[223] *See* CAMPAIGN LEGAL CTR., THE SUPREME COURT'S ROLE IN UNDERMINING AMERICAN DEMOCRACY 15 (July 2022), https://campaignlegal.org/sites/default/files/2022-07/CLC%202022%20SCOTUS%20Report_072022%20%281%29.pdf [https://perma.cc/LNB2-GBBF].

[224] *Citizens United*, 558 U.S. at 356–67.

[225] Berger, *supra* note 117, at 542.

[226] *Citizens United*, 558 U.S. at 448 (Stevens, J., concurring in part and dissenting in part).

[227] Buckley v. Valeo, 424 U.S. 1, 47–48 (1976); Michael T. Morley, *Contingent Constitutionality, Legislative Facts, and Campaign Finance Law*, 43 FLA. ST. U. L. REV. 679, 691–92 (2016) (noting that the Court's campaign finance rulings, including *Buckley* "often fail to identify the evidentiary or other basis that supports the Court's findings").

[228] *See Citizens United*, 558 U.S. at 448.

[229] *Id.* at 345 (quoting *Buckley*, 424 U.S. at 47).

[230] Brief of U.S. Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 9.

[231] Trevor Potter, *The Failed Promise of Unlimited 'Independent' Spending in Elections*, ABA HUM. RTS. MAG. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/the-failed-promise-of-unlimited-independent-spending/ [https://perma.cc/9487-AMJ6].

[232] Matea Gold, *It's Bold, But Legal: How Campaigns and Their Super PAC Backers Work Together*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-

can in tandem with the candidate request donations.[233] Campaigns and outside groups coordinate in plain view their campaign schedules, advertising spending, merchandising, volunteer recruitment, and event planning.[234] Campaigns even post video for associated groups to use in ads.[235] Any

61410da94eb1_story.html [https://perma.cc/2BXH-MZ2H]; *see also, e.g.*, Smith Testimony, *supra* note 194, at 16–17; Dan Eggen, *Friends and Family Plan: Super PACs Often Personal Campaign Fundraising Affairs*, WASH. POST (June 10, 2012), https://www.washingtonpost.com/politics/friends-and-family-plan-super-pacs-often-personal-campaign-fundraising-affairs/2012/06/10/gJQAi8hLTV_story.html [https://perma.cc/K7SZ-2SEQ]; Ashley Balcerzak, *Inside Donald Trump's Army of Super PACs and MAGA Nonprofits*, CTR. FOR PUB. INTEGRITY (Feb. 18, 2019), https://publicintegrity.org/politics/donald-trump-army-super-pacs-maga-nonprofits [https://perma.cc/4SVB-36PL]; Lachlan Markay, *Family-Funded Super PACs Are Boosting Relatives' Campaigns*, DAILY BEAST (May 28, 2020), https://www.thedailybeast.com/well-off-families-are-funding-super-pacs-to-hyper-boost-their-relatives-congressional-campaign [https://perma.cc/LV53-V8RY]; Fredreka Schouten & Christopher Schnaars, *'Friends and Family' Super PACs Play Big in Some House Races*, USA TODAY (May 30, 2016), https://www.usatoday.com/story/news/politics/elections/2016/2016/05/30/friends-and-family-super-pacs-play-big-some-house-races/84935804/ [https://perma.cc/EWU9-ZV9X]; Kenneth P. Vogel, *Dawn of the Mommy and Daddy PACs*, POLITICO (July 25, 2012), https://www.politico.com/story/2012/07/super-pacs-keep-it-in-the-family-078931 [https://perma.cc/FT97-FKS2].

[233] Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1478 (2015); Thomas B. Edsall, Opinion, *After* Citizens United*, a Vicious Cycle of Corruption*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html [https://perma.cc/82PQ-2TNS].

[234] Nick Corasaniti, *Carly Fiorina's 'Super PAC' Aids Her Campaign, in Plain Sight*, N.Y. TIMES (Sept. 30, 2015), https://www.nytimes.com/2015/10/01/us/politics/as-carly-fiorina-surges-so-does-the-work-of-her-super-pac.html [https://perma.cc/XTG6-F4D6].

[235] Kenan Davis, Kenton Powell & Feilding Cage, From A to B-Roll: *Exposing the 'Independent' Campaign Ads That Aren't, Really*, GUARDIAN (Oct. 31, 2014), https://www.theguardian.com/world/ng-interactive/2014/oct/31/-sp-a-to-b-roll-exposing-independent-campaign-ads-midterm-elections [https://perma.cc/8QKR-CRBX]. Congressional campaigns and their allied PACs have recently taken this coordination to new heights. One Senate campaign-allied super PAC "published a trove of sensitive documents" on a public website for the allied campaign to see, with everything "from thousands of pages of polling data, to memos assessing the strengths and weaknesses of [the candidate's] opponents, to a 177-page opposition research book," as well as suggested talking points. Alex Isenstadt, *A Mole Hunt, a Secret Website and Peter Thiel's Big Risk: How J.D. Vance Won His Primary*, POLITICO (May 3, 2022), https://www.politico.com/news/2022/05/03/jd-vance-win-ohio-primary-00029881 [https://perma.cc/33GX-KZZV]. Other campaigns have also begun to abandon all pretense of "independence" by clearly demarcating information on their campaign websites, such as detailed requests for ad buys and messaging, that is intended for use by allied super PACs and other dark-money groups. *See* Saurav Ghosh, *Voters Need to Know What "Redboxing" Is and How It Undermines Democracy*, CAMPAIGN LEGAL CTR. (May 13, 2022), https://campaignlegal.org/update/voters-need-know-what-redboxing-and-how-it-undermines-democracy [https://perma.cc/859L-SVG3]. To fully take advantage of the

"independence" the Court saw was at best a hope, and at worst an illusion or a fraud. Proper testing in lower courts would have put that all to scrutiny.

Even if "independence" were real, there remains ample "[e]vidence that corporate independent expenditures give rise to an appearance of corruption."[236] One is from the Court itself. In *Caperton v. A.T. Massey Coal*, the Court held that a coal company CEO's financial support for a West Virginia judge's election, much through independent expenditures, created "a serious risk of actual bias."[237] And polling in West Virginia found that the CEO's expenditures caused more than two-thirds of those polled to doubt that the judge could be fair[238] (a sentiment shared by a West Virginia judge).[239]

Confirming the link between big political spending and public concern about corruption, a 2002 national poll found that 71% of Americans thought that "Members of Congress cast votes based on the views of their big contributors, even when those views differed from the Member's own beliefs."[240] Studies conducted after *Citizens United* have similarly found that most people view coordination between outside groups and campaigns as corrupt.[241] This is not to prove the appearance-of-corruption point here, but to show this as a real issue which in normal fact-finding would be raised and debated at trial, with evidence and experts, and the trial judge's findings would be subject to appellate challenge and review, with false facts likely winnowed out. Here, the Court *sua sponte* invented them.

The Court's second conclusion, that "adequate disclosure" would eliminate corruption, was just as fact-free.[242] A proper fact-finding process would have developed a record showing that "adequate disclosure" would be a

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Court's *Citizens United* ruling, another Senate candidate recently used independent expenditures from his campaign committee to support a former staffer's campaign for the House of Representatives. Roger Sollenberger, *Ted Cruz's Latest Troll? Turning His Campaign into a Super PAC,* DAILY BEAST (Mar. 22, 2022), https://www.thedailybeast.com/ted-cruzs-latest-troll-turning-his-campaign-into-a-super-pac [https://perma.cc/GE6N-LTTB]. The Senate candidate's independent expenditures likely outstripped the House candidate's own spending, and the two barely bothered to hide the indicia of coordination. *Id.*

[236] *See* Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of* Citizens United, 105 NW. U. L. REV. COLLOQUY 203, 219 (2010).

[237] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009).

[238] Defendant FEC's Proposed Findings of Fact at 103, Speechnow.org v. FEC, 1:08-cv-00248-JR (D.D.C. Oct. 28, 2008), https://www.fec.gov/resources/legal-resources/litigation/speechnow_fec_finding_facts.pdf [https://perma.cc/VSR8-H6N5].

[239] *Id.* at 104.

[240] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 507 (2007) (Souter, J., dissenting).

[241] Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 376 (2016); Douglas M. Spencer & Alexander G. Theodoridis, *"Appearance of Corruption": Linking Public Opinion and Campaign Finance Reform*, 19 ELECTION L.J. 510, 515 (2020).

[242] Citizens United v. FEC, 558 U.S. 310, 370 (2010).

farce. The falsity of "adequate disclosure" was rapidly proven in real life by millions of dollars in anonymous political spending.[243] Senator John McCain and I pointed this out in an amicus brief just two years after *Citizens United*. We noted the method involved, that "[c]ertain types of political spending groups, organized under section 501(c) of the tax code, are not required to disclose their donors to the public, but only to the IRS on confidential grounds."[244] (These are the groups that donors launder their donations through, precisely because they mask their donors' identities.)[245] And we warned the Court plainly "that existing campaign finance rules purporting to provide for 'independence' and 'disclosure' in fact provide neither."[246]

The collapse of the "adequate disclosure" finding was predictable and rapid: "non-disclosing groups . . . accounted for 47 percent of all outside political spending" in the midterm elections immediately following *Citizens United*.[247] And it was huge: "Outside spending to influence federal elections has since topped $9 billion," with more than $2.6 billion of that spending coming directly from secretly-funded nonprofits or funneled from "[d]ark money groups and shell companies" through "federal political committees like super PACs."[248] Some transparency.

