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Constitutional Law in an Age of Alternative Facts

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CONSTITUTIONAL LAW IN AN AGE OF ALTERNATIVE FACTS

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Objective facts—while perhaps always elusive—are now an endangered species. A mix of digital speed, social media, fractured news, and party polarization has led to what some call a “post-truth” society: a culture where what is true matters less than what we want to be true. At the same moment in time when “alternative facts” reign supreme, we have also anchored our constitutional law in general observations about the way the world works. Do violent video games harm child brain development? Is voter fraud widespread? Is a “partial-birth abortion” ever medically necessary? Judicial pronouncements on questions like these are common, and—perhaps more importantly—they are being briefed by sophisticated litigants who know how to grow the factual dimensions of their case in order to achieve the constitutional change that they want.

The combination of these two forces—fact-heavy constitutional law in an environment where facts are easy to manipulate—is cause for serious concern. This Article explores what is new and worrisome about fact-finding today, and it identifies constitutional disputes loaded with convenient but false claims. To remedy the problem, we must empower courts to proactively guard against alternative facts. This means courts should push back on blanket calls for deference to the legislative record. Instead, I suggest re-focusing the standards of review in constitutional law to encourage fact-checking. It turns out some factual claims can be debunked with relative ease, and I encourage deference when lower courts rise above the fray and do just that.

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INTRODUCTION

Oxford Dictionary’s 2016 word of the year was “post-truth,”¹ and President Trump has now introduced us to the phrases “fake news”² and “alternative facts.”³ These expressions all point to the same phenomenon: In today’s political dialogue, we believe what we want to believe. Objective facts—while perhaps always elusive—are now endangered species. Some combination of technological speed, infinite access to information, a balkanized press, and a diluted notion of expertise has led to a very central role in our political conversations for claims about the way the world works. And—as we are learning—these facts are not always what they appear to be.

Six U.S. states now require that a woman seeking to terminate a pregnancy be told that abortion may increase one’s risk for breast cancer,⁴ despite a definitive statement from the National Cancer Institute categorically denying any such connection.⁵ Republican Congressmen repeat the claim that global warming is “the greatest

¹ Post-truth is defined as “circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.” Cynthia Kroet, *Post-Truth Enters Oxford English Dictionary*, POLITICO (June 27, 2017), <http://www.politico.eu/article/post-truth-enters-oxford-english-dictionary/>.

² The President used the phrase “fake news” fifteen times in his first month in office to impugn what he thinks is unreliable journalism. See Danielle Kurtzleben, *With ‘Fake News,’ Trump Moves from Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language> (discussing the President’s use of the term on Twitter).

³ “Alternative facts” is an expression first used by U.S. Counselor to the President, Kellyanne Conway, during a *Meet the Press* interview on January 22, 2017. Ms. Conway was defending the White House’s statement about the attendance at Donald Trump’s inauguration as President of the United States. Eric Bradner, *Conway: Trump White House Offered ‘Alternative Facts’ on Crowd Size*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts>. As explained below, see *infra* p. 104, I borrow this phrase from Conway but add my own definition.

⁴ Those states are Kansas, Mississippi, North Dakota, Texas, Oklahoma, and Alaska. Kansas, Mississippi, North Dakota, and Texas have all codified the requirement by statute. KAN. STAT. ANN. §§ 65-6709(a)(3), 6710(a)(2) (Supp. 2016); MISS. CODE ANN. § 41-41-33(1)(a)(ii) (2017); N.D. CENT. CODE § 14-02.1-02.1(1)(d) (Supp. 2017); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(1)(B)(iii) (West 2017). Alaska and Oklahoma include the connection with breast cancer in the printed materials provided to women seeking abortion. See OKLA. STATE BD. OF MED. LICENSURE & SUPERVISION, *A WOMAN’S RIGHT TO KNOW 17* (4th ed. 2015), http://www.awomansright.org/pdf/AWRK_Booklet-English-sm.pdf (noting that studies regarding a link between breast cancer and abortion have reached differing conclusions); *Possible Medical Risks or Complications of Abortion*, ALASKA DEP’T OF HEALTH & SOC. SERVS., <http://dhss.alaska.gov/dph/wcfh/Pages/informedconsent/abortion/risks.aspx> (last visited Dec. 27, 2017) (detailing risks including blood clots, cervical injury, and bacterial infections).

⁵ See Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL’Y REV. 4, 8 (2006) (noting the National Cancer Institute’s (NCI) categorical statement that “[i]nduced abortion is not associated with an increase in breast cancer risk” and that

hoax ever perpetrated on the American people,”⁶ despite the overwhelming consensus among scientists worldwide that the opposite is true.⁷ Democrats in Congress continue to argue that it is unsafe to store nuclear waste underground, despite insistence by the National Academy of Sciences that there is no basis for that fear.⁸ And of course President Trump’s claim that “millions of people . . . voted illegally” in the 2016 election remains unsubstantiated to date.⁹

“Alternative facts” (by which I mean false but convenient statements of reality) are infecting the democratic process. And at the same moment in time when we find ourselves labeled a post-truth society, Americans have also steeped our constitutional law in factual claims about the way the world works. Modern constitutional debates in the United States often turn on questions of fact. Is a “partial-birth abortion” ever medically necessary?¹⁰ Do violent video games harm

“this determination was ‘well-established,’ [which is] the institute’s highest rating”); *see also id.* (documenting state abortion counseling materials regarding breast cancer).

⁶ Politico Staff, *Climate Skeptics in Congress*, POLITICO (July 26, 2013), <http://www.politico.com/gallery/2013/07/climate-skeptics-in-congress/001199-016948.html> (providing the statement of Senator Jim Inhofe (R-Oklahoma) made on August 1, 2012); *see also The Anti-Science Climate Denier Caucus*, THINKPROGRESS (June 26, 2013, 1:44 PM), <https://thinkprogress.org/the-anti-science-climate-denier-caucus-732ec3a2a4d4> (collecting similar statements from congressional Republicans).

⁷ *See The Anti-Science Climate Denier Caucus*, *supra* note 6 (stating that ninety-seven percent of scientists say climate change is happening); *see also* DAVE LEVITAN, NOT A SCIENTIST: HOW POLITICIANS MISTAKE, MISREPRESENT, AND UTTERLY MANGLE SCIENCE 28–43 (2017) (explaining how politicians denying climate change misrepresent the science).

⁸ For example, Representative Shelley Berkley, Democrat of Nevada, and Senator Catherine Masto, another Nevada Democrat, have advocated against the Yucca Mountain project, a national site dedicated to nuclear waste disposal. John Collins Rudolf, *Republicans Open Inquiry on Yucca Mountain Shutdown*, N.Y. TIMES: GREEN (Apr. 5, 2011, 12:46 PM), <https://green.blogs.nytimes.com/2011/04/05/republicans-open-inquiry-on-yucca-mountain-shutdown> (identifying Berkley’s concern about the Yucca Mountain’s location and groundwater issues); Daria Sokolova, *Assembly Resolution Opposes Yucca Mountain*, PAHRUMP VALLEY TIMES (Mar. 17, 2017), <http://pvtimes.com/news/assembly-resolution-opposes-yucca-mountain> (quoting Masto calling the Yucca Mountain Project “a colossal waste of taxpayer money”). Their calls are made despite insistence from the scientific community that there is no scientifically founded reason to be alarmed about the safe disposal of nuclear waste underground. *See Yucca Mountain Myths and Facts Opponents Distort or Ignore Research*, NUCLEAR ENERGY INST. (Feb. 2011), <https://www.nei.org/Master-Documents-Folder/Backgrounders/Fact-Sheets/Yucca-Mountain-Myths-and-Facts-Opponents-Distort-o> (debunking various myths about the Yucca Mountain site).

⁹ *See* Kevin Liptak & Dan Merica, *Trump Believes Millions Voted Illegally, WH Says—But Provides No Proof*, CNN (Jan. 25, 2017), <http://www.cnn.com/2017/01/24/politics/wh-trump-believes-millions-voted-illegally/index.html> (indicating that “[a] number of studies have found no evidence of widespread voter fraud”).

¹⁰ *See* *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007) (noting that evidence from the District Courts contradicted Congress’s finding that the procedure is never medically necessary).

child brain development?¹¹ Does money corrupt politics?¹² How common are instances of in-person voter fraud?¹³ General observations about the world like these (so-called “legislative facts”) hold significant influence on the way courts construct and apply constitutional rules today.¹⁴ This results in constitutional decisions anchored in legislative facts and fat with secondary authorities bolstering those observations.¹⁵

The goal of this Article is to warn about the combination of these two forces: a constitutional law rich in factual claims coupled with an environment where information is very easy to manipulate. Building on prior work—in which I have identified sloppy and “creative” overreach by advocates on factual claims¹⁶—this Article explores a related but more sinister problem. I identify constitutional disputes where a central question of legislative fact has produced opposing narratives with expert authorities on each side, and I demonstrate that some of these “facts” are easily debunked once critically examined. To be clear, I am less interested in factual questions where genuine experts are truly undecided and uncertainty remains. I instead focus on factual claims that propel legal arguments even though some relatively modest fact-checking could expose major flaws in their reliability.

Of course, the American legal system is accustomed to dealing with competing factual claims; that is, after all, what an adversarial

¹¹ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–801 (2011) (rejecting California’s evidence from research psychologists purporting to show that violent video games cause harm to minors).

¹² See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (discussing whether “independent expenditures” are corrupt).

¹³ See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 201–02 (declining to find the statute as imposing excessively burdensome requirements where the record contained a single affidavit of in-person voter fraud) (2008).

¹⁴ For a very comprehensive treatment of this observation and an excellent tour on the way constitutional law depends on factual claims, see generally DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008).

¹⁵ I am not alone in noticing this trend. See generally A. Christopher Bryant, *The Empirical Judiciary*, 25 *CONST. COMMENT.* 467 (2008) (reviewing David Faigman’s work); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *DUKE L.J.* 1, 43–50 (2011) (discussing “[l]egislative [f]acts [l]et [l]oose”); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 *N.C. L. REV.* 115 (2003) (observing the Court’s “empirical turn” in constitutional law).

¹⁶ See, e.g., Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 *VA. L. REV.* 1255, 1286–1305 (2012) [hereinafter Larsen, *Confronting Supreme Court Fact Finding*] (discussing where the sources of in-house fact-finding come from and the risks of the modern approach); Allison Orr Larsen, *Factual Precedents*, 162 *U. PA. L. REV.* 59, 97–108 (2013) [hereinafter Larsen, *Factual Precedents*] (arguing for a default rule of “no authoritative force to Supreme Court statements of fact”); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 *VA. L. REV.* 1757, 1784–1808 (2014) [hereinafter Larsen, *The Trouble with Amicus Facts*] (presenting substance- and process-based objections to amici expert testimony).

system is all about. Factual disputes have been a part of constitutional debates for a very long time.¹⁷ But what is happening today, I argue, is different in a fundamental way. There are new forces at work that should make us concerned that the same disease plaguing today's political dialogue will infect (or further infect) the judiciary. For one thing, modern technology and the digital age make factual information extremely easy to access¹⁸ and—perhaps more importantly—the familiarity with this technology stokes judicial confidence in digesting this sort of factual claim.

Furthermore, constitutional litigants have become quite sophisticated at growing the factual dimensions of their arguments. Both conservative and liberal social movements have invested time and money in strategically finding the right factual frame for their legal arguments and then getting the necessary relevant experts before judges at all stages of litigation. “Law-office history” is a familiar and unflattering phrase to describe the tendency of advocates to shop for historians who will tell a friendly—but incomplete—historical account to corroborate a legal argument.¹⁹ What is happening today, I submit, is “law office history” gone wild. Advocates know that they need experts on all sorts of factual matters to mount a successful constitutional case, and they can easily recruit these experts to file amicus briefs or otherwise convey their expertise to the courts. Some of this expertise is valuable of course, but, as demonstrated below, that is not universally true.

Finally, social networking sites and a “balkanized media”²⁰ have played a big part in fracturing our collective sense of what is true and

¹⁷ See David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 545–47 (1991) (discussing how legislative facts played a role in the 1824 decision by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

¹⁸ See Frederick Schauer, *The Decline of “The Record”: A Comment on Posner*, 51 DUQ. L. REV. 51, 56 (2013) (“[W]e can appreciate that judicial factual inquiry into matters not argued below, not found in the appellate record or briefs, and not discussed at oral argument is indeed a relatively new phenomenon, fostered substantially by the ease of electronic research.”).

¹⁹ Judge Jeffrey Sutton ably describes the problem of law office history:

Reliance on law-office history—whether produced by lawyers or, what may come to the same thing, mercenary historians—runs a considerable risk: a selective use of historical materials to advance an argument without a fair treatment of countervailing evidence. It is often far too easy to find an expert in the subject who will corroborate any view you can name.

Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1185 (2009).

²⁰ I believe the credit for this phrase—or at least the popularity of it—goes to President Obama. See David Nakamura, *Media Critic Obama Is Worried that “Balkanized” Media Is Feeding Partisanship*, WASH. POST (Mar. 27, 2016), <https://www.washingtonpost.com/>

what is not. Facts that were once labeled outrageous are now quickly shared to those who want to believe them and are legitimized simply by their accessibility. People are shy to test their ideas and quick to denigrate those with opposing views. At the end of the day, confirmation bias and echo chambers have led to what I call a “my team-your team” double set of facts—about climate change, risks of vaccination, the prevalence of voter fraud, and more.