The Court's factual errors about independence and transparency were flagrant, massive, and immediately evident to anyone reading the news.[249] Instead of correcting its mistakes, however, the Supreme Court persisted. The Court had its first chance to self-correct in the case in which Senator McCain and I submitted our brief, *American Tradition Partnership, Inc. v. Bullock*.[250] In that case, the Montana courts had upheld state disclosure rules based on a rich record of "historical evidence of actual corruption" in Montana,[251] and

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[243] Brief of U.S. Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 13.

[244] *Id.*

[245] Richard Briffault, *Two Challenges for Campaign Finance Disclosure after* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983, 985 (2011).

[246] Brief of Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 2.

[247] *Id.* at 13.

[248] Anna Massoglia, *'Dark Money' Groups Have Poured Billions into Federal Elections Since the Supreme Court's 2010* Citizens United *Decision*, OPENSECRETS (Jan. 24, 2023), https://www.opensecrets.org/news/2023/01/dark-money-groups-have-poured-billions-into-federal-elections-since-the-supreme-courts-2010-citizens-united-decision/ [https://perma.cc/8KX6-WDG8].

[249] *See, e.g.*, MONICA YOUN, AM. CONST. SOC'Y FOR L. & POL'Y, *CITIZENS UNITED*: THE AFTERMATH (June 2010), https://www.acslaw.org/wp-content/uploads/2018/04/ACS_Issue_Brief_Youn_Citizens_United.pdf [https://perma.cc/5J6V-KPNE]; Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, PROPUBLICA (Nov. 21, 2011), https://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all [https://perma.cc/UE36-S7YY].

[250] Am. Tradition P'ship v. Bullock, 567 U.S. 516 (2012) (per curiam).

[251] Brief of Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 4; *see also* W. Tradition P'ship v. Att'y Gen., 271 P.3d 1, 6 (Mont. 2011).

evidence that "Montana voters believe that corporate independent expenditures lead to corruption."[252] The Supreme Court 5–4 threw out the law without even allowing argument, on grounds that the Montana Supreme Court "failed to meaningfully distinguish" *Citizens United*,[253] despite the by-then known falsity of *Citizens United*'s essential facts. As we specifically warned the Court: "Massive new spending . . . has been closely coordinated with campaigns, and much of it has been undisclosed."[254]

The Supreme Court stacked its house of cards even higher in *McCutcheon v. FEC*, where it cited *Citizens United* for the proposition, again with no record support, that there is no "prearrangement and coordination" involved with independent expenditures.[255] False facts can live on, renewed and propagated in later cases.

Now, thanks to a recent decision in *Americans for Prosperity Foundation v. Bonta*, the Court seems poised to eliminate disclosure requirements altogether.[256] This case is one of the Supreme Court's most dangerous decisions of late, and is a case study in why *Citizens United* and its progeny were wrong from the start. This decision threatens to create a constitutional right to political dark money, a massive avenue for special-interest corrupting influence.[257] To understand the danger, and why this dark money is political, you first have to understand the petitioner.

In the dark-money scrum that American politics has become since *Citizens United,* the state of the art is to pair an entity established under section 501(c)(3) of the tax code with an entity established under section 501(c)(4) of the tax code.[258] Although they are supposed to be legally separate entities, these pairings can share office space, donors, directors and staff.[259] In short, the corporate veil between them could be pierced with a banana. In this state-of-the-art political-influence pairing, petitioner Americans for Prosperity Foundation is the twin of Americans for Prosperity, the most prominent battleship in the armada of political-influence machinery wielded by the right-

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[252] Brief of Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 4.

[253] *Am. Tradition P'ship*, 567 U.S. at 516–17.

[254] Brief of U.S. Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 6. "The second critical assumption of *Citizens United* was that unlimited independent expenditures would take place under the glare of complete and effective disclosure. That is plainly not the case today." *Id.* at 12.

[255] McCutcheon v. FEC, 572 U.S. 185, 214 (2014) (quoting Citizens United v. FEC, 558 U.S 310, 357 (2010)).

[256] *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

[257] *See id.* at 2392 (Sotomayor, J., dissenting); *see also* Sarah C. Haan & Faith Stevelman, *The Stakes of* Americans for Prosperity Foundation v. Bonta, HISTPHIL (July 13, 2021), https://histphil.org/2021/07/13/the-stakes-of-americans-for-prosperity-foundation-v-bonta/ [https://perma.cc/LVR9-2YGH].

[258] *See* Tyler J. Kassner, *Bringing Dark Money into the Light: 501(c)(4) Organizations, Gift Tax, and Disclosure*, 10 HASTINGS BUS. L.J. 471, 476 (2014).

[259] *See id.*; *infra* note 260.

wing, billionaire Koch family.[260] These two organizations share location, staff, donors, and directors.[261] Since *Citizens United*, 501(c) organizations have become the primary vehicle for donors looking to spend on politics anonymously.[262] Thus, the Court was being asked by the corporate twin of the political battleship Americans for Prosperity to begin dismantling the very "disclosure" that the *Citizens United* Court said would expose corruption.[263] And the Republican majority did, 6–3.[264]

In addition to that case's oddly long hiatus on the Court's calendar,[265] another peculiarity was the fifty-strong turnout of front group amici supporting Americans for Prosperity Foundation at the certiorari stage.[266] Many amici, both at the certiorari and merits stages, had financial ties to the Koch political network behind Americans for Prosperity Foundation and Americans for Prosperity, and were dark-money 501(c) organizations themselves.[267] This flotilla of dark-money amici was one of the largest collections of such amici in the Court's history.[268]

An added feature of the case is that Americans for Prosperity had spent heavily to oppose the appointment of Judge Garland and to get the Trump-appointed trio of Supreme Court justices off the Federalist Society lists and onto the Court.[269] This trio likely knows perfectly well what Americans for

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[260] Kenneth P. Vogel, *Koch Brothers Plan $125M Spree*, POLITICO (May 9, 2014), https://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520 [https://perma.cc/QM42-ATNV].

[261] *See* AMERICANS FOR PROSPERITY FORM 990 (2021), https://s3.documentcloud.org/documents/23323282/americans-for-prosperity-2021-990.pdf [https://perma.cc/H9R3-LZTP]; Americans for PROSPERITY FOUNDATION FORM 990 (2021), https://s3.documentcloud.org/documents/23323283/americans-for-prosperity-foundation-2021-990.pdf [https://perma.cc/H4BV-CGH7]; *Americans for Prosperity*, CONSERVATIVE TRANSPARENCY, http://conservativetransparency.org/org/americans-for-prosperity/ (on file with the *Ohio State Law Journal*) (showing shared funding from Charles G. Koch Charitable Foundation, David H. Koch Charitable Foundation, & Friedman Foundation For Educational Choice).

[262] Brief of U.S. Sens. Sheldon Whitehouse & John McCain, *supra* note 215, at 13.

[263] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2380 (2021).

[264] *Id.* at 2379.

[265] The writ of certiorari in *Bonta* was not granted until January 2021, more than a full year after all briefing at that stage had been completed, after the petition was relisted four times, and after Justice Barrett replaced the late Justice Ginsburg. *No. 19-251: American for Prosperity Foundation, Petitioner v. Rob Bonta, Attorney General of California*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-251.html [https://perma.cc/YM48-9M6A].

[266] Whitehouse, *Flood of Judicial Lobbying*, *supra* note 23, at 147–48.

[267] *Id.* at 148–50.

[268] *Id.* at 149–50.

[269] *AFP Leads the Way in Grassroots Efforts to Confirm Next Supreme Court Justice*, AMS. FOR PROSPERITY (July 26, 2018), https://americansforprosperity.org/afp-leads-the-way-in-grassroots-efforts-to-confirm-next-supreme-court-justice/ [https://perma.cc/4QY8-

Prosperity is. In an amicus brief and in a letter to Justice Barrett, I warned the Court about the overlap between Americans for Prosperity and its petitioner twin.[270] The Court turned a blind eye to all of that.[271] If the AFPF 501(c)(3) is actively supporting the 501(c)(4)'s political work, including its massive political spending, it at minimum implicates the principle of *Caperton* that big spending to get judges on the bench has ethics and due process ramifications.[272] Best to just wish all that away by not addressing these issues at all. Which the Court did. Facts are less stubborn things when they can be blithely ignored.

Shelby County and *Citizens United* are egregious examples of a worrying trend. The Supreme Court used unsupported and ultimately false assertions "about the world in which we all live"[273] to reach its preferred results. To do so, it maneuvered around longstanding restraints on judicial power. It ignored factual records compiled in courts below, compiled by Congress, and even available in its own earlier decisions. The Court overturned facts found by Congress, a coequal branch with independent legislating and fact-finding authority under the Constitution. The Court's fact-finding found false facts, and those false facts were essential to the outcomes—the Court could not have gotten there without them. Subsequent events have left no doubt about their falsity. These false facts have had huge consequences: *Shelby County* and *Citizens United* undermine core components of our democracy—voting rights and protection against corruption.

5BAQ]; *AFP Mounts Full Scale Campaign to Confirm Judge Amy Coney Barrett*, AMS. FOR PROSPERITY (Sept. 26, 2020), https://americansforprosperity.org/afp-mounts-full-scale-campaign-to-confirmjudge-amy-coneybarrett [https://perma.cc/28SW-HRBQ].

[270] Brief of U.S. Senators as Amici Curiae in Support of Respondent at 12, 17, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251); Letter from Sen. Sheldon Whitehouse, Sen. Richard Blumenthal & Rep. Henry Johnson, U.S. Cong, to Hon. Amy Coney Barrett, Assoc. Just., U.S. Sup. Ct. (Apr. 16, 2021), https://www.whitehouse.senate.gov/imo/media/doc/210416_Letter%20to%20Justice%20Barrett.pdf [https://perma.cc/WQ42-7H7J].

[271] Then the majority went on to compare the donations of mega-donors operating from behind political influence operations in our modern dark-money-corrupted era, to mere membership in the NAACP in the violence of the Jim Crow South. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382 (2021). While this is not fact-finding in its purest state, the finding that things that are unalike are alike has a factual component. The sword versus shield distinction between billionaire manipulators hiding behind front groups of their own creation in order to bring secretive influence to bear, versus ordinary members who joined the Alabama NAACP in the 1950s would seem evident to many. And the prospect that those mega-donors had a major role in getting those justices on to the Court adds its own sordid flavor.

[272] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883–84 (2009).

[273] Berger, *supra* note 117, at 592.

B. *Judicial Fact-Finding Unbounded: The Supreme Court's October 2021 Term*

The beat goes on. During its October 2021 term, the Supreme Court issued a trio of cases implicating individual constitutional rights—*Dobbs v. Jackson Women's Health*,[274] *New York State Rifle & Pistol Ass'n v. Bruen*,[275] and *Kennedy v. Bremerton School District*[276]—in which the Court engaged in dubious and outcome-determinative fact-finding.

1. *False Facts and the Originalist Turn:* Dobbs v. Jackson Women's Health *and* New York State Rifle & Pistol Association v. Bruen

In *Dobbs* and *Bruen*, the Supreme Court used a new "history and tradition" test to determine the boundaries of constitutional protection.[277] The Supreme Court swapped its longstanding interest-balancing approach for a test never before applied in these contexts, provoking much criticism regarding the soundness of its historical methodology.[278] These cases portend a new arena of appellate fact-finding in which it is easier for appellate courts to rely on unreliable, extra-record historical facts.

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[274] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

[275] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[276] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).

[277] *Dobbs*, 142 S. Ct. at 2242; *Bruen*, 142 S. Ct. at 2128.

[278] *See, e.g.*, Hana Stuckstorff, *An Historian's Reaction to* Dobbs v. Jackson Women's Health Organization, WOMEN IN THEOLOGY (July 18, 2022), https://womenintheology.org/2022/07/18/an-historians-reaction-to-dobbs-v-jackson-womens-health-organization/ [https://perma.cc/KL5B-FMZU]; Karl Shoemaker, Mireille Pardon & Sara McDougall, *"Abortion Was a Crime?" Three Medievalists Respond to "English Cases Dating All the Way Back to the 13th Century Corroborate the Treatises' Statements That Abortion Was a Crime.,"* LAW & HIST. REV., https://lawandhistoryreview.org/article/abortion-was-a-crime-three-medievalists-respond-to-english-cases-dating-all-the-way-back-to-the-13th-century-corroborate-the-treatises-statements-that-abortio/ [https://perma.cc/7GPX-ZQA7]; Felicity Turner, *A View of Dobbs from the 19th Century*, LAW & HIST. REV., https://lawandhistoryreview.org/article/felicity-turner-a-view-of-dobbs-from-the-19th-century/ [https://perma.cc/828H-T6GD]; Maurizio Valsania, *Abortion Decision Cherry-Picks History—When the US Constitution Was Ratified, Women Had Much More Autonomy Over Abortion Decisions Than During 19th Century*, CONVERSATION (July 6, 2022), https://theconversation.com/abortion-decision-cherry-picks-history-when-the-us-constitution-was-ratified-women-had-much-more-autonomy-over-abortion-decisions-than-during-19th-century-185947 [https://perma.cc/B6ZH-NYGY]; Leslie J. Reagan, Opinion, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 [https://perma.cc/5HU7-4QG4]; Glenn C. Altschuler, *Justice Alito's Alternate Abortion 'Facts*,*'* HILL (May 22, 2022), https://thehill.com/opinion/judiciary/3497031-justice-alitos-alternate-abortion-facts/ [https://perma.cc/98HD-C7KR].

a. Dobbs v. Jackson Women's Health Organization

In *Dobbs v. Jackson Women's Health*, the Supreme Court for the first time eliminated an established individual constitutional right in its entirety[279]—and did so on a reading of history exclusive to Republican-appointed justices. The question whether the right to an abortion "is 'deeply rooted in [our] history and tradition' and essential to our Nation's 'scheme of ordered liberty,'"[280] was answered no, based on Supreme Court fact-finding criticized as "either incredibly bad history or simply dishonest."[281]

The Court had previously rejected this history-based test for substantive due process rights like abortion, and instead balanced a woman's interest in deciding whether to have a child against the state's desire to protect the fetus.[282] Here again, a change in the legal standard opened a wider path to errant fact-finding by making irrelevant the record assembled under the old standard.[283] Having opened the gate, the Court dove into a welter of appellate historical fact-finding, with no comprehensive record.[284] It is enough here to say that if the Court honestly felt the legal standard must change, it had every ability, consistent with judicial history and tradition in our scheme of ordered liberty, to send the case back for proper fact-finding under its new legal standard.

But if the goal was to undo this right and claim the long-sought prize of the anti-abortion movement, the Court had an irresistible opportunity. Was the standard chosen to fit the facts, or were the facts chosen to fit the standard, or were the two cobbled together to achieve the result? It's hard to know. What is crystal clear is that it was not done consistent with well-established constraints on appellate fact-finding. It is an irony that the Court violated judicial history and tradition, and guardrails of our ordered liberty, on its way to forging a decision putatively founded on those principles.

The Court's history test bakes in its own bias when it steers judges to ancient times when women were without property or political rights, indeed in some instances were chattel property.[285] One of the reasons the Supreme Court had not previously used this history test in this context was exactly that "the

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[279] *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor, & Kagan, J.J., dissenting).

[280] *Id.* at 2246.

[281] Shoemaker, Pardon & McDougall, *supra* note 278.

[282] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion).

[283] *See* Shoemaker, Pardon & McDougall, *supra* note 278.

[284] *See* CTR. FOR REPRODUCTIVE RTS, LEGAL ANALYSIS: WHAT *DOBBS* GOT WRONG 4 (Mar. 2023), https://reproductiverights.org/wp-content/uploads/2023/03/Legal-Analysis-What-Dobbs-Got-Wrong-3.15.23.pdf [https://perma.cc/P4JD-QNFG].

[285] Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 908–09, 920, 929–32 (2023); Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111, 159 (2022).

men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens."[286] Under the new standard, portions of the Court's reasoning relied on a treatise by "a 17th-century jurist who sentenced witches to execution and defended marital rape"—a peculiar source for an issue previously requiring a careful consideration of women's rights.[287] These sorts of sources would likely not have withstood the scrutiny of an orderly and proper development and review of the facts; they stand now in the law, impregnable, because the Court invented its factual assertions after any opportunity to challenge was past and refused to allow for a new record to be built. That is not how the process should work.

There are multiple signals in *Dobbs* that politics, and not bona fide constitutional reasoning, drove the outcome of the case. Free-range fact-finding was an important part of what went wrong: The change in legal standard opened up an arena for factual adventuring through history's pages; the factual adventuring dodged the proper, orderly development of record facts; and the dodge allowed factual inventions that took the majority to its chosen result.[288] At oral argument, Justice Sotomayor, anticipating the Court's intentions, asked, "[w]ill this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts? . . . I don't see how it is possible."[289]

b. New York State Rifle & Pistol Association v. Bruen

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court in an opinion by Justice Thomas struck down a 100-year-old New York law regulating licenses for the concealed carry of firearms.[290] The Court's right-wing majority employed a similarly selective excursion through historical facts to expand the Second Amendment right to bear arms.[291] That excursion, as one historian has put it, amounted to "distortion of the historical record, misreading of evidence, and dismissal of facts that don't fit the gun-rights narrative."[292]

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[286] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2329 (2022) (Breyer, Sotomayor, & Kagan, J.J., dissenting).

[287] Reagan, *supra* note 278.

[288] *See* Altschuler, *supra* note 278.

[289] Transcript of Oral Argument at 15, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2021) (No. 19-1392).

[290] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122–23, 2156 (2022).

[291] *Id.* at 2128.

[292] Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (Jun 27, 2022), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/ [https://perma.cc/Y78S-PZ63].