Journalists and social scientists are well aware of these new infections to our democracy.²¹ But what has not been adequately explored to date is the effect these changes will have on the interpretation of our Constitution. Because judges, like the rest of us, are vulnerable to confirmation bias, and since constitutional law has become increasingly dependent on factual claims, I argue that there is a real risk the toxic political dialogue of rogue facts will increasingly afflict the interpretation of our charter document and the vital rights it protects.

All is not lost, however. I conclude this Article by claiming that courts are capable of rising above the fray. Law has always depended on judges to make distinctions “between good and bad authority, privileged and nonprivileged authority, and authorities that rank higher or lower in the hierarchy of authorities.”²² There is no reason why distinguishing “good facts” from “alternative facts” cannot be added to the list—and indeed I provide examples of federal district court judges (judges appointed by Presidents of both parties) who are doing just that.²³

Historically, those who worried about bad facts in constitutional litigation found themselves in debates about deference and institutional competence (both as between courts and legislatures and as between levels of courts).²⁴ I enter those two debates here.

The traditional claim is that courts do not have the same fact-finding tools as legislatures and are thus not equipped to get the facts

politics/media-critic-obama-is-worried-that-balkanized-media-are-feeding-partisanship/2016/03/27/8c72b408-f1e3-11e5-89c3-a647fccc95e0_story.html (discussing the impact of technology on the dissemination of political viewpoints during the 2016 presidential campaign).

²¹ See *infra* Section II.B.

²² Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 497 (2000).

²³ See *infra* Section III.C.

²⁴ See, e.g., Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170 (2001) (explaining but then expressing doubt about the assumption that “as a matter of comparative institutional competence, the Court is better at sorting out the law and legislators are better equipped to get the facts right”).

right.²⁵ But this argument, I submit, pre-dates a world of infinite information and endless apparent expertise. In an age where the political dialogue is contaminated by biased presentation of factual claims, the calculus about institutional competence to digest facts must change. To protect constitutional law from alternative facts, we must empower courts to proactively guard against them—and judges must rise to meet the challenge. Specifically, I push back on blanket calls for deference to the legislative factual record—calls that are present particularly in our federal courts, who label themselves “reluctant fact-finders.”²⁶ That reluctance is too costly in today’s “fact-y”²⁷ environment, and it is applied too inconsistently to be principled. I suggest instead re-focusing the standards of review in constitutional litigation so that courts are tasked with evaluating the process used to generate the factual claims presented.

Moreover, I suggest re-thinking the conventional wisdom that this sort of factual claim is best left to appellate courts. Trial judges have their hands on the levers of the adversarial system and they are well-positioned to debunk facts that deserve debunking – more so perhaps than their appellate counterparts. As a corollary, I encourage deference to the lower federal courts when they are actively engaged in this time-intensive fact-checking work.

Although not an inevitable path (and indeed not one followed by every country),²⁸ U.S. constitutional law is awash in empirical claims,

²⁵ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (“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 Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion))).

²⁶ See Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 *IND. L.J.* 1, 6 (2009) (“In keeping with this self-described role, federal courts have generally deferred to congressional and state legislative fact-finding.”).

²⁷ “Fact-y” is a word I invented and have used before. On the spectrum between law and fact, “fact-y” describes the area on the fact side of the scale—meaning, as described below, claims that can be falsified and are supported by secondary authorities.

²⁸ Perhaps our closest legal cousin, the United Kingdom, does not anchor its judicial opinions with factual observations about the world. One commentator noted:

To be blunt about it, for most of its history the British judiciary has tended to maintain “the law-is-the-law approach” to legal language. On this model of decision-making, the job of the judiciary is conceived of as positivistic and machine-like: judges are supposed to find out what the law *is* (eschewing any inquiry into what it *ought* to be) by consulting the “plain meaning” of statutory words and common law precedents.

Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 *V.A. J. SOC. POL’Y & L.* 239, 283 (2006).

and there is no indication this will change any time soon.²⁹ But there are serious consequences to embracing the factual narrative in a world where facts are cheap and slippery. Our new splintered political dialogue coupled with (and perhaps caused by) modern technology has us at a crucial turning point. U.S. courts can continue to anchor constitutional law in factual assessments about the way the world works, but only if they simultaneously protect themselves from the risks that fact-heavy decisions carry.

I WHAT IS NEW

In order to evaluate my warning about the effect of alternative facts on constitutional law, one must first assess—in the pithy phrasing of Fred Schauer—“[w]hat [i]s [n]ew and [w]hat is [n]ot.”³⁰ I cannot and do not claim that a fact-heavy constitutional law is entirely new. After all, most of us know that *Roe v. Wade* included plenty of medical research from Justice Blackmun’s 1972 summer studying at the Mayo Clinic,³¹ and the “Brandeis Brief” (a brief that emphasizes factual information over legal arguments) dates back to 1908.³² At the same time, however, the emphasis on facts in constitutional law has taken new shape—both in terms of the centrality of these claims and in the way in which they are generated. It is to those developments that I now turn.

A. *The Somewhat New: “Fact-y” Constitutional Law and the Digital Age*

Pick up any issue of the U.S. Reports today and one will quickly encounter “fact-y” claims and non-legal authorities: Justice Kennedy citing statistics on car crashes,³³ Justice Breyer explaining rates of medical complications following abortions,³⁴ Chief Justice Roberts on

²⁹ To be sure, legislative facts are on the rise in areas of the law beyond just disputes arising out of the Constitution. I have chosen to narrow the scope of this Article to constitutional claims, however, because of the heightened stakes and the prevalence of examples of “my team-your team” facts in those cases. I certainly acknowledge that the problems I identify are not limited to these cases.

³⁰ Schauer, *supra* note 18, at 55.

³¹ See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 82–83, 90–91 (2005) (discussing Blackmun’s research at the Mayo Clinic library).

³² See Schauer, *supra* note 18, at 55 & n.25 (noting the brief from *Mueller v. Oregon*, 208 U.S. 412 (1908)).

³³ *Sykes v. United States*, 564 U.S. 1, 10–11 (2011), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015).

³⁴ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–15 (2016).

the economics of the health insurance industry.³⁵ As Timothy Zick observed back in 2003, constitutional law is “in the throes of a widespread empirical turn.”³⁶ “Questions that in the past were [once] answered conceptually, or even with reference to purported judicial common sense,” Zick explained, “are now routinely expressed empirically. . . . [F]rom rigorous social science and medical research, to lighter survey fare and data compilations”³⁷

But before one can get into causes or consequences of this “fact-y” turn, a few words are necessary on what I mean by “fact.” As I have conceded in the past, there is no satisfactory definition of a statement of “fact” as compared to a statement of “law.”³⁸ Several scholars think there is no difference at all between the two concepts while others explain that statements of law and statements of fact—while not static polar opposites—are distinct and real categories that exist on a spectrum.³⁹ Although this is a tough debate, it is one that can be avoided for present purposes. As Schauer puts it, “[a]ll distinctions potentially have borderline cases. . . . And although lawyers, particularly, are likely to be preoccupied with dusk when people ask them about the distinction between night and day,” that does not mean the distinction is not worth making in the first instance.⁴⁰

Thus, my working definition of a “fact” draws from two common characteristics that lead most of us to label certain statements factual ones when we encounter them.⁴¹ First, factual claims are ones that can theoretically be falsified—meaning they can be tested as true or false

³⁵ King v. Burwell, 135 S. Ct. 2480, 2485–86 (2015).

³⁶ Zick, *supra* note 15, at 118. Zick marks the beginning of this empirical turn somewhere in the early 1990s. *See id.* at 195 (“Prior to the early 1990s, empirical markers in constitutional law were a rarity.”).

³⁷ *Id.* at 118.

³⁸ *See* Larsen, *Factual Precedents*, *supra* note 16, at 67–73 (discussing law versus fact and “acknowledg[ing] the possibility that there may be no clear analytic distinction between” them).

³⁹ Compare Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. REV. 1769, 1770 (2003) (arguing that “the concepts ‘law’ and ‘fact’ do not denote distinct ontological categories”), Gary Lawson, *Proving the Law*, 86 Nw. U. L. REV. 859, 863 (1992) (“[T]he law-fact distinction, whatever its utility, is purely a creature of convention.”), and John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008) (“There is no analytical dichotomy between law and fact.”), with Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 Nw. U. L. REV. 916, 917–19 (1992) (“There is an analytic difference, independent of convention, between law and fact”), and Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) (conceding that the concepts are not “static polar opposites” but “[r]ather, [the two] have a nodal quality; they are points of rest and relative stability on a continuum of experience”).

⁴⁰ Schauer & Wise, *supra* note 22, at 498.

⁴¹ For a longer discussion on my position of “law versus fact,” see Larsen, *Factual Precedents*, *supra* note 16, at 67–73.

“with a degree of detached certainty.”⁴² And second, factual claims are typically followed by evidence. By this I mean that “a factual assertion is often followed by ‘look it up’ (or, more likely, ‘Google it’), whereas a normative assertion or a proffered legal interpretation is not.”⁴³

Drawing a similar line years ago, Fred Schauer and Virginia Wise asked a helpful question in distinguishing legal from non-legal authorities: “[W]ould the source have been available on the shelves of a typical federal, state, county, municipal, or law school law library in, say, 1970?”⁴⁴ If not (like a general interest newspaper, periodicals not aimed at lawyers, or books like, *How to Buy and Care for Tires*), then chances are it is an authority backing up a factual claim.

Complicating this groundwork even more, “facts” are further divided using the slippery distinction between “legislative fact” and “adjudicative fact.”⁴⁵ An adjudicative fact is “the stuff of ordinary litigation”⁴⁶—the facts of the case, or the “whodunit” facts.⁴⁷ By con-

⁴² Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 378 (1984). I stand on the shoulders of others who have helpfully elaborated on this definition. See David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1018 (1989) (“[T]he fact that scientific theories are vulnerable to falsification imparts a strength stemming from having taken the risk of refutation.”); *id.* at 1020 (“The testing of theories forms the battlefield of the scientific enterprise, and it is in the trenches that science maintains its principal advantages over common sense. . . . [S]cience subjects theories and hypotheses to systematic and constant tests, in order to uncover the outer limits of their strengths or explanatory powers.” (footnote omitted)); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 150 (“I rely on the basic scientific definition of facts as (at least in theory) falsifiable.”).

⁴³ Larsen, *Factual Precedents*, *supra* note 16, at 70; see also Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1066–67 (2005) (“Finding the facts involves investigation, and the facts can be more or less certain, depending on the quality of the evidence and the quality of the sleuthing.”). Certainly, this definition is imperfect, but it is important to remember that our legal system draws this line between law and fact all the time—in order to allocate decisionmaking authority, assign levels of deference, and determine *stare decisis* effect, to name a few examples. See Allen & Pardo, *supra* note 39, at 1769 (calling the law-fact distinction “the legal system’s fundamental and critical distinction”); Friedman, *supra* note 39, at 917–19 (making a similar argument).

⁴⁴ Schauer & Wise, *supra* note 22, at 499.

⁴⁵ “Legislative fact” and “adjudicative fact” are phrases coined by Kenneth Culp Davis. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) (arguing that factfinding for the creation of law and determination of policy differs from factfinding for particular parties to a particular case). Others have subsequently refined the concept and created new labels, but it is the original Davis articulation upon which I primarily rely.

⁴⁶ Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113–14 (1988).

⁴⁷ Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 16, at 1255.

trast, a legislative fact is a generalized statement about the way the world works. A legislative fact “transcend[s] the particular dispute,”⁴⁸ and provides descriptive information about the world that judges use as foundational “building blocks” to form and apply legal rules.⁴⁹

It is tricky business to pinpoint the moment in time when U.S. constitutional law began embracing legislative facts and empirical rationales.⁵⁰ For a long time, as David Faigman explains in his book on the subject, “constitutional pronouncements float above the empirical mire, neither being informed by contingent realities nor subject to empirical check by those realities.”⁵¹ But this tide has turned.⁵²

Scholars generally agree that the trend toward factual claims to support legal arguments has its roots with the birth of legal realism, and certainly picked up steam with the dawn of the Internet age.⁵³ In any event, the available empirical evidence is clear that—compared to thirty years ago—judicial opinions are now longer,⁵⁴ padded with significantly more citations,⁵⁵ and rich with “nonlegal” authorities.⁵⁶

⁴⁸ Faigman, *supra* note 17, at 552.

⁴⁹ Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988).

⁵⁰ Zick explains that the Rehnquist Court ushered in this empirical turn. *See* Zick, *supra* note 15, at 118–19 (describing how the Rehnquist Court’s adoption of empiricism was the logical outgrowth of the economic and utilitarian methods utilized by the Burger Court). Courts used balancing tests before then, he concedes, but they didn’t actually measure legislative predicates. *Id.*

⁵¹ FAIGMAN, *supra* note 14, at 1.

⁵² *See* Zick, *supra* note 15, at 115 (observing a shift towards “constitutional empiricism,” a trend “characterized by judicial reliance in constitutional review on empirical and scientific conventions and processes”).

⁵³ *See id.* at 129–30 (describing the use of data and empirical methods by legal realists in the 1920s and 1930s); *see also* Schauer & Wise, *supra* note 22, at 497 (noting the dramatic increase of Supreme Court citations to nonlegal sources since 1990 and arguing that this is caused in part by increased use of the Internet).