Bruen hinged on two factual conclusions: that the New York law imposed a rigorous standard to obtain a concealed-carry license that provided too much discretion to state officials to deny applications; and that such regulation was not "consistent with this Nation's historical tradition of firearm regulation."[293]

As to the first finding, the New York law required an applicant for a concealed-carry permit to show "proper cause exists" for issuance of the permit, and decades of state case law interpreted this standard to require a showing of "a special need for self-protection distinguishable from that of the general community."[294] The Court characterized this standard as "demanding," judicial review as "limited," and the law as an overly stringent outlier compared to the laws in other states as a result.[295] But these conclusions were nowhere to be found in any factual record below. As Justice Breyer pointed out in his dissent, this case came to the Supreme Court at the pleading stage, so "there [was] no record to support the Court's negative characterizations;" indeed, "[t]he parties [had] not had an opportunity to conduct discovery, and no evidentiary hearings [had] been held to develop the record."[296] Instead of remanding for factual development in the trial court, the majority conjured its own facts, with no record support beyond assertions in the complaint, which had not yet been subject to adversarial testing.[297]

Then came the Court's determinations regarding historical tradition: "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[298] As recently as *District of Columbia v. Heller*, the Court had suggested that it would follow traditional means-end scrutiny,[299] and in the fourteen years that followed, courts of appeals "coalesced around" a means-end intermediate scrutiny test.[300] *Bruen* abruptly "replace[d] the Courts of Appeals' consensus framework with its own history-only approach."[301] As the dissent explained, "[t]hat is unusual. We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade."[302]

But again the change in the standard opened opportunities for historical fact-finding. It did not go well. The right-wing majority drew criticism for "law office" history[303]—as one professional historian put it, the majority

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[293] *Bruen*, 142 S. Ct. at 2122–23, 2126.
[294] *Id.* at 2123.
[295] *Id.* at 2123–24.
[296] *Id.* at 2170 (Breyer, J., dissenting).
[297] *See id.* at 2168–74.
[298] *Id.* at 2126 (majority opinion).
[299] District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).
[300] *Bruen*, 142 S. Ct. at 2125.
[301] *Id.* at 2175 (Breyer, J., dissenting).
[302] *Id.*
[303] *Id.* at 2177; *see, e.g.*, Cornell, *supra* note 292; Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88

offered "a version of the past that is little more than an ideological fantasy."[304] Critics charged that it was "invented by gun-rights advocates and their libertarian allies in the legal academy with the express purpose of bolstering litigation such as *Bruen*,"[305] a narrative conceived "in the mid-1970s, largely at the behest of the National Rifle Association (NRA) and other gun rights advocates, as part of a wider, organized campaign to advance a broad, individual rights interpretation of the Second Amendment."[306] Maybe the critics are right, maybe not; but under the American system of justice that question should be subject to the daylight of adversarial challenge and review, not be resolved in darkness and secrecy in the one place where review is impossible.

There is a corollary danger of cooked history being presented to the Court for these last-minute unreviewable determinations. At least twelve NRA-funded *amici* filed briefs in *Bruen*; the petitioner was an NRA affiliate;[307] and much of the history was offered up by scholars who had received NRA funding.[308] Challenges to their motivated and selective history (remember that a former Chief Justice called the NRA-backed argument that the Second Amendment guarantees an individual right to bear arms a "fraud"[309]) should not take place in the aftermath of a decided case, but in the proper process of judicial development and review of facts.

One last example highlights the mischief of undisciplined fact-finding. New York presented copious historical evidence of concealed-carry

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BROOK. L. REV 797, 797 (2023); Jake Charles, Bruen*, Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L. (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/ [https://perma.cc/F3H3-EXSZ]; Robert J. Spitzer, *How the Supreme Court Rewrote History to Justify Its Flawed Gun Decision*, NBC NEWS (June 23, 2022), https://www.nbcnews.com/think/opinion/supreme-court-expands-gun-rights-concealed-carry-history-rcna35000 [https://perma.cc/QD8C-X63N]; Steven Lubet, *The Supreme Court's Bad History*, HILL (Nov. 16, 2022), https://thehill.com/opinion/judiciary/3737503-the-supreme-courts-bad-history/ [https://perma.cc/6EZ5-H9MR].

[304] Cornell, *supra* note 292.

[305] *Id.*; *see* Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. ILL. L. REV. ONLINE 195, 195 (2021), https://illinoislawreview.org/online/the-invention-of-the-right-to-peaceable-carry-in-modern-second-amendment-scholarship/ [https://perma.cc/P3CU-Y289].

[306] Charles, *supra* note 305, at 195.

[307] Van Sant, *supra* note 129.

[308] *Id.*

[309] Nina Totenberg, *From 'Fraud' to Individual Right, Where Does the Supreme Court Stand on Guns?*, NPR (Mar. 5, 2018), https://www.npr.org/2018/03/05/590920670/from-fraud-to-individual-right-where-does-the-supreme-court-stand-on-guns [https://perma.cc/6V6H-EKTC]; *see also* Peter Finn, *NRA Money Helped Reshape Gun Law*, WASH. POST (Mar. 13, 2013), https://www.washingtonpost.com/world/national-security/nra-money-helped-reshape-gun-law/2013/03/13/73d71e22-829a-11e2-b99e-6baf4ebe42df_story.html [https://perma.cc/HTJ7-ZDJ5].

restrictions, but that history undermined the majority's desired result.[310] The result was near-acrobatic feats by the majority to dismiss each example as irrelevant or aberrational.[311] In one ironic instance, the Republican-appointed justices discounted medieval English law as "not sufficiently probative" of historical tradition —despite having relied in *Dobbs* on sources from the same era, as well as the treatise of the 17th century witch-burner.[312] In short, as the dissent explained:

> In each instance, the Court finds a reason to discount the historical evidence's persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could?[313]

That embarrassing paragraph should never have to appear in a Supreme Court dissent, and it would not have, if the bizarre, late-stage, historical fact-finding adventures by the Court had gone instead through the judicial fact-finding process presented by our judicial history and tradition.

Dobbs and *Bruen* demonstrate that a motivated Supreme Court majority can build an imagined historic past of its own making, without the training and resources of professional historians, or any testing at trial and intermediate appeal, and manipulate the outcome of cases by manipulating the historical facts. *Dobbs* and *Bruen* present a dangerous acceleration in the Court's penchant for strategic fact-finding.

2. *A New Era of False Facts?* Kennedy v. Bremerton School District *and Battles of the Record*

These above examples of mischievous fact-finding occur in the realm of "legislative" fact. But a bold court can meddle in adjudicative facts as well. In *Kennedy v. Bremerton School District*, factual manipulation at the Court fell squarely in the realm of "adjudicatory" fact.

Bremerton involved a public school district's suspension of a football coach for his game-day prayers on the field.[314] The school district contended that it had to suspend the coach to avoid violating the Constitution's

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[310] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2181 (2022) (Breyer, J., dissenting).

[311] *See id.* at 2179–80.

[312] *Id.* at 2139 (majority opinion); Reagan, *supra* note 278.

[313] *Bruen*, 142 S. Ct. at 2190 (Breyer, J., dissenting).

[314] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415 (2022).

Establishment Clause.[315] The case turned on factual questions regarding the public or private nature of the prayers, whether the coach was acting in the scope of his duties when he offered those prayers, and various specific conduct surrounding the prayers.[316] The district court and court of appeals agreed that Coach Kennedy's actions violated the Establishment Clause.[317] The Supreme Court reversed.[318]

Justice Gorsuch marshaled a version of the facts for the Court that bore little resemblance to the factual record. He characterized Kennedy's prayers as "personal," "private," "quiet," and "brief."[319] The record compiled in the district court revealed that Kennedy's prayers were often anything but "personal," "private," "quiet," or "brief."[320] Indeed, a Ninth Circuit opinion stated that "the facts in the record utterly belie [the] contention that the prayer was personal and private,"[321] with one judge in a later opinion describing the narrative of "silent, private prayers" as a "deceitful narrative of this case spun by counsel."[322] Justice Sotomayor was so exasperated with the majority's factual presentation that she incorporated into her dissent photos of the coach's on-field prayer sessions.[323] Nevertheless, the debunked-and-resuscitated "facts" largely controlled the outcome of the case.

In *Bremerton*, the law was not changed to allow appellate fact-finding to intrude. The Court did not work to evade having a proper record. The question was not "legislative" facts about the general ways of the world. Here, on a robust (even photographed) trial court record, the Supreme Court majority just made up its own adjudicative facts, despite the record below. This signals a degree of boldness by the Republican-appointed justices in getting to their desired results—a degree of boldness that highlights the need to monitor and enforce *all* the guardrails designed to constrain them. In this respect, the majority's actions in *Bremerton*—although distinct from the "legislative" fact-finding problems discussed above—are as worrying as any other case discussed here.

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315 *Id.*

316 *Id.* at 2423–24, 2429–32.

317 *Id.* at 2419–21.

318 *Id.* at 2432–33.

319 *Id.* at 2415, 2417.

320 *See Bremerton*, 142 S. Ct. at 2416, 2418; Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1229–30 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022), and *rev'd*, 142 S. Ct. 2407 (2022).

321 Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1017 (9th Cir. 2021).

322 Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 912 (9th Cir. 2021) (Smith, J., concurring).

323 *Bremerton*, 142 S. Ct. at 2435–40 (Sotomayor, J., dissenting).

IV. CLEANING UP THE MESS

So what is to be done? Depending on the Supreme Court to clean up its mess seems unlikely to yield much. Cases like *Shelby County* and *Citizens United* do not bode well: the Republican-appointed justices have refused to correct obvious plain errors. The recent term suggests that more fact-free fact-finding is on its way. The lure of policy-making, via fact-free fact-finding, has proven irresistible to the Republican-appointed majority.

There is a role here for academia. The implications of free-range appellate fact-finding have received relatively little scholarly attention, likely because principles of appellate fact-finding have so long been honored. New attorneys preparing their first appellate case are ordinarily told to steer clear of quarreling over facts: The clear error standard is hard, and the path is steep.[324] Most appellate courts remand where they find clearly erroneous facts.[325] Until recently, there has been little fact-finding controversy to merit widespread scholarly attention. Now that these principles are regularly abused by the Supreme Court, however, robust discussion of why it matters to assign fact-finding away from appellate courts can help guide an overdue correction.

If you accept my theory that this is now a captured Supreme Court, in the traditional sense of regulatory or agency capture,[326] and if you accept my observation that there is a distinct and indelible pattern of outcomes emerging from the Court—to the uniform benefit of big Republican political interests[327]—then taking its decisions on faith is no longer automatically justified. Too many decisions are delivered goods, not judicial work. My premise that there is mischief afoot raises the question: on what basis of principle can the Court's past mischief be undone? Reconstituting the Supreme Court may be wise to stop future mischief, but it adds no principle to guide review and remedy of past mischief. Academic debate can help develop that principle by solving the new problem of false appellate facts.

What of the other branches? Remember *Marbury v. Madison*'s celebrated admonition that "it is emphatically the province and the duty of the judicial department to say what the law is"—what the *law* is.[328] Not what the facts are.

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[324] *See* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 48 (2000); Borgmann, *supra* note 82, at 1199–200 ("[T]he standard is understood to require significant deference to the trial judge.").

[325] *See* Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982) (holding that when a court of appeals rules that a district court's fact-finding was erroneous, the "usual requirement" is "remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance").

[326] *See* STABENOW, SCHUMER & WHITEHOUSE, *supra* note 24, at 19.

[327] *See supra* note 14 and accompanying text; Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1181–82 (2001).

[328] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

We in Congress and officials in the executive branch owe deference to judicial determinations of "what the law is," but we owe no deference to the Supreme Court's view of what the facts are. Indeed, as the Court itself once recognized, we are often better situated than the Court to assess what the facts actually are, particularly broad "legislative" facts.[329]

Where a court has found narrow adjudicative facts specific to a case or controversy, and particularly where proper judicial fact-finding procedure has been followed, there is little logic and potentially much mischief to other branches intervening. Often, those facts are bound up in the "law of the case." Congress should be chary of intruding into adjudicative fact-finding, and the judiciary should be properly protective of its prerogatives there. It is also usually not worth the time or effort of other branches to quarrel about factual determinations by courts that are of limited effect. In a word, who cares? Those cases whose fact-finding will have little effect beyond the parties should get little attention.

In the "danger zone," where appellate courts without record support make general factual pronouncements, the situation is different. We in Congress are just as, if not more, capable of finding "legislative" facts.[330] Even the nomenclature separating "adjudicative" from "legislative" facts makes the distinction. Congress can use any number of means, for however long it takes, to gather these facts from subject-matter experts.[331] Plus, if we're wrong, public pressure and elections can drive repair. When massive societal shifts are imposed by the Court by virtue of false pronouncements, the stakes for society can be enormous, affecting millions of individuals and putting an improper thumb on the scales of our democratic system. Those cases merit attention, not meek acceptance, from the elected branches.

When the worst happens, and the factual pronouncements have been proven indisputably false, it is actually wrong to allow them to stand. A court, if captured, might like its false facts to stand, because it likes the results it achieved with those facts; but that is no reason for the other branches to stand idly by. The lives of our constituents and the integrity of our democracy are being affected by determinations that (a) stand on falsity, and (b) only persist because of a deliberate and unjustified refusal of the Supreme Court to make necessary corrections.

It is logical to tie the deference due Supreme Court decisions to the Court's own deference to the principles that protect our democracy against unbounded appellate fact-finding. "Did you stay within your lane? If yes, okay, we should stay within ours and respect your decisions. But if not . . . "

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329 *Turner II*, 520 U.S. at 195–96; *see also* Devins, *supra* note 327, at 1180.

330 Devins, *supra* note 327, at 1179.

331 *Id.* at 1178–82; *see also Turner II*, 520 U.S. at 195–96 ("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." (quoting *Turner I*, 512, U.S. at 665–66)).

This presents a principled way for other branches to redress clear and plain Supreme Court error affecting public policy. It can provide a principled check on unprincipled fact-finding. It gives Congress and the executive branch a predictable way, consistent with long traditions of American governance, for each branch to assert itself as a defender of checks and balances, as a shield against arbitrary (or worse) judicial decision-making. Not broadly, not just because we disagree, but in that narrow and perilous "danger zone" of improper and erroneous Supreme Court fact-finding driving consequential social results.

A. *Judicial Self-Help*

The Supreme Court could today begin to minimize the harm done by its false fact-finding. There is precedent for the Court to update its decisions when they are based on false factual predicates. In *United States v. Leon*, Justice Blackmun explained that Supreme Court opinions premised on "empirical judgment[s]" "cannot be cast in stone."[332] Those judgments are "provisional" and the Court must "reconsider" its ruling whenever its "assumptions" are disproven in the "real world."[333] According to Justice Blackmun, "[t]he logic of a decision that rests on untested predictions . . . demands no less."[334]

Longstanding *stare decisis* doctrine also provides an opening for courts to reconsider cases premised on debunked facts. The respect owed precedent depends on "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[335] The Court also considers "the quality of the reasoning in a prior case" and the "effect on other areas of law,"[336] both of which are affected by false facts. In *Dobbs*, ironically, the Court noted that "sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong."[337] In these circumstances, "the country is usually stuck with the bad decision unless" the Court is "willing to reconsider and, if necessary, overrule" it.[338] My point exactly. The irony, of course, is that *Dobbs* is the egregiously wrong decision, standing on dubious facts cherry-picked from the historical record.

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[332] United States v. Leon, 468 U.S. 897, 927–28 (1984) (Blackmun, J., concurring).

[333] *Id.*

[334] *Id.* at 928.

[335] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (plurality opinion); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096–99 (2018) (overruling Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967) and Quill Corp. v. North Dakota, 504 U.S. 298 (1992)).

[336] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265–66, 2275 (2022).

[337] *Id.* at 2280.

[338] *Id.* at 2262.

Shelby County and *Citizens United,* decisions that we are "stuck with," are ripe for reconsideration and overruling as "egregiously wrong from the start" and "bad."[339] They even cast a shadow across other areas of constitutional law by "dilut[ing] the strict standard for facial constitutional challenges . . . as well as the rule that statutes should be read where possible to avoid unconstitutionality."[340] They are ripe for review. But the Court has had abundant opportunity to revisit *Shelby County* and *Citizens United*, and has not[341]—a sharp contrast to the Republican appointees' eagerly inviting litigation on precedents they are eager to review.[342]

The Court could also rein in its newly invented tests that allow decisions to be driven by free-ranging opinions about history and tradition. Ideally, it should act fast to repair *Dobbs*, *Bruen*, and *Bremerton* "before any notable reliance interests . . . develop[]."[343] And it could incorporate a litany of new tests and principles offered by scholars to bring greater consistency and coherence to decisions.[344] The consistency the present Court exhibits is the

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[339] *Id.* at 2243, 2262.

[340] *Id.* at 2276–77.

[341] *See supra* Part III.A.

[342] *See* Adam Liptak, *With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear*, N.Y. TIMES (July 6, 2015), https://www.nytimes.com/2015/07/07/us/supreme-court-sends-signals-to-request-cases-they-want-to-hear.html [https://perma.cc/B32Q-AW2S]; *see also* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012) ("Our cases to date have tolerated this 'impingement,' and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake."); Harris v. Quinn, 573 U.S. 616, 671 (2014) (Kagan, J., dissenting) ("Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority would not restrain itself from saying (and saying and saying) so."); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 807 (2017) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Indeed, this Court has refused even to decide whether § 5 is constitutional, despite having twice taken cases to decide that question."); Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 295 n.1 (2015) (Thomas, J., dissenting) ("As I have previously explained, § 5 of the Voting Rights Act is unconstitutional."); Dobbs, 142 S. Ct. at 2304 (Thomas, J., concurring) ("[B]ecause this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. But, in future cases, we should 'follow the text of the Constitution . . . .' Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity." (citation omitted)); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022) (Thomas, J., concurring).

[343] *Dobbs*, 142 S. Ct. at 2342 (Breyer, Sotomayor, Kagan, J.J., dissenting).

[344] *See, e.g.*, William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 893 (2013); FAIGMAN, *supra* note 79, at 43–62 (proposing a taxonomy of facts and courts' treatment thereof); Devins, *supra* note 327, at 1187–205; Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 GEO. L.J. 637, 666–80 (2014); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislation Fact-Finding*, 84 IND. L.J. 1, 3, 46–56 (2009) (arguing that "courts should independently review the factual foundation of all legislation

consistent pattern of outcomes that consistently benefit a small group of big political donor interests.[345]

An obvious principle to restore at the Court is respect for Congress's fact-finding.[346] One need not love Congress to honor this principle. Regardless of whether one believes legislatures or courts to be better fact-finders,[347] Congress's findings stem from its own constitutional fact-finding prerogative under Article I.[348] Like us or not, we stand on constitutional footing when we find facts. That counts for something in a system of separated powers. When justices smugly and without record support dismiss Congress's findings as pretextual or done in bad faith, they cross an important line.