⁵⁴ *See* Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634–35 (2008) (describing a notable increase in median Supreme Court majority opinion length beginning in the early 1970s).

⁵⁵ *See* Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 531–32 (describing an increase in the median number of citations in Supreme Court majority opinions based on 26,681 opinions between 1791 and 2005).

⁵⁶ *See* Schauer & Wise, *supra* note 22, at 502 (describing “a genuine and substantial increase in the frequency of nonlegal citation[s] by the United States Supreme Court” since 1990); *see also* John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 L. LIBR. J. 427, 430–43 (2002) (documenting the frequency and nature of nonlegal citations referenced in Supreme Court opinions from 1989 to 1998); Bezalel Stern, *Nonlegal Citations and the Failure of Law: A Case Study of the Supreme Court 2010–11 Term*, 35 WHITTIER L. REV. 79, 107 (2013) (describing the use of nonlegal citations in the 2010–2011 term and noting a recent increase in the use of nonlegal citations).

This last observation is worth a pause. Citation rates are up generally in the law, a development that is almost certainly related to digital technology.⁵⁷ As Judge Posner colorfully put it speaking about his law clerks, people now “feel naked unless they are quoting and citing” authorities in their arguments.⁵⁸ And, importantly, this leads not only to opinions that are padded with legal authorities, but also to a proliferation of “nonlegal” ones—authorities that go to the factual questions lurking in the background (and sometimes foreground) of the case.⁵⁹ Judges and lawyers now regularly cite to newspaper articles, books, online data sets, websites, and even occasionally Wikipedia to back up their generalized observations about the world.⁶⁰ Today “lawyers, judges, and law clerks . . . find it increasingly important to look to a wider range of materials.”⁶¹ Schauer and Wise documented this change in 2000, and recent new studies indicate the shift is here to stay.⁶²

This change has consequences for the law generally. If the law “is increasingly seen necessarily to involve a wider range of facts and norms than has traditionally been supposed,”⁶³ it is not surprising that those “nonlegal” arguments will eventually take center stage.

Why might this be? There are probably several causes, but it is hard to deny that the Internet was a game-changer. In the last twenty

⁵⁷ See Cross et al., *supra* note 55, at 531–32 (noting that the rise in citation rates in U.S. Supreme Court decisions can be attributed to, among other things, access to electronic databases); Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U. ILL. J.L. TECH. & POL’Y 51, 69–70 (finding a correlation between the number of cited cases in federal appellate opinions and judicial access to electronic legal databases); Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65 (2010); Shane Tintle, Note, *Citing the Elite: The Burden of Authorial Anxiety*, 57 DUKE L.J. 487 (2007).

⁵⁸ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 148 (1996).

⁵⁹ See Schauer & Wise, *supra* note 22, at 500–09 (documenting a rise in nonlegal authorities); see also Hasko, *supra* note 56, at 432 (finding that the Supreme Court cited more than 1800 nonlegal books, articles, dictionaries, newspapers, and other sources between 1989 and 1998); Stern, *supra* note 56, at 105 (finding that during the 2010–2011 term, the Supreme Court cited sources from disciplines including linguistics, history, science, literature, and others).

⁶⁰ See, e.g., Gorod, *supra* note 15, at 57 (explaining that courts engage in their own research, looking to historical records and social science reports to resolve legislative fact disputes); Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 16, at 1287–90 (describing the process of judicial in-house fact finding); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 6 (2009) (finding 407 federal and state judicial opinions with some reference to a wiki or Wikipedia article); Schauer & Wise, *supra* note 22, at 500–03 (tracking citations to nonlegal authority in Supreme Court opinions).

⁶¹ Schauer & Wise, *supra* note 22, at 510.

⁶² *Id.*; see, e.g., Cross et al., *supra* note 55, at 531–37; Fronk, *supra* note 57.

⁶³ *Id.*

years the world has undergone a revolutionary change in how information is transmitted and received.⁶⁴ Factual information is now cheaply manufactured and easily posted to the world with a click of a mouse.

One troubling consequence, as I have fretted about in the past, is that factual claims are pressed to courts without adequate adversarial testing.⁶⁵ Who needs an expert at trial when convenient studies can be found on Google or funded by a friendly source and then cited to a judge as a factual authority in an amicus brief?⁶⁶ This shortcut of the adversarial process risks tainting the law with unreliable claims.

But there is more to worry about. Facts are not just easier to access in the digital age, they are also easier to legitimize. Factual claims that may have once been labeled as outrageous assertions from fringe players are now easily distributed in a way that makes them seem more mainstream.⁶⁷

Al Gore has likened the Internet to the “Wild West” stage of the early printing press.⁶⁸ He is optimistic that we will learn to tame this vast new tool and he thinks fears about its abuse are overblown.⁶⁹ But, as NPR reporter Audie Cornish pushed back in her interview of Mr. Gore, there is an important difference between digital technology and any innovation that came before it: “[Y]ou couldn’t get your pamphlet to everybody, right? Like, today, if you plant the seed of something

⁶⁴ See Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 16, at 1286 (explaining how access to online databases like Westlaw and Lexis has impacted legal citations in Supreme Court briefs and opinions); Schauer, *supra* note 18, at 56 (noting that the growth of judicial reliance on nonlegal sources is in large part a product of the ease of access to electronic information); see also Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U. L. REV. 1137, 1156–64 (2014) (discussing the expanse of online information now available during the Information Age and discussing how that affects judicial notice rules); Schauer & Wise, *supra* note 22, at 510–13 (discussing changes to legal argument and authorities given the ease of finding sources digitally).

⁶⁵ See Larsen, *The Trouble with Amicus Facts*, *supra* note 16, at 1803 (noting the tension between the Court’s commitment to the adversarial process and its reliance on amicus briefs to answer questions of fact).

⁶⁶ For examples of this occurring, see my prior work. See generally Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 16, at 1286 (explaining that nonlegal sources have been brought to the Supreme Court’s attention by amicus briefs); Larsen, *The Trouble with Amicus Facts*, *supra* note 16, at 1760–61 (noting judges’ willingness to rely on factual assertions presented in amicus briefs).

⁶⁷ For examples of this phenomenon, see generally LEVITAN, *supra* note 7. For instance, Levitan explains how politicians have publicly voiced concerns about the link between the HPV vaccine and “mental retardation”—a “mythical connection” that is without any medical support. *Id.* at 195.

⁶⁸ *In the Age of Fake News and Alternative Facts, Al Gore Remains Optimistic*, NPR (Mar. 14, 2017), <http://www.npr.org/2017/03/14/520162882/in-the-age-of-fake-news-and-alternative-facts-al-gore-remains-optimistic>.

⁶⁹ *Id.*

outrageous and not true, there's a chance the president would retweet it."⁷⁰

Finally, there is another, more subtle consequence of the digital revolution that likely accounts for the rise in “fact-y” constitutional law: It seems that being surrounded by facts changes one’s attitudes about them. For judges—and indeed for everyone living in 2018—no factual question seems out of reach. We can all access infinite information on our phones, so it is no wonder that there is a bolstered faith in our ability to understand the world around us. The information age, in other words, has produced an increased confidence in digesting factual information. This may at least partially explain the increased citation to nonlegal materials in judicial opinions generally and the “empirical turn” in constitutional law specifically.⁷¹

But this newfound confidence with facts is also worth a pause. If we are all capable of digesting facts quickly, then this dilutes expertise in a dangerous way. As Harry Collins asks in his provocative new book: Are we all experts now?⁷² Collins is quite worried about the dilution of scientific expertise. Citing the politicization over debates on climate change and vaccination, Collins argues, “[i]f we start to believe we are all scientific experts, society will change: it will be those with the power to enforce their ideas or those with the most media appeal who will make our truths.”⁷³ Moreover, the flip side of the coin is also scary: that our ease with factual expertise will be marshaled only in convenient spots—judicially deployed in charts and graphs in some cases, and denigrated as “gobbledygook” in others.⁷⁴

Of course, creative factual narratives in constitutional arguments are not entirely new, and one can likely think of old examples in which false facts have infected judicial decisions well before the digital revolution.⁷⁵ But it seems hard to believe that the increase in cita-

⁷⁰ *Id.*

⁷¹ See Zick, *supra* note 15, at 196 (“As courts have become more confident consumers of empirical data they have enshrined their newfound faith in data and quantification in constitutional law.”).

⁷² HARRY COLLINS, ARE WE ALL SCIENTIFIC EXPERTS NOW?; see also LEVITAN, *supra* note 7, at 1–8 (discussing how politicians bend science to serve their own political purposes).

⁷³ COLLINS, *supra* note 72, at 131.

⁷⁴ Compare *Shelby County v. Holder*, 133 S. Ct. 2612, 2626 (2013) (using a graph to compare black and white voter registration rates in southern states in 1965 and 2004), with Transcript of Oral Argument at 40, *Gill v. Whitford*, No. 16-1161 (U.S. Oct. 3, 2017) (Roberts, C.J.) (expressing concern about assessing gerrymandered electoral districts under standards he characterized as “sociological gobbledygook”).

⁷⁵ A horrifying but older example is *Buck v. Bell*. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a statute permitting compulsory sterilization of the intellectually disabled because “[t]hree generations of imbeciles are enough”); Stephen Jay Gould, *Carrie Buck’s Daughter*, NAT. HIST., July 1984, at 15–16 (discussing *Buck v. Bell*, and

tions—particularly for statements of fact—is unrelated to the new way in which we all trade information.

B. *The Really New: Social Media and Fact-Savvy Litigants*

Changes in information technology and an emphasis on factual authorities in court decisions are important, but they have also been around for a few decades at least. In considering the intersection between constitutional fact-finding and a world of “alternative facts,” there are at least two additional new forces that are very new and that deserve special attention. They are: (1) the rise of social media and polarized news outlets, and (2) an expansion of litigating social movements and their sophistication at growing facts central to their causes.

1. *Social Media and “My Team-Your Team” Facts*

I certainly do not believe that constitutional law was pure and untainted by confirmation bias and motivated reasoning before the invention of the Internet and Facebook.⁷⁶ But there is a reason that phrases like “alternative facts” and “post-truth” keep popping up now and not before. A recent article in *The Economist* explains it this way: “[Post-truth politics] picks out the heart of what is new: that truth is not falsified, or contested, but of secondary importance.”⁷⁷

There is thus something new in the air—and it is not just that facts are everywhere.⁷⁸ The real change is more chilling than that. America has always been a place where people held starkly different

noting two false facts in the decision—Carrie Buck was in fact a woman of “obviously normal intelligence,” and most mental deficiencies are in fact not passed by inheritance); see also Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 61 (1985) (explaining that neither Carrie Buck, nor her mother Emma or daughter Vivian, displayed traits that belied Holmes’s description of them as imbeciles).

⁷⁶ Motivated reasoning and confirmation bias are phrases used by psychologists to explain the human tendency to make decisions with a prior goal in mind and to confirm what one already believes to be true.

⁷⁷ *Art of the Lie*, THE ECONOMIST (Sept. 10, 2016), <https://www.economist.com/news/leaders/21706525-politicians-have-always-lied-does-it-matter-if-they-leave-truth-behind-entirely-art>.

⁷⁸ See *Yes, I’d Lie to You*, THE ECONOMIST (Sept. 10, 2016), <https://www.economist.com/news/briefing/21706498-dishonesty-politics-nothing-new-manner-which-some-politicians-now-lie-and> (“Post-truth politics is advancing in many parts of the world.”); see also Olivia Ward, *Truth, Lies and Democracy: Journalism in the Age of Trump*, MOYERS & CO. (Mar. 13, 2017), <http://billmoyers.com/story/truth-lies-democracy-journalism-age-trump/> (“[E]veryone can have their own ‘alternative facts’ delivered to them by social media via robotized algorithms. They need never emerge from their self-affirming media silos into the chilling air of reality.”). In Part III, *infra*, I will argue that this change significantly alters the evaluation of institutional competence—courts versus legislatures—to find generalized facts. But for now the point is just to observe that something is changing about our political dialogue.

political views, but now it seems those differences have evolved into “my team-your team” facts.⁷⁹ Whether one believes climate change is man-made or voter fraud is an epidemic, for example, may well depend on one’s political affiliation. Perhaps comedian Stephen Colbert had it right when he coined the phrase “truthiness” in 2005.⁸⁰ In today’s political dialogue, Colbert explained sarcastically, ideas that “‘feel right . . . should be true.’”⁸¹

There are likely many reasons for this shift—including some positive American traits, like the tendency to question institutions and to not accept the status quo.⁸² But other explanations for the rise of “my team-your team” facts are less noble.

A chief culprit here is social media. Broadly defined as technologies that facilitate the exchange of information distribution, the services provided by companies like Facebook, Twitter, and Instagram (and likely more companies that I am too old to really understand) have radically changed the way people communicate ideas today.⁸³ These networks have almost completely supplanted the six o’clock nightly news in terms of how people educate themselves about the world. And that change brings with it some troubling consequences. In the unsettling words of one journalist: “The fragmentation of news sources has created an atomized world in which lies, rumour and gossip spread with alarming speed. Lies that are widely shared online within a network, whose members trust each other more than they trust any mainstream-media source, can quickly take on the appearance of truth.”⁸⁴ The crux of the problem is that social media creates an echo chamber where “facts” from friends are repeated, exacerbating confirmation bias and giving authenticity to claims based simply on how often they are shared.⁸⁵

⁷⁹ See Toby Bolsen et al., *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 POL. BEHAV. 235, 237 (2014) (discussing the concern that partisan identification slants decisionmaking).