There is more in Congress's favor: Factual errors baked into judicial opinions like *Shelby County* and *Citizens United* have proven hard to dislodge. Even when provably false, "zombie" false facts still stalk the landscape terrorizing the villagers. Congressional fact-finding brings the advantage that Congress is in its nature more responsive to popular sentiment than courts, so plain factual errors—or laws premised on plain factual error—can be remedied through our democratic process. Whether or not we in Congress are less likely than the Court to err on matters of legislative fact, our errors are far more amenable to correction.

Finally, assume that an instance of congressional fact-finding actually is wrong. Nothing says that Congress's fact-finding error gives the Supreme Court authority to then make up its own facts. The Court is not our equal in that sense. Congress actually is designed to be a fact-finding body.[349] The Supreme Court is not; it is instead the policeman of a fact-finding function assigned elsewhere within the judicial branch—a function with its own judicial rules, procedures, and principles.[350] Just because some justices believe we got

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that curtails important individual rights protected by the federal Constitution"); Larsen, *Confronting*, *supra* note 111, at 1305–12 (positing minimalist and maximalist fact-finding approaches and applicable guiding principles); Adamson, *supra* note 71, at 1082–87; Brent Ferguson, *Predictive Facts*, 95 WASH. L. REV. 1621, 1625, 1662–72 (2020); Ross, *supra* note 150, at 2081–104; Borgmann, *supra* note 82, at 1190 (arguing that appellate courts should apply the same standard of review to "social facts" as to other facts).

[345] *See supra* note 14 and accompanying text.

[346] *See* Faigman, *supra* note 107, at 554–55; Crane, *supra* note 344, at 647 ("Congressional findings thus occupy an uncertain position in modern constitutional jurisprudence. They are seldom required, sometimes helpful, and sometimes hurtful to the constitutionality of a statute. Justices on both sides of the political spectrum cite the presence, sufficiency, and absence of legislative findings in explaining their votes. Legislative findings are thus ubiquitous and ideologically unidentifiable properties in modern constitutional litigation."); FAIGMAN, *supra* note 79, at 130–32.

[347] FAIGMAN, *supra* note 79, at 132–33.

[348] *See* sources cited *supra* note 115.

[349] Devins, *supra* note 327, at 1178–82 (discussing why "Congress has numerous advantages over the courts in pursuing information"). *But see id.* at 1182–87 (explaining that "Congress has the tools but may lack the incentives to take factfinding seriously").

[350] *See* Araiza, *supra* note 344, at 938, 942.

it wrong does not send that all out the window. A Court operating within proper bounds would be sensitive to the need for robust and reliable judicial fact-finding, which in America we accomplish through a thorough, adversarial process in the lower courts—not by appellate courts cherry-picking desirable facts from amicus briefs and online search engines.[351] The Supreme Court should not only treat Congress's findings fairly and with respect, it should also treat with respect traditional and well-established principles regarding judicial fact-finding—including where fact-finding belongs in the judicial branch and why.

B. *End "Factual Precedents"*

The Judicial Branch could resolve some of the issues stemming from dubious appellate fact-finding by addressing the problem in the lower courts. Nothing requires automatic adherence to "factual precedents."[352] Supreme Court opinions are increasingly "chock-full of statistics, social science studies, and other general statements of fact about the world."[353] Lower courts sometimes treat "the Supreme Court's assertion of legislative fact—a general factual claim—as authority to prove that the observation is indeed true."[354] Instead of citing "evidence from the record to establish" a relevant fact, a lower court will instead "cite language from a Supreme Court opinion for that point."[355] This practice can be corrected, as it stands on no important principle.

To be sure, separating facts in a Supreme Court opinion from the legal rules to which they are connected is not always easy.[356] But if any of the "Court's statements of fact" should be denied "separate precedential force, distinct from the precedential force of whatever legal conclusions they contributed to originally," it is the false facts of the kind behind *Shelby County* and *Citizens United*.[357] Lower courts sometimes distinguish Supreme Court rulings predicated on erroneous facts,[358] but these examples are few.[359] It

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[351] *See supra* notes 76–79 and accompanying text; Larsen, *Confronting*, *supra* note 111, at 1271, 1275–76.

[352] *See* Larsen, *Factual Precedents*, *supra* note 72, at 63.

[353] *Id.* at 61.

[354] *Id.* at 62, 73.

[355] *Id.* at 62.

[356] *Id.* at 63.

[357] *Id.*; *see also* Gorod, *supra* note 37, at 65 ("It is unclear why factual findings should be held to [the same standard as Supreme Court rulings]. It may be beneficial for legal precedents to enjoy a certain stability, but it is unclear why factual findings should be equally stable when the world they are describing may not be, and when new research inevitably provides a better and more precise understanding of the world.").

[358] *See, e.g.*, Hamilton, *supra* note 130, at 38–39 (discussing how the Sixth Circuit's decision in Does #1–5 v. Snyder, 834 F.3d 696 (6th Cir. 2016), treats Smith v. Doe, 538 U.S. 84 (2003), and similar cases).

remains unclear how lower courts should treat false factual premises.[360] It is well within the province of the judicial branch, and does no true damage to the Supreme Court's role within that branch, to stop blindly adhering to the Supreme Court's "[f]actual statements about the way the world works."[361] The supremacy of the Supreme Court is not supremacy in generalized fact-finding.[362] Actually, the Supreme Court is for a variety of reasons probably the worst place to locate fact-finding in the whole of government. So when the Court embarks on fact-finding knight-errantry, neither law nor practice nor common sense demand that it be followed.

This questioning by lower courts will create a healthy judicial debate, refining which facts lower courts can be expected to follow and which are either pure invention or have been proven false by events.[363] Scholarly effort could contribute to this debate by giving lower courts an intellectual framework to differentiate legal precedent, which is to be followed or distinguished, from what one scholar has called "factual precedents," that ought first to be tested for falsity.[364] Academia could offer lower courts standards for examining general factual propositions made up by their appellate colleagues and standards for declining to accord cases precedential status to the extent they stand on "facts" that are not actually factual.

From these debates a jurisprudence linking precedent principles and fact-finding practice could emerge. The pieces are already there, already steeped in generations of judicial wisdom and tradition. This jurisprudence would be deeply founded both in legal practice and constitutional principle. And it would fit well in a political system guarded by checks and balances. In this way, the judiciary itself can provide an important check and balance against Supreme Court knight-errantry.

C. *Congressional Solutions to a Fact-Free Court*

If the Court will not heal itself, then Congress will have to step in. The Supreme Court and the federal judiciary serve as an important shield against discriminatory and dangerous actions by the elected branches of government. But Congress must stay vigilant against the abuse of judicial power—to guard against that shield becoming a sword. When that occurs, Congress must be prepared to push back against the Court's fact-finding mischief.

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[359] *See* Gorod, *supra* note 37, at 64 ("Whatever the law might require, lower courts will, as a practical matter, often reflexively follow a statement by a higher court, even if the statement is only dictum or a factual finding that perhaps ought not be binding.").

[360] *See* Larsen, *Factual Precedents*, *supra* note 72, at 62 n.11 (summarizing scholarship confronting "the confusion surrounding the precedential value of factual claims").

[361] *Id.* at 63.

[362] *See id.* (explaining that "[t]he Supreme Court is not a factfinding institution").

[363] *See id.* at 111–12.

[364] *Id.* at 73.

1. *Legislating to Overturn Decisions Based on Bad Facts*

Congress has several tools at its disposal to remedy Supreme Court decisions based on faulty facts. When a federal statute is at issue and the Court has held that Congress's factual record is inadequate to support the law, Congress can renew the legislation with updated, more robust findings. Congressional Democrats, with occasional support from a handful of Republicans, have offered legislation along these lines in every Congress since *Shelby County*.[365] The problem with this is the obvious one: Where the false-facts decision tipped the political balance in favor of one party, that party will block the effort to update the factual findings.

In cases involving individual constitutional rights, like *Dobbs*, *Bruen*, and *Bremerton*, the appropriate legislative response is less clear. Congress may not "overrule" a Supreme Court decision grounded in the Constitution.[366] That takes a constitutional amendment.[367] However, Congress can grant federal statutory rights.[368] *Dobbs* eliminated the abortion right as a matter of constitutional law, so Congress tried to pass a law creating a federal statutory right to abortion: the Women's Health Protection Act.[369] The bill failed in the

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[365] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a) (2014); Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 3(a) (2014); Voting Rights Advancement Act of 2015, S. 1659, 114th Cong. § 4(a) (2015); Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. § 4(a) (2017); Voting Rights Advancement Act of 2017, S. 1419, 115th Cong. § 4(a) (2017); Voting Rights Amendment Act of 2017, H.R. 3239, 117th Cong. § 3(a) (2017); Voting Rights Advancement Act of 2019, S. 561, 116th Cong. § 4(a) (2019); Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 3(a) (2019); Voting Rights Amendment Act of 2019, H.R. 1799, 116th Cong. § 3(a) (2019); For the People Act of 2019, S. 949, 116th Cong. § 1031(a) (2019); For the People Act of 2019, H.R. 1, 116th Cong. § 1031(a) (2019); John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. § 4(a) (2020); Voting Rights Amendment Act of 2022, H.R. 7905, 117th Cong. § 3(a) (2022); John R. Lewis Voting Rights Advancement Act of 2021, S. 4, 117th Cong. § 104(a) (2021); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 5(a) (2021); For the People Act of 2021, S. 1, 117th Cong. § 1031(a) (2021); For the People Act of 2021, H.R. 1, 117th Cong. § 1031(a) (2021); For the People Act of 2021, S. 2093, 117th Cong. § 1031(a) (2021); Freedom to Vote Act, S. 2747, 117th Cong. § 1031(a) (2021); Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. § 9004(a) (2022).

[366] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.").

[367] *See* U.S. CONST. art. V.

[368] *See* Neal Devins, *Congressional Responses to Judicial Decisions*, *in* ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (Mark Graber et al. eds., Gale MacMillan, 2008).

[369] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022); Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. § 2(b) (2021); Women's Health Protection Act of 2022, S. 4132, 117th Cong § 3(a) (2022); Women's Health Protection Act of 2023, H.R. 12, 118th Cong. § 3 (2023); Women's Health Protection Act of 2023, S. 701, 118th Cong. § 2 (2023).

Senate after passing in the House.[370] Here again, where the underlying decision gave a big win to one political party, that party will block the remedial bill. Thus, to facilitate passing remedial legislation, Congress could empower itself to respond more quickly and efficiently with legislation like the Supreme Court Review Act, which provides expedited procedures for remedial bills.[371] Legislation like this would make it easier for Congress to reassert itself as a body capable of protecting Americans from harmful decisions by the third branch.

2. *Countering Judicial Factual Supremacy*

Congress cannot undo constitutional rulings through legislation, so enacting remedies to cases like *Bruen* or *Bremerton* that restrict Congress's ability to legislate in certain areas can be complicated. But even in these instances, Congress still has powers.

The most obvious one is to amend the Constitution. But the constitutional amendment process, which can begin with a two-thirds vote of Congress and then requires ratification by three-fourths of the states, is long and laborious.[372] It provides no timely remedies for individuals harmed by Supreme Court decisions that become effective immediately. [373] As a practical matter, in today's polarized era, this route is largely a dead letter in most constitutional disputes.[374]

That leaves an activist Supreme Court free to issue damaging, highly disruptive opinions based on false or manipulated facts, and Congress with no way to remedy those politicized decisions. This should encourage a rethinking of the status quo. History and tradition hold ideas about the political branches' power to challenge the Supreme Court. For instance, the modern notion that the Supreme Court holds the final word was not always the case.[375] Since the Founding, factions of conservatives and liberals alike have argued that the democratic branches of government have their own coequal role in defining

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[370] Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NPR (May 11, 2022), https://www.npr.org/2022/05/11/1097980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely-f/ [https://perma.cc/5C8Y-TUVW].

[371] *See* Supreme Court Review Act of 2022, S. 4681, 117th Cong. § 3 (2022).

[372] U.S. CONST. art. V. Article V of the Constitution also provides an alternative constitutional convention procedure. *Id.*

[373] *Id.*

[374] *See, e.g.*, Tara Law, *Virginia Just Became the 38th State to Pass the Equal Rights Amendment. Here's What to Know About the History of the ERA*, TIME (Jan. 15, 2020), https://time.com/5657997/equal-rights-amendment-history/ [https://perma.cc/9NFF-CR86].

[375] *See* Brad Snyder, Opinion, *The Supreme Court Has Too Much Power and Liberals Are to Blame*, POLITICO (July 27, 2022), https://www.politico.com/news/magazine/2022/07/27/supreme-court-power-liberals-democrats-00048155 [https://perma.cc/22Q5-UWMF].

the meaning of the Constitution.[376] "During the early years of U.S. history, it was widely believed that each branch or department of government should interpret the Constitution for itself, without any branch's interpretation necessarily binding the others"—a theory known as "departmentalism."[377] In recent decades, some scholars have pushed a theory known as "popular constitutionalism," arguing that "the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms."[378] In other words, "the ultimate authority in constitutional interpretation resides in 'the people themselves.'"[379]

Presidents and Congresses alike have invoked these concepts, most famously in response to Supreme Court decisions like *McCulloch v. Maryland*[380] and *Dred Scott v. Sandford*.[381] Although it was largely conservatives who championed such theories in the years of the Warren Court,[382] progressives have returned to them recently.[383] This Article argues

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[376] *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 491, 495–97 (2018); *see also* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 15 (2005); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1721 (2017); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 468–70 (2003); Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 404 (1982); L.A. Powe, Jr., *The Court's Constitution*, 12 U. PA. J. CONST. L. 529, 529 (2010); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687–88 (2005); WURMAN TESTIMONY, *supra* note 14, at 5–8; Stephen Griffin, *Departmentalism: What Went Wrong?*, BALKINIZATION BLOG (June 19, 2014), https://balkin.blogspot.com/2014/06/departmentalism-what-went-wrong.html [https://perma.cc/KV5C-U7ZK].

[377] Fallon, *supra* note 376, at 489.

[378] Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 898–99 (2005).

[379] Fallon, *supra* note 376, at 489 (citation omitted).

[380] Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 899 (2008).

[381] *Id.* at 904–05.

[382] *See* Barry Friedman, *The Cycles of Constitutional Theory*, 67 L. & CONTEMP. PROBS. 149, 157–58 (2004).

[383] Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 218 (2019); *see also* Ryan Cooper, *The Case Against Judicial Review*, AM. PROSPECT (July 11, 2022), https://prospect.org/justice/the-case-against-judicial-review/ [https://perma.cc/F9C3-KQ78]; Snyder, *supra* note 375; Joseph Fishkin & William E. Forbath, *The Supreme Court Wasn't Always the Final Arbiter of the Constitution*, WASH. POST (Aug. 2, 2022), https://www.washingtonpost.com/made-by-history/2022/08/02/supreme-court-wasnt-always-final-arbiter-constitution/ [https://perma.cc/5S54-AKKD]; Jamelle Bouie, Opinion, *Down With Judicial Supremacy!*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/opinion/down-with-judicial-supremacy.html [https://perma.cc/NX85-JK62].

only that Congress may have more power than it thinks, and that the Supreme Court veering into results-oriented decisions based on false or flimsy facts provides occasion to review the rules that prevail in normal times.

How should Congress respond to problematic Supreme Court decisions? Assume the Court has had time and opportunity to correct its mistakes, and proves recalcitrant, so the best case—self-correction—is foreclosed. Congress could start by exploring more targeted remedies that fall well within its established powers, including some of the existing proposals for improving Supreme Court decision-making that the Court has ignored. These could include modifying existing congressionally approved rules by changing the standards of review for factual determinations, tightening the rules on appellate court fact-finding and judicial notice, or introducing stricter remand requirements for factual questions. Reforms such as these may not solve all of the problems identified here, but together they could shift the window on what Supreme Court conduct is considered ordinary and permissible.

Congress could also use its oversight authority to hale justices before committees to explain their actions.[384] Justices already appear before Congress to support their requests for appropriations.[385] Justices and judges have appeared before Congress in other contexts hundreds of times.[386] Often these appearances relate to funding requests or reviewing the judiciary's administrative activities.[387] However, nothing prevents Congress from examining suspicious patterns of decisions, or questionable interactions between justices and interests, or ethics concerns either generally or specific to cases.[388] Novelty does not make a practice unconstitutional,[389] and ethical or due process concerns, to protect honest litigants and honest courtrooms, could be manageable.

If oversight fails, Congress could move toward more direct confrontation. The other branches could simply refuse to honor an opinion based on false facts.[390] Congress could make a new law, based on proper facts, and force a confrontation with the Supreme Court over its false facts. Congress could even

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[384] JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 195–97 (2017).

[385] *See* Harvey Rishikof & Barbara A. Perry, *"Separateness but Interdependence, Autonomy but Reciprocity": A First Look at Federal Judges' Appearances Before Legislative Committees*, 46 MERCER L. REV. 667, 674–76 (1995).

[386] *Id.* at 679.

[387] *Id.* at 676. Of course, nothing prevents a justice from refusing to help Congress facilitate oversight on matters well within Congress's authority to hold hearings on and investigate. *See, e.g.*, Letter from Hon. John Roberts, C.J. of the Sup. Ct., to Sen. Richard J. Durbin, Chair, Comm. on the Judiciary, U.S. Senate (Apr. 25, 2023), https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf [https://perma.cc/QKF8-9DTD].

[388] *See* CHAFETZ, *supra* note 384, at 196–97.

[389] Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1454–55 (2017).

[390] *See* Walsh, *supra* note 376, at 1721.

include "fallback" provisions that would take effect if the Court persisted in its factual error and moved to overturn the measure.[391] Congress of course retains the power of the purse, a power that courts have sometimes advised Congress to use in inter-branch contests.[392] If the power of the purse is recommended to pressure the executive goose, it is hard to find its use improper for the judicial gander. Again, we are talking here only about areas where the Court has trespassed out of its proper zone into improper fact-finding. More aggressive judicial overreach requires more aggressive exploration of permissible solutions.

Congress could strip the Supreme Court—or the entire federal judiciary for that matter—of jurisdiction over the contested matter.[393] Article III of the Constitution grants Congress authority to adjust the scope of the Supreme Court's jurisdiction, excepting cases over which the Court has "original jurisdiction."[394] Congress's plenary authority to structure the lower courts allows it to adjust lower courts' jurisdiction.[395] Since Congress's creation of the lower courts with the 1789 Judiciary Act, Congress has used this power throughout the country's history.[396] The precise scope of this authority remains unclear,[397] and the effort would obviously be controversial, so it should be restricted to remedying identified excesses committed by the Supreme Court. At the end of the day, in a battle for constitutional interpretive supremacy, Congress's jurisdiction-stripping authority enjoys textual support that judicial review itself does not.[398]

Finally, if the mischief were persistent and flagrant enough, remedies like impeachment, term limits, and changes to the Court's number remain viable under the Constitution.[399] It is no small matter, for instance, that the Court

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[391] Brianne J. Gorod, *The Collateral Consequences of Ex Post Judicial Review*, 88 WASH. L. REV. 903, 953–54 (2013).