⁸⁰ See Ben Zimmer, *Truthiness*, N.Y. TIMES (Oct. 13, 2010), <http://www.nytimes.com/2010/10/17/magazine/17FOB-onlanguage-t.html> (discussing Colbert’s creation of “truthiness,” meaning an assertion that feels like approximation of reality, unburdened by fact).

⁸¹ *Yes, I’d Lie to You*, *supra* note 78 (citing the legal luminary Stephen Colbert).

⁸² See *Art of the Lie*, *supra* note 77 (noting that post-truth politics has come about in part because of traditionally noble democratic values, including the questioning of received wisdom and institutions).

⁸³ See Jan H. Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 241 (2011) (discussing how the emergence of social media brought about a new communication landscape).

⁸⁴ *Art of the Lie*, *supra* note 77.

⁸⁵ See Walter Quattrociocchi et al., *Echo Chambers on Facebook* 14–15 (June 13, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795110

Social media is just the new tool, however. It is exacerbating a tendency we already possess. Dan Kahan has done important work in this area. Using experiments where people are tasked with evaluating factual claims packaged in different narratives, Kahan's work demonstrates that people tend to "endorse whichever position reinforces their connection to others with whom they share important commitments."⁸⁶ We are in the midst, he says, of an "American culture war of fact."⁸⁷

Our technological tools today, in other words, enable us to resist testing our preconceived notions about the way the world works—what the law calls "legislative facts."⁸⁸ This is not healthy. As one cognitive scientist explains, being unwilling "to subject our opinions to thorough examination and alternative views results in the development of opinions that are factually flawed and further perpetuates divisions in society because it is anchored in our deep seated prejudices and what we want to believe as opposed to actually what is factually accurate."⁸⁹

And, to make matters worse, these changes in technology are coupled with a dramatic pattern of increased party polarization. Political scientists have documented that "[t]he polarization between the legislative parties is, perhaps, one of the most obvious and recognizable trends in Congress during the last 30 years."⁹⁰ The gap in the political parties is mirrored by a gap in the electorate generally: "Democrats are more liberal and Republicans are more conservative than they were 50 years ago."⁹¹ Moreover, the political divide has led

(finding that Facebook users show a tendency to seek out and receive information that strengthens their preferred narratives and to reject information that undermines them).

⁸⁶ Dan Kahan, *Fixing the Communications Failure*, 463 NATURE 296, 296 (2010).

⁸⁷ See Donald Braman et al., *The Second National Risk and Culture Study: Making Sense of—and Making Progress In—The American Culture War of Fact* (GW Law Faculty Pub. & Other Works, Paper No. 211, 2007), http://scholarship.law.gwu.edu/faculty_publications/211 (finding that while a majority of Americans value social welfare ahead of moral values in terms of political importance, what people believe ought to be done to promote social welfare is correlated with their cultural outlook).

⁸⁸ See discussion *supra* Part I.

⁸⁹ Ivanpal S. Grewal, Opinion, *Political Discourse in the Age of Fake News and Alternative Facts*, STAR (Feb. 27, 2017), <http://www.thestar.com.my/opinion/online-exclusive/making-progress/2017/02/27/political-discourse-in-the-age-of-fake-news-and-alternative-facts/> (quoting the work of cognitive scientists Steven Sloman and Phillip Fernback).

⁹⁰ Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 PARTY POL. 483, 485 (2006); see also Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 751 (2011) (providing graphs that display the party polarization in Congress from 1879 to 2010).

⁹¹ Lilliana Mason, "I Disrespectfully Agree": *The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. POL. SCI. 128, 128 (2015).

to greater “partisan bias, activism, and anger.”⁹² In the “contemporary American political environment, there is evidence of increasing hostility across party lines.”⁹³

These developments are likely related to the aforementioned changes in media consumption. According to polls conducted by the Pew Research Center, “Republicans account for only 24% of NPR listeners whereas Democrats account for only 28% of talk radio listeners.”⁹⁴ As Neal Devins has explained, “proliferation of media outlets—cable television, radio, and the Internet—feeds polarization by creating markets for niche audiences.”⁹⁵ If instead “this change in the parties had occurred a half century ago, the dominant news media might have moderated polarizing tendencies because of their interest in appealing to a mass audience that crossed ideological lines.”⁹⁶ In today’s media scene, however, “partisanship pays.”⁹⁷

The upshot of all this is that we are more divided than ever before and—thanks to modern technology—we are listening to each other less than ever before. It is no wonder that our constitutional disputes have spawned alternative accounts about the way the world works.

2. *Growth and New Sophistication in Social Movements Seeking Constitutional Change*

The digital revolution and the advent of social media are not the only new developments to be reckoned with when evaluating the factual component of constitutional law. Equally important is the change in how constitutional cases are litigated today. Broadly speaking, there are more groups with wider missions seeking to change the course of constitutional law today, and, as demonstrated below, these

⁹² *Id.*; see also Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RES. Q. 225, 225 (2015) (finding that the public has recently become socially polarized, meaning members of different political parties increasingly dislike each other).

⁹³ Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 691 (2015).

⁹⁴ Devins, *supra* note 90, at 755 n.59 (citing PEW RESEARCH CTR., ONLINE NEWS AUDIENCES LARGER, MORE DIVERSE: NEWS AUDIENCES INCREASINGLY POLITICIZED 8 (June 8, 2004), <http://www.people-press.org/files/legacy-pdf/215.pdf>).

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting Paul Starr, *Governing in the Age of Fox News*, ATLANTIC (Jan.–Feb. 2010), <https://www.theatlantic.com/magazine/archive/2010/01/governing-in-the-age-of-fox-news/307845/>).

⁹⁷ *Id.*

groups have become much better at growing the factual dimensions of their arguments.⁹⁸

Charles Epp argued years ago that “the strength and character of the support structure for litigation—social movements, legal advocacy groups, available resources and financing for litigation, and a diverse legal profession developing legal ideas and strategies—[is what] most closely determined the intensity of [a] rights revolution” and constitutional change.⁹⁹ And if Epp is right that the legal profession can cause constitutional change, one cannot close her eyes to relevant shifts in tactics used by that legal profession to get what they want.

First, the number of public interest organizations who seek to influence constitutional law appears to have grown dramatically in recent years.¹⁰⁰ By one count the number of such groups jumped over one thousand percent from 1975 to 2004.¹⁰¹ Not only are there more of these organizations, but even the older ones have grown tremendously in staff size and budget. As Deborah Rhode explains, “[g]roups that started with a few idealists, typewriters, and a Xerox machine are now multimillion dollar institutions at the forefront of social reform.”¹⁰²

⁹⁸ While others have documented the growth and influence of these litigating groups, I believe I am the first to observe the marked increase in sophistication in factual strategies.

⁹⁹ Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 519 (2011) (citing CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 2–6, 199 (1998)).

¹⁰⁰ See Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1607–08 (2006) (noting that the number of lawyers and non-lawyers employed by public interest law organizations has grown dramatically since 1975); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2028 (2008) (“Most of this nation’s leading public interest law organizations are now in midlife; they have grown substantially in size and influence since their formation beginning in the late 1960s.”); see also *id.* at 2032 (“The most obvious change has been size. Over the last several decades, the number, scale, and diversity of public interest legal organizations has markedly increased.”). For further discussion on the growing influence of public interest organizations on constitutional law, see Paul M. Collins Jr., *Interest Groups in the Judicial Arena*, in *NEW DIRECTIONS IN INTEREST GROUP POLITICS* 454 (Matt Grossman ed., 2013).

¹⁰¹ Nielsen & Albiston, *supra* note 100, at 1605–06 (noting that there were eighty-six “core” public interest organizations in 1975 and over a thousand in 2004). The authors of this study point out that of course there is imprecision in how one counts “public interest law organizations.” They define them as “organizations in the voluntary sector that employ at least one lawyer at least part time, and whose activities (1) seek to produce significant benefits for those who are external to the organization’s participants, and (2) involve at least one adjudicatory strategy.” *Id.* at 1601. This concession about the difficulty in defining the contours of “public interest law firms” pervades the literature. See, e.g., Ann Southworth, *What Is Public Interest Law? Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 494–95 (2013).

¹⁰² Rhode, *supra* note 100, at 2028.

Another obvious change in social movements seeking constitutional change—besides their explosion in size—is in a greater variety of missions. While social movements were once dominated by causes traditionally on the left of the political spectrum (the NAACP being the classic example), the last thirty years have brought a proliferation of public interest groups promoting conservative causes as well.¹⁰³ This “rise of the conservative legal movement”—closely aligned with the success of the Federalist Society—has been quite influential in changing constitutional conversations in the academy, the legal profession, and the courts.¹⁰⁴

The “second generation” of conservative public interest litigants has also changed direction on how to seek constitutional change.¹⁰⁵ As Steven Teles explains in his book, while the previous generation of conservative litigators “had insisted on ‘judicial restraint,’” second generation firms—groups like the Center for Individual Rights and the Institute for Justice—instead have adopted a more strategic approach to “actively us[e] courts to establish new or reinvigorate old rights.”¹⁰⁶ Ann Southworth makes a similar observation. She says that conservative public interest firms “now frequently initiate litigation” designed to “eliminate or diminish rights forged by liberal public interest law groups.”¹⁰⁷

This focus on warring litigation with social movements on both sides systematically seeking constitutional change is “something of a paradigm shift” from the Civil Rights Era days of the NAACP.¹⁰⁸ The change matters for our purposes because both sides are pushing opposing factual narratives to the courts. And they are using some specific new fact-savvy strategies to do so.¹⁰⁹

¹⁰³ See generally ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (John M. Conley & Lynn Mather eds., 2008); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

¹⁰⁴ SOUTHWORTH, *supra* note 103, at 12, 33 (discussing efforts by conservatives to “jump into the public interest law game”); TELES, *supra* note 103, at 221 (“The changing profile of conservative public interest law’s leaders went hand in hand with the growth of the Federalist Society . . .”).

¹⁰⁵ See TELES, *supra* note 103, at 221 (noting that they learned “from the failures of first-generation firms, and from the success of their liberal counterparts”).

¹⁰⁶ *Id.*

¹⁰⁷ SOUTHWORTH, *supra* note 103, at 35.

¹⁰⁸ Hollis-Brusky, *supra* note 99, at 524.

¹⁰⁹ See TELES, *supra* note 103, at 221 (noting that the new conservative generation has a “more strategic approach to client selection,” is smart at “pick[ing] cases with the potential to alter the nation’s constitutional debate,” and takes advantage of “the rising number of conservatives in the legal academy” who have “the cultural, social, and human capital essential to the peculiarities of legal politics”); Hollis-Brusky, *supra* note 99, at 527–28 (discussing the works of Epp, Southworth, and Teles).

One growing movement strategy among these groups (conservative and liberal alike) is knowing which facts are necessary to press the change in constitutional law that they want.¹¹⁰ This move involves reading signals from the courts. Take, for example, 2013's high stakes case about public unions, *Friedrichs v. California Teachers Ass'n*.¹¹¹ Under existing Supreme Court precedent, workers who are not members of a union may still be charged a fee that pays for union activity devoted to bargaining for workplace rights.¹¹² *Friedrichs* was a case created specifically to challenge this precedent under the First Amendment; it was a lawsuit brought at an accelerated pace by the Center for Individual Rights (a conservative public interest law firm).¹¹³

The reason for the rush was a statement in a prior case by Justice Alito suggesting the time was ripe for a change.¹¹⁴ The Center for Individual Rights caught the hint.¹¹⁵ Terry Pell, the then-President of that group, explains: "When we read Alito's opinion in [*Knox*], we saw it as an invitation to bring the 1st Amendment back to the Supreme Court."¹¹⁶ And they did just that. The Center filed a lawsuit later that year and made unusual concessions in the district court in order to fast-track the case to the Supreme Court as a vehicle for Justice Alito to get his chance to change course constitutionally.¹¹⁷

¹¹⁰ See Anders Walker, *Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law*, 38 FLA. ST. U. L. REV. 345, 349–50 (2011) (identifying several fact-based techniques "movement strategists" have used in recent cases seeking constitutional change).

¹¹¹ No. SAVC 13-676-JLS, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013), *aff'd*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd mem. by an equally divided court*, 136 S. Ct. 1083 (2016). Although the case ended in a 4-4 tie in 2016, the Supreme Court recently agreed to take the issue up again. See *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, Council 31, 851 F.3d 746 (7th Cir.), *cert. granted*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466).

¹¹² *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222–23 (1977).

¹¹³ Linda Greenhouse, Opinion, *Bring Me a Case*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html>.

¹¹⁴ In a 2012 case, *Knox v. Service Employees International Union, Local 1000*, Justice Alito seemed to go out of his way to make the following statement: "[W]e do not revisit today whether the court's former cases have given adequate recognition to the critical First Amendment rights at stake." 567 U.S. 298, 311 (2012). Justice Sonia Sotomayor caught that wink and nod and did not like it: "To cast serious doubt on longstanding precedent," she wrote in a concurrence, "is a step we historically take only with the greatest caution and reticence. To do so, as the majority does, on our own invitation and without adversarial presentation is both unfair and unwise." *Id.* at 328 (Sotomayor, J., concurring).

¹¹⁵ See David G. Savage, *Group Appeals Mandatory Union Fees to Supreme Court*, L.A. TIMES (Jan. 31, 2015), <http://www.latimes.com/local/california/la-me-0201-court-teachers-union-20150201-story.html>.

¹¹⁶ *Id.*

¹¹⁷ See Dahlia Lithwick, *Public Sector Unions Just Dodged a Major Bullet at the Supreme Court*, SLATE (Mar. 29, 2016, 11:26 AM), http://www.slate.com/blogs/the_slatest/

Adam Liptak of the *New York Times* says this is a trend: cases like *Friedrichs*, he reports, “are creations of legal entrepreneurs” who are paying attention “to signals from justices who have done more than wait for cases to arrive at their courthouse.”¹¹⁸

Liptak is not the only one noticing a pattern. Reading judicial signals is something public interest law firms are getting quite good at doing.¹¹⁹ As political scientist Vanessa Baird points out, public interest groups (like the Center for Individual Rights on the right or the ACLU on the left) “use information from previous [judicial] decisions about how case facts can be used to make particular legal arguments that can help them push the envelope of legal change.”¹²⁰ Reading the tea leaves like this helps clever legal strategists decide to spend money “scour[ing] the environment for cases with appropriate case facts that lend themselves to sophisticated and policy relevant legal arguments, and then support the litigation of the cases so that they are available to the Court.”¹²¹

The same strategists that know what facts make good vehicles for their causes also know how to develop those facts in a way that attracts judicial attention once the case is born. This involves first finding what has been called the right “frame” for a legal dispute, and then making sure the “right” expert authorities are in place to cement that factual frame for the judges.¹²²

2016/03/29/public_sectors_unions_dodge_a_bullet_at_the_supreme_court.html (calling *Friedrichs* litigation “on the fast track”).

¹¹⁸ 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?_r=0.

¹¹⁹ See generally VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA (2007) (connecting “litigants’ strategies with the aggregate policy trends on the U.S. Supreme Court’s agenda”); Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. U. J.L. & POL’Y 215 (2009) (discussing research on judicial signaling and litigant responsiveness).

¹²⁰ Baird & Jacobi, *supra* note 119, at 219.

¹²¹ *Id.* at 222. Indeed, another success story for this new generation of conservative public interest litigators is *District of Columbia v. Heller*, the landmark 2008 decision holding that the Second Amendment protects an individual right to own a handgun. 554 U.S. 570, 635 (2008). That case was brought by litigators at the Cato Institute and the Institute of Justice at the not-so-subtle request by Justice Thomas that he hoped to have the opportunity to decide that issue “at some future date.” See Hollis-Brusky, *supra* note 99, at 530–31 (discussing *Heller* and Justice Thomas’s signaling in *Printz v. United States*, 521 U.S. 898, 939 (1997)). Taking this hint and running with it, the conservative litigators “responded and brought a well-framed, well-argued, and successful challenge to the District of Columbia’s hand-gun ban.” *Id.* at 531.

¹²² See Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1921 (2016) (discussing the importance of experts in Supreme Court cases); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 279–81 (2011) (discussing the importance of framing).

Litigation over same-sex marriage bans provides an instructive example here. As historians have documented, the litigants in the struggle for marriage equality shifted argument strategies around the mid-2000s to stress “civil- and equal-rights rhetoric” as opposed to pure privacy concerns.¹²³ This move brought several advantages to the movement, including shifting the factual debate in a way that forced opponents to prove—as a matter of fact—that same-sex couples were somehow unequal parents.¹²⁴

These questions of fact then became prominent in the second-wave of marriage litigation. In *Hollingsworth v. Perry*, the case challenging the same-sex marriage ban in California,¹²⁵ Ted Olson (a lead lawyer for the challengers) knew the drill. He first advised finding plaintiffs who were “in long-term committed relationships . . . ‘I want a teacher, a police officer, and someone who owns a bookstore,’” he is quoted as saying.¹²⁶

Beyond selecting the “right” plaintiffs, Olson and the other litigators fighting for marriage equality also knew that there were big generalized factual questions that would need to be answered, and they worked hard to get their experts up front.¹²⁷ The litigation in California actually went to a trial in which these generalized claims of fact were put to the test.¹²⁸ Judge Walker, the district court judge, heard testimony from over a dozen witnesses (expert and lay) on factual questions, such as: Whether sexual orientation is an immutable

¹²³ Ziegler, *supra* note 122, at 301. I need to be clear that the movement lawyers on this issue did not have a monopoly like, for example, the NAACP did with respect to school segregation in the South. See *NAACP Legal History*, NAACP, <http://www.naacp.org/legal-department/naacp-legal-history/> (last visited Nov. 27, 2017) (noting that the NAACP’s origins date back to 1909). The LGBT movement lawyers were “plenty strategic” but just had less control over the litigation due to the plethora of lawyers willing to take such a case. See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 217 (2013) (stating that gay rights litigators have lacked control over gay marriage litigation compared to the NAACP with regard to school desegregation litigation).

¹²⁴ See Ziegler, *supra* note 122, at 302 (discussing shifts in opponents’ strategies in 1996, 2003, and 2006). As Michael Klarman demonstrates in his book on the subject, this move also had a significant effect on public opinion. See KLARMAN, *supra* note 123, at 210 (“One can only guess how many people have changed their attitudes toward gay marriage after experiencing gay married couples as good neighbors or as parents of well-adjusted children.”).

¹²⁵ 133 S. Ct. 2652, 2659–60 (2013).

¹²⁶ JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 22 (2014).

¹²⁷ See *id.* at 55–58 (describing how litigation strategy evolved once it was realized facts would need to be proven at trial).

¹²⁸ See KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* 199 (2015) (discussing considerable time spent by plaintiffs and defendants in presenting their case and cross-examining witnesses).

trait, whether permitting same-sex marriage will cause a reduction in heterosexual marriage, and the effect of having two parents of the same gender on a child's development.¹²⁹ The court ultimately ruled for the challengers making over eighty findings of fact on issues of this sort, complete with citations to testimony from the record.¹³⁰ Writing about the trial, Kenji Yoshino describes the findings of fact in Judge Walker's opinion as "the language of power. The words were bricks on the page; the pages were the walls of a citadel."¹³¹

And even though *Perry* was not the case that ultimately brought same-sex marriage bans to an end, history shows that shifting the factual controversy to issues involving children and equality was the right strategy. Justice Kennedy's opinions in *United States v. Windsor* and later *Obergefell v. Hodges* emphasized principles of equality and concerns for children being raised by gay couples who were taught that their families were somehow less worthy of state recognition.¹³² It turns out the shift of factual frame to emphasize family and equality was a winning move. And it was no accident, but rather the product of sophisticated lawyers seeking constitutional change.

Of course, the emphasis on finding the appropriate frame and factual record for a constitutional case does not stop at trial. More and more frequently these days, the factual contours of a constitutional case are presented in briefs filed on appeal by outside experts as amici curiae, or "friends of the court."¹³³ This is one strategy movement lawyers use for spreading what they call the "intellectual capital" necessary for change in constitutional law.¹³⁴ In *Friedrichs*, for example, even though the factual record below was basically non-existent, the Center for Individual Rights secured assistance of nine amicus briefs

¹²⁹ Although having a trial on questions like this may seem unusual, many praised the move. As Kenji Yoshino says in his book documenting the trial: "Claims that might seem unassailable in a thirty-second spot on television could be dismantled through hours of methodical questioning in the dock." *Id.* at 158.

¹³⁰ *Id.* at 234.

¹³¹ *Id.*

¹³² See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–07 (2015) (citing the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *United States v. Windsor*, 133 S. Ct. 2675, 2689–96 (2013) (discussing due process and equal protection principles).

¹³³ I have written extensively on the subject of amicus briefs before, noting their rise in recent years both in terms of the number of briefs filed and also the number of briefs cited by the Court. See Larsen, *The Trouble with Amicus Facts*, *supra* note 16, at 1758 (noting that "[a]micus curiae briefs filed at the U.S. Supreme Court are on the rise—up 8000% over 50 years"); Larsen & Devins, *supra* note 122, at 1911, 1915 (noting "an explosion of amicus briefs routinely filed at the Court").

¹³⁴ "Intellectual capital" was a phrase used by Steve Teles to describe an important new strategy of the second generation of conservative public interest law firms. TELES, *supra* note 103, at 199; see also Hollis-Brusky, *supra* note 99, at 532 (connecting this strategy to the rise of amicus briefs).

at the cert petition stage and twenty-five such briefs on the merits. By my count fifty-six percent of these briefs included at least one whole section or over ten authorities devoted to factual claims, such as empirical data on whether collective bargaining lowers strike rates and whether unions can exist without agency fees.¹³⁵

And *Friedrichs* is not unusual. Amicus briefs have had a tremendous growth spurt at the Supreme Court in the last twenty years, and the sophisticated advocates of today know how to use them.¹³⁶ As I have written about before with my colleague Neal Devins, advocates at the Court “wrangle” the amicus experts they think would influence the justices and then “whisper” to them to make sure they are saying what needs to be said.¹³⁷ A targeted amicus strategy is seen by those in the know to be a necessity not a luxury, and those briefs are increasingly responsible for marshalling factual authorities to the courts.

It is now common for any one case at the Supreme Court to draw dozens of amicus briefs.¹³⁸ And it is becoming more common for the brief count to climb even higher than that. *District of Columbia v. Heller* drew sixty-eight briefs of amicus support, *Whole Women’s Health* drew eighty such briefs, and *Obergefell v. Hodges* set the record with 153 briefs by amicus curiae. For the sake of comparison historically, consider that *Brown v. Board of Education* had just six amicus briefs and *Roe v. Wade* had only twenty-three.¹³⁹

What is even more noteworthy, however, is the percentage of those amicus briefs that dedicate a significant portion of their pages to factual claims.¹⁴⁰ In *District of Columbia v. Heller*, for example, nearly half of the amicus briefs devoted a section or more of their briefs to arguments involving legislative fact—arguments like those presenting “criminological evidence” in an attempt to “discredit[] the mantra

¹³⁵ See, e.g., Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioners at 6–10, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2006) (mem.) (per curiam) (No. 14-915) (discussing the relationship between agency fees and exclusive bargaining in the public sector); Brief of Steve Bullock, Governor of Montana, as Amicus Curiae in Support of Respondents at 13–15, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (similar). For a list of briefs coded as “fact-y,” please see spreadsheets on file with the *N.Y.U. Law Review*.

¹³⁶ Larsen & Devins, *supra* note 122, at 1912.

¹³⁷ See *id.* at 1919–26 (discussing the “amicus wrangler” and “amicus whisperer”).

¹³⁸ See *id.* at 1902 (noting that “marquee cases” attract “briefs in the triple digits”).

¹³⁹ *Id.* at 1912.

¹⁴⁰ A word on methodology: In reaching this number, I define significant to mean devoting one entire roman numeral section to claims of legislative fact or to citing ten or more factual authorities. For a complete list of sorted cases, see spreadsheets on file with *N.Y.U. Law Review*.

more guns = more violence and death.”¹⁴¹ And in *Whole Woman’s Health*, a case where sixty-three percent of the briefs were largely devoted to claims of legislative fact,¹⁴² competing groups of obstetricians as amici made completely opposite medical claims about the inherent risks of the abortion procedure.¹⁴³

As I have observed before, the Justices seem hungry for this sort of factual information and they are increasingly turning to amici to get it.¹⁴⁴ There is value, certainly, to providing the Court with factual expertise—particularly when modern Justices seem more interested in laying down broad rules than just deciding specific disputes. But there is also a downside to advocates funneling factual arguments in their amicus briefs particularly those who are pushing an agenda and surrounded by “my team-your team” facts at all times. Just as “law-office history” tends to be one-sided and advocacy-driven,¹⁴⁵ so too should we worry about “law-office medicine” or “law-office social science” or “law-office description of police practices.” It is a concern made more acute by the boom in amicus practice, the eager participation by experts and pseudo-experts in all fields, and the increasing sophistication of advocates and activists who know where to find them.¹⁴⁶

¹⁴¹ Brandeis Brief Filed on Behalf of Amici Frederick Bieber et al. Supporting Appellants at 3, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

¹⁴² For a complete list of the coded briefs in this case, see spreadsheets on file with *N.Y.U. Law Review*.

¹⁴³ *Compare* Brief of Amici Curiae American Ass’n of Pro-Life Obstetricians & Gynecologists et al. in Support of Respondents at 6–17, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) (alleging that both surgical and drug-induced abortions are significantly associated with risks of major complications and death), *with* Brief for Amici Curiae American College of Obstetricians & Gynecologists et al. in Support of Petitioners at 6–10, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-274) (stating that abortions are extremely safe medical procedures with exceptionally low death rates).

¹⁴⁴ See Larsen, *The Trouble with Amicus Facts*, *supra* note 16, at 1778–79 (arguing that the Justices now “treat amici as experts, not as a research tool”); Larsen & Devins, *supra* note 122, at 1953 (pointing to the Roberts Court’s “willingness to appoint amici curiae to argue issues raised by the Justices”).

¹⁴⁵ I believe the phrase “law-office history” was coined by Alfred Kelly, who explained that “[b]y ‘law-office history,’ I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the data proffered.” Wendie Ellen Schneider, Case Note, *Past Imperfect*, 110 *YALE L.J.* 1531, 1542 (2001) (quoting Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119, 122 n.13).