[392] *See, e.g.*, Comm. on the Judiciary v. McGahn, 951 F.3d 510, 519, 528-529 (D.C. Cir. 2020), *vacated en banc*, 968 F.3d 755 (D.C. Cir. 2020) (conflicts between Congress and the executive branch over congressional testimony of White House official and document production).

[393] CHRISTOPHER JON SPRIGMAN, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., JURISDICTION STRIPPING AS A TOOL FOR DEMOCRATIC REFORM OF THE SUPREME COURT 7–103 (Aug. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf [https://perma.cc/4FMG-VD7Z].

[394] U.S. CONST. art. III, § 2, cl. 2.

[395] FINAL REPORT, *supra* note 63, at 155–58.

[396] *Id.*

[397] *Id.* at 155, 158.

[398] SPRIGMAN, *supra* note 393, at 8–10; *see also* Transcript of Oral Argument at 22, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("[T]here's so much that's not in the Constitution, including the fact that we have the last word. *Marbury versus Madison*. There is not anything in the Constitution that says that the Court, the Supreme Court, is the last word on what the Constitution means.").

[399] *See* JOANNA R. LAMPE, CONG. RSCH. SERV., R47382, CONGRESSIONAL CONTROL OVER THE SUPREME COURT 5–6 (2023).

allowed corruption into our democracy at an industrial scale, as *Citizens United* accomplished. The point here is that Congress is not helpless in the face of a Supreme Court aggrandizing its own power at the expense of the other branches and at odds with the American democratic system of popular supremacy.

There are dangers to opening this door. Segregationists' attempts to circumvent *Brown v. Board of Education* offer an important cautionary tale,[400] as did the pre-*Dobbs* movement at the state level to pursue "private bounty hunter" laws to insulate then-unconstitutional abortion restrictions from judicial review.[401] Supreme Court decisions can be challenged for a variety of motives, with collateral damage possible to federal supremacy and constitutional protections for individuals across the country. In an age of industrialized disinformation and rampant "alternative facts," political forces can manufacture narratives that what is false is true.[402] (One could argue that the historical "facts" of *Dobbs* were the product of exactly such an effort.) But there are equally dangers to allowing the Supreme Court to force anti-democratic policies improperly on the rest of the country, using false facts to get their way. Just ask the voters disenfranchised in the wake of the *Shelby County* opinion, or victims of the corruption sheltered by the *Citizens United* case.[403]

Yes, undermining the judiciary's power to adjudicate constitutional disputes would reduce courts' power to police Congress and could undermine the important role of the Supreme Court with respect to the "settlement function of law."[404] In a world in which the Court does not have ultimate

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[400] *See The Case that Changed America:* Brown v. Board of Education*: The Southern Manifesto and "Massive Resistance" to* Brown, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/JY9R-A7Z3]; Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58 (1955); *see also* United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 848–49 (5th Cir. 1966); Jackson Mun. Separate Sch. Dist. v. Evers, 357 F.2d 653, 654 (5th Cir. 1966); John P. Jackson Jr., *The Scientific Attack on* Brown v. Board of Education*, 1954–1964*, 59 AM. PSYCH. 530, 530–35 (2004).

[401] *In re* Whole Woman's Health, 142 S. Ct. 701, 702 (2022) (mem.) (Sotomayor, J., dissenting).

[402] Larsen, *Constitutional*, *supra* note 73, at 183–93, 202–18.

[403] In the same vein, victims of climate harm could likely trace much of that harm to the post-*Citizens United* tsunami of spending by the fossil fuel industry, contributing no small part to the blockade of climate legislation in Congress. *See* Niall McCarthy, *Oil And Gas Giants Spend Millions Lobbying To Block Climate Change Policies*, FORBES (Mar. 25, 2019), https://www.forbes.com/sites/niallmccarthy/2019/03/25/oil-and-gas-giants-spend-millions-lobbying-to-block-climate-change-policies-infographic/?sh=36d838e07c4f [https://perma.cc/A72E-QYKH].

[404] *See* Walsh, *supra* note 376, at 1719–22; *see also* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 469–71 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371–72 (1997); Letter from Rosalind Dixon, Dir., Gilbert & Tobin Ctr. of Pub. L., to Profs. Bob Bauer & Cristina Rodriguez, Co-

authority to settle constitutional disputes, the political branches could be enmired in lengthy and disruptive disputation. Nevertheless, careful and thoughtful congressional contestation might remain the best option in the face of a Court manipulating facts to reach its desired outcomes. Perhaps these disputes should be settled in the democratic sphere, where error is more readily corrected by the people.

The federal judiciary has a mixed record in our American struggle for liberty. Legendary cases accomplished majestic expansions of freedom, but not always. One scholar recently argued to the Presidential Commission on the Supreme Court of the United States that the Supreme Court has often stood in the way of *Congress's* attempts to "protect the civil rights of all Americans."[405] Over roughly 150 years, "the Supreme Court has invalidated dozens of federal laws designed to expand political equality" for African Americans and other racial minorities, low-income Americans, children, women, the sick, and other vulnerable groups.[406] The Supreme Court curtailed the Reconstruction Amendments passed by Congress.[407] One of the Court's principal achievements—*Brown v. Board of Education*—created rights previously established by federal anti-discrimination legislation that the Court "had earlier gutted" decades before.[408] When Congress has imposed legislation that "harmed racial, religious, or ideological minorities, the Court has almost exclusively adopted a posture of deference."[409] It stood by "when Congress and the president have violently disposed Native tribes, excluded Chinese immigrants, persecuted political dissidents, withheld civil rights from U.S. citizens in territories, and banned Muslim refugees."[410] And in wartime emergencies, the Court has "allowed the federal government to round up whichever ethnic or religious groups they think are suspicious."[411] Congress is no perfect defender of constitutional values. But the Supreme Court has its own bleak history. When the Court abuses its power—especially by manipulating the factual record or discarding Congress's findings—Congress must confront hard questions. No formula governs when and how Congress should take up these tasks. These are inevitably political decisions. But the evidence amassed here shows that it is well past time to start the conversation.

Chairs, Presidential Comm'n on the Sup. Ct. of the U.S. (June 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf [https://perma.cc/QY2Y-FBN6].

405 *See* BOWIE TESTIMONY, *supra* note 1, at 6.

406 *Id.* at 4.

407 *Id.* at 6.

408 *Id.* at 6–9.

409 *Id.* at 10.

410 *Id.*

411 BOWIE TESTIMONY, *supra* note 1, at 11.

V. CONCLUSION

At the opening of his confirmation hearings in 2005, Chief Justice Roberts told the Senate Judiciary Committee that he did not have an "agenda," but did "have a commitment."[412] That commitment was to "confront every case with an open mind," to "fully and fairly analyze the legal arguments that are presented," to "be open to the considered views of [his] colleagues on the bench," and to "decide every case based on the record, according to the rule of law, without fear or favor, to the best of [his] ability."[413] Whatever one thinks of the rest of the Chief Justice's commitment, it is hard to look at the record of the Roberts Court in cases like *Shelby County*, *Citizens United*, *Dobbs*, *Bruen*, and *Bremerton* and conclude that the Court majority has lived up to his promise to "confront every case with an open mind" and "decide every case based on the record." Instead, the Supreme Court has broken long-standing rules and practices to force desired results on the American people. One such violation has been its excursion into fact-finding, based not on the record before it, nor on factual findings of Congress, but on imagined or confected findings that served ulterior purposes of the justices. The Court's persistent refusal to confront these errors in the face of overwhelming evidence only makes the Court's conduct more egregious. The Court's new emphasis on "history and tradition" threatens even more wanton and arbitrary fact-finding, and *Bremerton* foreshadows deliberate disregard by justices of even adjudicatory facts plain in the record before them.

The Supreme Court's claim to supremacy in constitutional interpretation is at its weakest when the interpretation is premised on bogus facts. Even the power to "say what the law is"[414] enjoys no textual support in the Constitution. Asserting that the Court has ultimate authority to say what the *facts* are leaps into constitutional fantasy, and endangers the balance between the Supreme Court and its coequal branches. The Court has no special competency to find facts. When fact-finding is done in an unconstrained manner, when the facts arrived at are indefensible, and when they are used to reach a preferred outcome, this signals wrongful trespass into the policymaking function the Constitution assigns to the political branches. To prevent the dangers that unchecked judicial authority poses to the separation of powers and to popular liberty, judicial procedure cabins appellate fact-finding.[415]

The American people deserve a Court that plays by the rules. If the Court continues to play fast and loose with the facts to suit the outcome its

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[412] *Chief Justice Roberts Statement - Nomination Process*, U.S. COURTS (Sept. 29, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/GR2U-WQDZ].

[413] *Id.*

[414] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Devins, *supra* note 327, at 1169.

[415] *See supra* Part II.B.

Republican supermajority wants, Congress has tools to remedy the abuse. Something needs to be done. That something should start in the halls of Congress, and it should start now.