¹⁴⁶ Neal Devins and I have written in the past about the value members of the Supreme Court bar bring to the amicus practice in our article *The Amicus Machine*. See generally Larsen & Devins, *supra* note 122. As I explain there, I maintain my concern about an unbridled amicus practice, but I believe that the risks can be mitigated by the reputation market created by elite members of the Supreme Court bar. *Id.* at 1901. For the same reasons, I am less concerned by that particular circle of advocates propelling and endorsing alternative facts.

At the end of the day whether through careful case selection or choosing smart factual frames or recruiting the right experts at trial and as amici, the second generation of social movement lawyers are quite advanced at growing the factual dimensions of their cases in a way that sets them up for successful constitutional arguments. It is another part of what makes the “fact-y” turn in U.S. constitutional law so dramatic, and it sets the stage for a collision with alternative facts in an undesirable way.

II

EXAMPLES OF ALTERNATIVE FACTS IN CONSTITUTIONAL LITIGATION

Alternative facts disturbing Thanksgiving dinner conversations are one thing. It is another thing to talk about whether these facts affect the interpretation of our Constitution. As demonstrated below, they can and they do. This Part discusses examples of current constitutional controversies in which judges are besieged by “my team-your team” facts: two different sets of authorities coming to opposite conclusions about the way the world works. These facts are not just being used rhetorically but are seemingly central to the outcome of the case. And, as explored below, some of these “facts” are simply untrue.

A. *Restrictions on Abortion*

Alternative facts are perhaps most rampant around laws that restrict access to abortion. Following the *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision in 1992, states are permitted to enact restrictions on abortion procedures so long as such laws do not impose an “undue burden” on a woman’s right to choose to end her pregnancy before fetal viability.¹⁴⁷ In the twenty-five years or so since *Casey*, such laws have been enacted at an aggressive pace.¹⁴⁸ Indeed, by one count more than 300 of these laws were introduced in state legislatures since 2010 alone.¹⁴⁹ And, as demonstrated

¹⁴⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–77 (1992) (plurality opinion) (defining “undue burden” as “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

¹⁴⁸ See, e.g., *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 1, 2017), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (listing abortion laws concerning the requirements of performance by a licensed physician, hospital requirements, private and public funding limits, mandated counseling, waiting periods, and parental involvement for minors seeking abortions).

¹⁴⁹ See Sarah Lipton-Lubet, Opinion, “*Alternative Facts*” and the Anti-Abortion Movement, HILL (Jan. 27, 2017, 7:40 AM), <http://thehill.com/blogs/pundits-blog/civil-rights/316428-the-anti-abortion-movement-a-match-made-in-alternative-fact> (noting that nearly

below, plenty of this legislation (and subsequent litigation) has been infected with factual claims that are of dubious reliability.¹⁵⁰

In this Section, I discuss three varieties of abortion restrictions surrounded by controversy on questions of fact: (1) “informed consent” laws that require disclosure to patients of certain risks that abortion is said to carry, (2) regulations on abortion providers (such as requiring doctors to have admitting privileges in local hospitals), and (3) “fetal pain laws” or laws that ban abortion at twenty weeks on the grounds that the fetus is capable of feeling pain at that point.

1. *Informed Consent Laws*

One strategy in restricting abortion is to regulate the mandatory counseling a woman must receive before undergoing an abortion procedure. Seven states require providers to inform women that having an abortion can have negative mental health consequences including specifically mentioning (in some states) the risk of suicide or depression.¹⁵¹ Four states provide information to women telling them that having an abortion can jeopardize her future fertility.¹⁵² And six states require informing women that having an abortion could increase the risk of breast cancer.¹⁵³

None of these claims withstand medical scrutiny. The National Cancer Institute convened a group of one hundred of the world’s

one-third of the more than 1100 abortion restrictions enacted by states have been adopted since 2010).

¹⁵⁰ See *infra* Section II.A.1–3.

¹⁵¹ KAN. STAT. ANN. § 65-6710(a)(3) (West 2017); LA. STAT. ANN. § 40:1061.16(D) (West 2017); MICH. COMP. LAWS SERV. § 333.17015(11)(b)(iii) (West Supp. 2017); NEB. REV. STAT. § 28-327.01(1)(b) (2016); N.C. GEN. STAT. ANN. § 90-21.82(1)(b) (West Supp. 2013); S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(i), (ii) (Supp. 2017); W. VA. CODE § 16-2I-3(a)(2) (LexisNexis 2016); see also *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Oct. 1, 2017), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (categorizing state abortion laws based on different included provisions).

¹⁵² Those four states are: Arizona, Kansas, South Dakota, and Texas. See GUTTMACHER INST., *supra* note 151 (noting that the four states inaccurately portray risks regarding future fertility); see also TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(1)(B)(ii) (West 2017) (requiring notice of the potential risk of infertility for consent to an abortion to be voluntary and informed); ARIZ. DEP’T OF HEALTH SERVS., A WOMAN’S RIGHT TO KNOW 15, <http://www.azdhs.gov/documents/prevention/womens-childrens-health/informed-consent/a-womans-right-to-know.pdf> (last visited Jan. 15, 2018) (including information on future fertility in state materials given to abortion patients); KAN. DEP’T OF HEALTH & ENV’T, IF YOU ARE PREGNANT 18, 19, 22, 26, http://www.womansrighttoknow.org/download/Handbook_English.pdf (last visited Jan. 15, 2018) (same).

¹⁵³ For Kansas, Mississippi, North Dakota, Texas, Alaska, and Oklahoma, see the statutes and material listed, *supra* note 5. There are of course variations in the language required. For details and a state-by-state breakdown of the information mandated in the informed consent, see GUTTMACHER INST., *supra* note 148.

leading experts who study pregnancy and breast cancer risk. They conclusively determined that “having an abortion or miscarriage does not increase a woman’s subsequent risk of developing breast cancer.”¹⁵⁴ Similarly, the American College of Obstetricians and Gynecologists in 2015 concluded that having one abortion had no adverse effect on future fertility or pregnancy complications.¹⁵⁵

Further, the psychological effect of abortion is a subject also surrounded by claims of questionable reliability. Consider, for example, a man named Vincent Rue. Rue has been a frequent expert in abortion restriction cases—both in court and before legislatures.¹⁵⁶ Rue is not a medical doctor but holds an advanced degree in home economics. He is the inventor of the phrase “post-abortion syndrome,” a label used to describe alleged adverse psychological effects women experience following abortion.¹⁵⁷ According to Rue, abortion triggers psychological effects similar to those felt by soldiers after war in post-traumatic stress disorder.¹⁵⁸

Rue’s research has been widely discredited by the American Psychology Association, which has flatly denied any connection between

¹⁵⁴ *Abortion, Miscarriage, and Breast Cancer Risk: 2003 Workshop*, NAT’L CANCER INST. (Jan. 12, 2010), <https://www.cancer.gov/types/breast/abortion-miscarriage-risk>.

¹⁵⁵ See *Frequently Asked Questions: Induced Abortion*, AM. C. OBSTETRICIANS & GYNECOLOGISTS (May 2015), <http://www.acog.org/Patients/FAQs/Induced-Abortion> (“Most health care providers agree that one abortion does not affect your ability to get pregnant or the risk of future pregnancy complications.”); see also Hani K. Atrash & Carol J. Rowland Hogue, *The Effect of Pregnancy Termination on Future Reproduction*, 4 BAILLIÈRE’S CLINICAL OBSTETRICS & GYNAECOLOGY 391, 392 (1990) (finding that generally no significantly increased risks of adverse reproductive health following induced abortion have been observed); Peter Frank et al., *The Effect of Induced Abortion on Subsequent Fertility*, 100 BRITISH J. OBSTETRICS & GYNAECOLOGY 575 (1993) (finding that induced abortions are not related to future fertility); Yvonne Butler Tobah, *Could an Abortion Increase the Risk of Problems in a Subsequent Pregnancy?*, MAYO CLINIC: HEALTHY LIFESTYLE (July 19, 2017), <http://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/expert-answers/abortion/faq-20058551> (“Generally, elective abortion isn’t thought to cause fertility issues . . .”).

¹⁵⁶ See Irin Carmon, *Who Is Vincent Rue?*, MSNBC (June 11, 2014), <http://www.msnbc.com/msnbc/who-vincent-rue> (profiling Vincent Rue).

¹⁵⁷ *Id.*

¹⁵⁸ See Priscilla K. Coleman, Catherine T. Coyle, Martha Shuping & Vincent M. Rue, *Induced Abortion and Anxiety, Mood, and Substance Abuse Disorders: Isolating the Effects of Abortion in the National Comorbidity Survey*, 43 J. PSYCHIATRIC RES. 770, 775 (2009) (“The results of this study revealed that women who have aborted are at a higher risk for a variety of mental health problems . . . when compared to women without a history of abortion . . .”); see also Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES MAG. (Jan. 21, 2007), <https://nyti.ms/2k9Cm21> (“This way of thinking was first articulated in the early 1980s. Vincent Rue, a family therapist and ally of Reardon’s, testified before Congress in 1981 about a variant of post-traumatic stress disorder that he claimed was afflicting women—‘post-abortion syndrome.’”).

abortion and adverse mental health.¹⁵⁹ Indeed, a journal in which Rue's research was published was forced to issue a retraction after his study was debunked by psychologists at the University of California, who did not mince words when calling Rue's research flawed: "This is not a scholarly difference of opinion; their facts were flatly wrong. This was an abuse of the scientific process to reach conclusions that are not supported by the data."¹⁶⁰ Even Ronald Reagan's surgeon general, C. Everett Koop, a conservative and pro-life supporter, refused to credit Rue's research—reporting back to his boss that he was unconvinced by the data on the mental health effects of abortion on women.¹⁶¹

But even after Rue's research has been widely discredited—and recognized as such by several district courts who threw out his testimony as unreliable¹⁶²—he continues to hold influence behind the scenes. Although he no longer testifies in court, Rue has recently been paid a total of over \$192,000 to testify about the supposedly harmful effects of abortion on women's health before legislatures in Texas, Wisconsin, Alabama, and North Dakota.¹⁶³

Furthermore, Rue has been hired to "consult" and to "ghost-write" expert testimony from other people in constitutional litigation

¹⁵⁹ See generally BRENDA MAJOR ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2008), <http://www.apa.org/pi/women/programs/abortion/mental-health.pdf> ("The best scientific evidence published indicates that among adult women who have an *unplanned pregnancy* the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy.").

¹⁶⁰ Carmon, *supra* note 156 (quoting Jane Steinberg, assistant professor in the Department of Psychiatry at University of California-San Diego); see Julia R. Steinberg & Lawrence B. Finer, *Examining the Association of Abortion History and Current Mental Health: A Reanalysis of the National Comorbidity Survey Using Common-Risk-Factors Model*, 72 SOC. SCI. & MED. 72 (2011) (debunking Coleman, Coyle, Shuping, and Rue's study).

¹⁶¹ Carmon, *supra* note 156.

¹⁶² See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333–34 (E.D. Pa. 1990) (finding that Vincent Rue's testimony was "not credible," "devoid of the analytical force and scientific rigor which typified the testimony of plaintiffs' expert psychologist," and "suggest[ed] a possible personal bias"), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); *Hodgson v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986) (finding that Vincent Rue "possesse[d] neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses" and that "his testimony lacked the analytical force of" and was "less persuasive than" plaintiffs' expert testimony), *rev'd on other grounds*, 853 F.2d 1452 (8th Cir. 1988).

¹⁶³ Molly Redden, *Texas Pays "Thoroughly Discredited" Expert \$42,000 to Defend Anti-Abortion Law*, MOTHER JONES (Aug. 13, 2014, 10:00 AM), <http://www.motherjones.com/politics/2014/08/texas-vincent-rue-anti-abortion-law/>; see also Carmon, *supra* note 156 (describing Rue's behind the scenes work in recruiting and consulting expert witnesses).

about these abortion laws.¹⁶⁴ Rue's undercover influence, in fact, has been revealed on cross-examination in several recent constitutional trials. One district judge, Judge Yeakel in Texas, admitted e-mail correspondence to show how the state's psychological expert was being coached by Rue as she prepared her testimony.¹⁶⁵ In similar litigation in Alabama, the state's expert admitted on cross examination to using Rue for help in "wordsmithing" his testimony.¹⁶⁶ And a district court in Wisconsin also found Rue's behind the scenes influence to be a liability.¹⁶⁷

The fact that Rue's fingerprints have been discovered by vigilant district courts is cause for optimism (and discussed in Part III and IV below), but the fact remains that this widely discredited "science" has still held influence in laws that affect the constitutional rights of millions of citizens.

2. *Regulations on Abortion Providers*

Another type of abortion restrictions are regulations on the institutions that seek to offer abortion services. Called "Targeted Regulation of Abortion Providers" or "TRAP" laws by critics,¹⁶⁸ these laws "singl[e] out abortion providers for onerous regulation concerning building standards, licensing, telemedicine, and admitting privileges," and they "work either to raise the cost of providing abortions or to put providers out of business altogether."¹⁶⁹ All of these regulations are passed in the name of protecting the health of women.¹⁷⁰

But, as Reva Siegel and Linda Greenhouse have observed at length—and as several district courts have found—there are reasons to be skeptical about the factual claims underlying these regulations

¹⁶⁴ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 973 n.24 (W.D. Wis. 2015).

¹⁶⁵ Redden, *supra* note 163.

¹⁶⁶ *Id.*

¹⁶⁷ *See Van Hollen*, 94 F. Supp. 3d at 973 n.24 (noting that the weight given to defendant's expert was called into question in part because he "had been actively recruited by Dr. Vincent Rue").

¹⁶⁸ Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 *YALE L.J.F.* 149, 151 (2016), <https://www.yalelawjournal.org/forum/the-difference-a-whole-woman-makes>.

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g., Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013) (referencing the stated rationale of a Wisconsin TRAP law "to protect the health of women who have abortions"); *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1298 (M.D. Ala. 2014) (referencing Alabama's purpose of passing a TRAP law to "further[] women's health"); State Defendants' Trial Brief at 42, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No. 1:13-CV-862) (referencing Texas's TRAP laws' purpose "to protect the health and safety of patients").

on abortion providers.¹⁷¹ These restrictions are said to be necessary to keep abortion safe. In reality, however, the overwhelming medical consensus is that abortion procedures are extremely safe already: less than 0.3% of U.S. abortion patients experience a complication that requires hospitalization.¹⁷² “And in the unlikely event of an emergency, federal law requires a hospital to treat a woman, regardless of whether the abortion provider has admitting privileges at that facility.”¹⁷³

This fact—about the rate of abortion complications—is another one that has been the subject of some shenanigans. Consider the statistics submitted by expert Dr. John Thorp in several cases involving regulation of abortion providers. Thorp has testified before several state legislatures and courts about the complication rate for abortions, which he says fall somewhere “between 2 and 10 percent.”¹⁷⁴ The problem, however, is that on cross examination in a 2014 case, *Planned Parenthood of Wisconsin v. Van Hollen*, Thorp admitted that he had omitted a decimal point and the real risk was somewhere between 0.2 and 10 percent. True, the missing decimal point could have been an honest mistake.¹⁷⁵ But there is reason to be skeptical since Thorp made the same decimal mistake (and was caught in a deposition) in a different case in Alabama in 2013.¹⁷⁶

The constitutional litigation over TRAP laws in the courts has been on a bit of a roller coaster, as illustrated by the fate of HB2 in Texas. This law required that abortion providers have admitting privileges at a nearby hospital and be equipped as ambulatory surgical centers (an expensive requirement).¹⁷⁷ Judge Lee Yeakel of the Western District of Texas found in *Whole Women’s Health v. Lakey* that prior to the admitting privileges law in Texas “abortion in Texas was

¹⁷¹ See Greenhouse & Siegel, *supra* note 168, at 153 (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684, 687–88 (W.D. Tex. 2014)); see also Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When Protecting Health Obstructs Choice*, 125 *YALE L.J.* 1428, 1454 (2016) (describing “deep questions about whether evidence supports the alleged benefits to women’s health” proposed in TRAP laws).

¹⁷² See *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 863 (W.D. Wis. 2013) (referencing studies cited by Dr. Douglas Laube “demonstrating that legal abortion is one of the safest medical procedures in the United States”).

¹⁷³ Rachel Benson Gold & Elizabeth Nash, *Flouting the Facts: State Abortion Restrictions Flying in the Face of Science*, 20 *GUTTMACHER POL’Y REV.* 53, 54 (2017).

¹⁷⁴ For the entire story of Thorp’s testimony, see Imani Gandy, *When Does an Error Become a Lie? The Case of the Missing Decimal Point*, *REWIRE* (Apr. 24, 2015, 11:07 AM), <https://rewire.news/article/2015/04/24/error-becomes-lie-missing-decimal-point/>.

¹⁷⁵ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 968–69 (W.D. Wis. 2015).

¹⁷⁶ Gandy, *supra* note 174 (discussing Thorp’s deposition in *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014)).

¹⁷⁷ H.B. 2, 2013 Tex. Gen. Laws 5013, 5017 (West).

extremely safe” and that the regulations were not just unnecessary but also “would effect[] the closing of almost all abortion clinics in Texas.”¹⁷⁸

The district court’s fact-checking here was quite detailed. Following a trial and expert witness credibility determinations the court found that the law had the effect of reducing abortion providers in the state by eighty percent.¹⁷⁹ It also found that “[t]he great weight of the evidence demonstrate[d]” that abortion was “extremely safe” before the passage of HB2 and that there was a “dearth of credible evidence” that ambulatory centers were necessary to protect women’s health.¹⁸⁰

The Fifth Circuit reversed Judge Yeakel (a George W. Bush appointee)—citing deference to the legislative record.¹⁸¹ But the U.S. Supreme Court vindicated the trial court in 2016, holding in *Whole Woman’s Health v. Hellerstedt* that the “undue burden” standard governing abortion restrictions demands “close attention to the scientific evidence” behind the law.¹⁸² Justice Breyer, writing for the majority, was explicit that courts have a role in fact-checking laws like this: “[T]he ‘Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.’”¹⁸³ As Linda Greenhouse and Reva Siegel describe it, the Court’s opinion “is rich with factual findings of the district court and of amici that bear on the balance of benefits and burdens in the case.”¹⁸⁴ Ultimately concluding that the law achieved “little or no health benefits,” while at the same time “adversely affect[ing] women’s access” to abortion, the Court once again anchored constitutional law in factual claims, but this time showed an increased willingness to scrutinize them.¹⁸⁵

3. *Fetal Pain Laws*

A final example of abortion restrictions that rest on factual claims of questionable reliability concern laws that ban abortion earlier than viability based on evidence that the fetus can feel pain earlier in the

¹⁷⁸ *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684, 687 (W.D. Tex. 2014).

¹⁷⁹ *See id.* at 680–81 (stating that the number of licensed abortion facilities would go from forty to “at most, eight”).

¹⁸⁰ *Id.* at 684–85.

¹⁸¹ *See Whole Woman’s Health v. Lakey*, 769 F.3d 285, 297 (5th Cir.) (“In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.”), *vacated in part by* 135 S. Ct. 399 (2014) (mem.).

¹⁸² Greenhouse & Siegel, *supra* note 168, at 150; *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (finding that the district court’s consideration of scientific witness credibility was appropriate).

¹⁸³ *Whole Woman’s Health*, 136 S. Ct. at 2310 (emphasis omitted) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

¹⁸⁴ Greenhouse & Siegel, *supra* note 168, at 156.

¹⁸⁵ *Id.* at 158.

pregnancy. Twenty-week abortion bans have been enacted in twenty-one states to date.¹⁸⁶ Arizona passed one such law in 2012, forbidding abortion after twenty weeks except in a medical emergency.¹⁸⁷ Despite the concession that twenty weeks is before fetus viability—the line at which abortion is constitutionally protected—the Arizona Legislature justifies its law in part by citing “the strong medical evidence that unborn children feel pain during an abortion at that gestational age.”¹⁸⁸

In *Issacson v. Horne*, the Ninth Circuit struck down the Arizona law on the grounds that it was flatly inconsistent with *Roe v. Wade*.¹⁸⁹ But interestingly neither the Ninth Circuit nor the district court engaged with the factual premise behind the law—the claim that a fetus can feel pain before twenty weeks.

When one digs a little, however, it is far from obvious that this factual claim is indeed true. The “strong medical evidence” relied on by the Arizona Legislature and assumed to be true by the reviewing courts actually amounts to one medical study published in 1987.¹⁹⁰ The rest of the legislative record assembled by Arizona does not concern fetal pain at all.¹⁹¹

And the 1987 study is counter-balanced by some serious contrary authority. The American College of Obstetricians and Gynecologists, for example, relying on “recent systematic reviews of the existing research published in peer-reviewed journals,” rejects the claim that the fetus can feel pain that early in a pregnancy.¹⁹² And the consensus of the American Medical Association is that “[e]vidence regarding the capacity for fetal pain is limited but indicates that fetal perception of

¹⁸⁶ The states are Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. *20-Week Bans*, REWIRE: LEGIS. TRACKER, <https://rewire.news/legislative-tracker/law-topic/20-week-bans/> (last updated Oct. 10, 2017). Laws in three of those states have been blocked by federal courts.

¹⁸⁷ H.R. 2036, 2012 Ariz. Sess. Laws 1346, 1364 (codified at ARIZ. REV. STAT. ANN. § 36-2159 (2014)).

¹⁸⁸ *Issacson v. Horne*, 716 F.3d 1213, 1218 (9th Cir. 2013) (quoting H.R. 2036 § 9(B)(1)).

¹⁸⁹ *See id.* at 1217 (“Arizona’s twenty-week law is a preclusion prior to fetal viability and is thus invalid under binding Supreme Court precedent.”).

¹⁹⁰ *See* H.R. 2036 § 9(A)(7) (showing that the only study relating to fetal pain laws is K.J.S. Anand & P.R. Hickey, *Pain and Its Effects in the Human Neonate and Fetus*, 317 NEW ENG. J. MED. 1321 (1987)).

¹⁹¹ H.R. 2036.

¹⁹² Motion of American College of Obstetrics & Gynecologists & American Congress of Obstetricians & Gynecologists for Leave to File Brief Amici Curiae Supporting Appellants at 21, *Issacson*, 716 F.3d 1213 (No. 12-16670).

pain is unlikely before the third trimester.”¹⁹³ Given the mixed authority (and perhaps that is a generous characterization), one has to question the choice to label one 1987 study as “strong medical evidence” sufficient to justify infringing a constitutionally protected right.

B. Voter ID Laws

“My team-your team” facts plague constitutional controversies well beyond the abortion debate. Recent years have seen a flurry of state laws that seek to tighten procedural requirements before voting, particularly those commonly known as “voter ID laws.” In 2006, only three states required identification before voting.¹⁹⁴ Just over ten years later, thirty-four states now require some form of identification before voting, and eight of those states have “strict” voter ID laws that require the ID to contain a photograph.¹⁹⁵

This wave of legislative reform is fueled by a concern that elections in the United States are tainted by voting fraud.¹⁹⁶ Proponents of these laws see voter ID requirements as a way to fix the problem.¹⁹⁷ Challengers argue that these laws are not necessary and that they infringe the fundamental right to vote, specifically suppressing the rights of minority and low-income voters who are less likely to have a photo ID.¹⁹⁸

The fight has a distinctly partisan flavor: “Republicans strongly favor voter ID laws as a way to prevent voter fraud while Democrats oppose them as a crass partisan tactic to suppress turnout among their strongest supporters.”¹⁹⁹ Indeed, of the new state voter ID laws between 2005 and 2007, ninety-five percent of Republican legislators

¹⁹³ Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 947 (2005) (carrying the endorsement by the AMA through publication in JAMA, the AMA's own journal); see also LEVITAN, *supra* note 7, at 11–13 (“Several reviews of available evidence, conducted by well-respected scientific organizations, have concluded that the insistence on pain at 20 weeks is misplaced.”).

¹⁹⁴ See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 639 (2007) (showing that the three states that required photo identification were Georgia, Indiana, and Missouri).

¹⁹⁵ See *Voter Identification Requirements Report*, NAT. CTR FOR ST. CTS, (January 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>; Terri Peretti, *Judicial Partisanship in Voter Identification Litigation*, 15 ELECTION L.J. 214, 215 & n.3 (2016); see also Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 744 & n.18 (2015) (noting that thirty-four states have passed voter ID laws but not all have taken effect).

¹⁹⁶ See Peretti, *supra* note 195, at 214 (citing “[i]rregularities in the administration of the 2000 presidential election” as triggering these concerns).

¹⁹⁷ See Gilbert, *supra* note 195, at 744 (“The target (or some would say ‘alleged’ target) of strict voter ID laws is voter fraud.” (footnote omitted)).

¹⁹⁸ *Id.* at 741.

¹⁹⁹ Peretti, *supra* note 195, at 215.

voted in favor of them, while only two percent of Democratic legislators did so.²⁰⁰

And the partisan fight seems to continue in the courtroom. Almost as quickly as voter ID laws are being enacted, constitutional challenges have followed. The outcome of such cases falls into a conspicuous pattern. As political scientist Terri Peretti recently documented, there is “a striking partisan divide” in these cases with judges appointed by Democrats skeptical of voter ID laws and judges appointed by Republicans more likely to uphold them.²⁰¹ Peretti found “that nearly three-quarters of all judicial votes in voter identification cases (107 out of 145) are partisan in the sense that those votes conform to the position of the party to which the judge belongs.”²⁰²

One might be tempted to rush to the conclusion that the judges in these cases are acting as “partisan zealots” and prioritizing party loyalty over other legal commitments.²⁰³ Resist that temptation. Dan Kahan argues that a more likely explanation has to do with “[t]he essentially factual nature of the disagreement,” and the effect of subconscious “cultural cognition” on the assessment of those facts.²⁰⁴ “Cultural cognition,” Kahan explains, “refers to the influence of group values—ones relating to equality and authority, individualism and community—on risk perceptions and related beliefs.”²⁰⁵ Recall that Kahan’s work demonstrates that people tend to “endorse whichever position reinforces their connection to others with whom they share important commitments.”²⁰⁶

In terms of the voter ID dispute, Kahan argues, the partisan divide can be explained by judges “sincerely basing their decisions on their views of the law,” but in a way that reflects “subconscious, extra-legal influences on their perception of legally consequential facts.”²⁰⁷ It is more than plausible that on questions of fact—like whether voter fraud is rampant and whether voter ID laws suppress votes—we should “expect judges, like everyone else, to gravitate toward the fac-

²⁰⁰ *Id.*

²⁰¹ *Id.* at 214.

²⁰² *Id.* at 224.

²⁰³ Peretti also resists this conclusion. *See id.* at 225 (“This finding of a close link between a judge’s partisan affiliation and her decisions in voter ID cases does not necessarily mean that judges are crassly favoring their party’s policy goals and electoral interests.”).

²⁰⁴ Dan M. Kahan, “*Ideology in*” or “*Cultural Cognition of*” *Judging: What Difference Does it Make?*, 92 MARQ. L. REV. 413, 417 (2009).

²⁰⁵ Kahan, *supra* note 86, at 296; *see also* Kahan, *supra* note 204, at 418 (comparing how people with individualistic values and egalitarian values differ).

²⁰⁶ Kahan, *supra* note 86, at 296.

²⁰⁷ Kahan, *supra* note 204, at 417.

tual beliefs that are most congenial to their defining commitments.”²⁰⁸ Peretti puts it a little more colorfully:

Republican judges may watch FOX News and honestly believe that voter fraud is rampant and should be addressed with corrective legislation, while Democratic judges may watch MSNBC and honestly believe that voter fraud is a myth that Republicans advance in order to suppress voter turnout among young, poor, and minority voters.²⁰⁹

Indeed, this dispute is particularly ripe for culture cognition bias because of the “fact-y” nature of the doctrinal test to be applied. The key case is *Crawford v. Marion County Election Board*, the Supreme Court’s decision upholding Indiana’s voter ID law in 2008.²¹⁰ After *Crawford*, “a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”²¹¹ As Michael Gilbert explains, the marching orders post-*Crawford* create an evidentiary showdown on questions of “hard facts.”²¹² Courts must determine: (1) whether ID laws actually combat fraud and (2) whether they actually depress turnout by lawful voters.

So what do we know about these two factual questions that seem to drive all constitutional challenges to voter ID laws? As to the first, the only type of fraud a voter ID law is capable of preventing is “in-person voter fraud”—attempts by one person to vote for another person. And empiricists seem to agree that this kind of fraud is not much of a problem: “Scholarly consensus is quite clear that there is virtually no evidence of the type of in-person impersonation fraud that voter ID laws seek to remedy.”²¹³

To be fair, the other side of this dispute can be guilty of empirical exaggeration as well. In terms of voter suppression effect of ID laws,

²⁰⁸ *Id.* at 419.

²⁰⁹ Peretti, *supra* note 195, at 225 Kyle C. Kopko, *Litigant Partisan Identity and Challenges to Campaign Finance Policies: An Examination of U.S. District Court Decisions, 1971–2007*, 36 JUST. SYS. J. 212, 228–29 (2015) (pointing to “out-group bias” as a possible influence on individual behavior); see generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (noting that judges have ruled along party lines in resolving partisan fights over election rules).

²¹⁰ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008).

²¹¹ *Crawford*, 553 U.S. at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

²¹² Gilbert, *supra* note 195, at 750–51 (showing that the Court considered whether the opposing sides could support their positions with hard facts).

²¹³ Peretti, *supra* note 195, at 218; see also LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 6 (2010) (“[A]lmost no one knowingly and willfully casts an illegal vote in the United States today. . . . Voter fraud is a politically constructed myth.”).

“most studies have found, at best, a small impact on voter turnout.”²¹⁴ Peretti sums up the empirical debate humorously: “[This is] a fight between two bald men over a comb.”²¹⁵

It is important to recognize, though, that not all factual authorities are created equal. Some come from political scientists and are based on sworn declarations or empirical studies published in peer-review journals.²¹⁶ But other purported expert opinions on these pivotal questions are chockful of anecdotal stories that “are often misleading, incomplete, and unrepresentative.”²¹⁷

Take, for example, two stories commonly circulated in camps who support strict voter ID laws. The first surrounds the Wisconsin 2004 election. Susan Molinari, a Republican former congresswoman and member of a commission founded to suggest reforms to the electoral process, supported a call for voter ID laws by pointing out that in the Wisconsin 2004 election there were “more than 200 cases of felons voting illegally and more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person.”²¹⁸

The problem, however, as Spencer Overton details in his article, is that these Wisconsin anecdotes are more myth than reality.²¹⁹ For one thing, none of the “double voting” individuals named by Molinari and her fellow commissioners were indicted for fraud; the Republican-appointed U.S. Attorney in Wisconsin instead found that the cases involved either clerical errors or individuals with similar names, but different birth dates.²²⁰ In fact, the Republican U.S. Attorney explicitly stated: “We don’t see a massive conspiracy to alter

²¹⁴ Peretti, *supra* note 195, at 218; *see also* Gilbert, *supra* note 195, at 749–50 (describing the empirical literature on this question as mixed); Michael J. Pitts & Matthew D. Newmann, *Documenting Disfranchisement: Voter Identification During Indiana’s 2008 General Election*, 25 J.L. & POL. 329, 330 (2009) (finding that out of the 2.8 million persons who cast ballots in the 2008 Indiana election, 1039 arrived without photo ID and cast a provisional ballot, and 902 did not get their votes counted).

²¹⁵ Peretti, *supra* note 195, at 218 (quoting Ethan Bronner).

²¹⁶ Indeed many leading election law scholars welcome the empirical evidence, calling for a “‘data-driven’ focus” to this constitutional dispute. Pitts & Newmann, *supra* note 214, at 329; *see also* HEATHER K. GERKEN, *THE DEMOCRACY INDEX 5–6* (2009) (calling for a “Democracy Index” that would use comparative data on state and local election performance to gauge the need for reform).

²¹⁷ Overton, *supra* note 194, at 644; *see* MINNITE, *supra* note 213, at 56–73 (showing instances of alleged voter fraud did not actually involve fraud); Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 108–09 (2012) (same); *see also* Gilbert, *supra* note 195, at 746 n.37 (“Some suggest that voter fraud is rarer than UFO sightings.”).

²¹⁸ Overton, *supra* note 194, at 646 (quoting COMM’N ON FED. ELECTION REFORM, *BUILDING CONFIDENCE IN U.S. ELECTIONS 4* (2005)).

²¹⁹ *See id.* at 645–48 (discussing how the “Wisconsin anecdotes are misleading”).

²²⁰ *Id.* at 646.

the election in Milwaukee, one way or another.”²²¹ Moreover, even “[a]ssuming that each of these instances resulted from intentional voter fraud rather than a clerical mistake . . . , this is a fraud rate of less than one-seventh of one percent”—hardly a terrifying rate used to justify reform.²²²

In addition to exaggerating the numbers, other voter fraud anecdotes “often distract with emotion and fail to reveal the causes or effects of fraud.”²²³ For example, the first page of John Fund’s book *Stealing Elections: How Voter Fraud Threatens Our Democracy* opens with a startling line: “At least eight of the nineteen hijackers who attacked the World Trade Center and the Pentagon were actually able to register to vote in either Virginia or Florida while they made their deadly preparations for 9/11.”²²⁴ This “fact” has considerable sticking power and is used by photo-identification proponents to cite the danger of voter fraud nationwide.²²⁵

But this story has some holes in it, to say the least. Researchers and journalists have been unable to confirm that any of the 9/11 hijackers were actually registered to vote, and—more importantly—even if they were registered to vote there is zero evidence that any “improper registration resulted in fraudulent votes” or could be resolved by a photo ID requirement.²²⁶

These misleading anecdotal stories are not just circulated on Facebook; they can worm their way into judicial opinions as well. The Wisconsin election story, for example, was cited by a U.S. district court in Connecticut as evidence to conclude that the voter ID law there should be upheld.²²⁷ Importantly, the court’s citation of the story was not haphazard. It was told as part of a long, careful narrative of various states’ experience with voter ID laws and it led to the conclusion that “although elections in the United States are far from riven

²²¹ *Id.* at 647 (quoting former United States Attorney Steve Biskupic).

²²² *Id.*

²²³ *Id.* at 648. Atiba Ellis goes so far as to call voting fraud fears a “meme;” she suggests anecdotes that propel fears of voting fraud get traction precisely because they are “prone to abundant social sharing because it plays into shared emotions and experience.” Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 887 (2014) (quoting Simon Owens, *How Internet Memes Went Corporate*, U.S. NEWS & WORLD REP. (Apr. 25, 2012), <http://www.usnews.com/news/articles/2012/04/25/how-internet-memes-went-corporate>); see also *id.* at 880 (calling fears of voter fraud a “modern-day bogeyman”).

²²⁴ Overton, *supra* note 194, at 648 (quoting JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* 1 (2004)).

²²⁵ *Id.* at 649 (citing editorials relaying the story).

²²⁶ *Id.*

²²⁷ ACORN v. Bysiewicz, 413 F. Supp. 2d 119, 137 (D. Conn. 2005).

by fraud, the potential for voter fraud exists, and states are, therefore, right to be concerned about it and to take steps to minimize it.”²²⁸

This is an important point and it underscores one specific feature of alternative facts that causes me to worry. The Connecticut judge did not cite the anecdotal evidence flippantly. It does not seem to have been a sloppy mistake. Instead, it was part of a long and detailed opinion. Surrounded by a sea of evidence, and when push comes to shove, the judge—like the rest of us—was drawn to the familiar.

This is bad for constitutional law, and not just because false facts are contaminating judicial opinions. With the two sides speaking past each other and refusing to grant empirical weaknesses in their respective claims, the constitutional debate reaches an unhealthy stalemate. Michael Gilbert explains it well. He argues that the “sophisticated narrative” of the voter ID dispute (as opposed to the “common narrative”) is that it is likely that these laws both “deter some fraud, however little, and they simultaneously depress some lawful votes, however few.”²²⁹ The tough normative question, therefore, becomes evaluating the trade-off.²³⁰ But that nuance is lost in the current debate. Because we are living in an age where the dueling factual narratives do not interact with each other and the “my team-your team” facts serve to entrench thinkers into their extreme respective camps, there is reason to be concerned that the facts on the ground will just cease to matter at all.

C. *Licensing Regulations*

Not all examples of bad facts in constitutional law come at the expense of traditionally conservative causes. Claims of economic liberty championed by libertarians and groups like the Center for Individual Rights expose other examples.

Many states subject small businesses to onerous licensing laws under the guise of flimsy factual records supposedly justifying such restrictions for public health.²³¹ From hair braiding to teeth whitening to floral design, small businesses are often subject to regulations requiring them to take extensive classes or to obtain licenses and expensive certification.²³²

²²⁸ *Id.* at 137–38.

²²⁹ Gilbert, *supra* note 195, at 752.

²³⁰ *See id.* at 753 (“On the normative side, there is a lack of consensus on the social costs of depressed turnout and the benefits of fraud prevention.”).

²³¹ *See generally* John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 *UCLA L. REV.* 844 (2017) (describing various state license laws).

²³² *Id.* at 857.

These licensing laws have drawn sharp criticisms from conservative groups who claim that they are nothing more than anticompetitive barriers to entry dressed up in fake facts about public safety.²³³ Critics say the “science” purporting to justify these laws—claims that teeth whitening and hair braiding can be dangerous, for example—are just lies used to shut down competitors.²³⁴ Unlike the above examples, the applicable constitutional test here is just rationality review,²³⁵ but even on such a deferential standard at least one factual record has still failed to make the grade.

African hair braiding is a “traditional practice [that] involves an intricate process of weaving, twisting, and braiding that is considered more natural because it uses no chemicals.”²³⁶ In states like Washington, Missouri, and Arkansas, however, in order to sell services in African hair braiding, an individual must obtain a cosmetology license—which includes payment of a fee and up to 330 hours of supervised training.²³⁷

These license laws are justified by concerns about scalp safety, but there are serious doubts as to whether the factual claims about the risks are based on anything except creative lobbying by competitor salons. Indeed, in 2016 the Institute of Justice (a conservative think tank) commissioned a nationwide study that demonstrated the risk of complaint of injuries from hair braiding was astonishingly low—only

²³³ See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL’Y, 209, 216–18 (2016) (arguing that many occupations are not related to protection of the public health and safety); Marc P. Florman, Comment, *The Harmless Pursuit of Happiness: Why “Rational Basis with Bite” Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721, 741–42 (2012) (arguing that restrictive licensing laws could restrict would-be entrepreneurs from starting businesses); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1068 (2013) (arguing that the “major purpose is to suppress competition by restricting entry into a particular profession”).

²³⁴ See, e.g., *Braiding*, INST. FOR JUST., <http://ij.org/issues/economic-liberty/braiding/> (last visited Dec. 3, 2017) (“Braiding is a very safe practice as braiders do not use any dangerous chemicals, dyes or coloring agents and do not cut hair. . . . The Institute for Justice is dedicated to untangling these entrepreneurs from burdensome regulations.”); see also Daren Bakst & Patrick Tyrrell, *Big Government Policies that Hurt the Poor and How to Address Them*, HERITAGE FOUND. (Apr. 5, 2017), <http://www.heritage.org/poverty-and-inequality/report/big-government-policies-hurt-the-poor-and-how-address-them> (“Licensing requirements can also be cronyism disguised as consumer protection.”).

²³⁵ See, e.g., *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105 (S.D. Cal. 1999) (“A state can require high standards of qualification when regulating a profession but any qualification must have a rational connection with the applicant’s fitness or capacity to engage in the chosen profession.”).

²³⁶ Blevins, *supra* note 231, at 864–65.

²³⁷ *Id.* at 865; see also *Cornwell*, 80 F. Supp. 2d at 1101, 1110 n.27 (showing an example where hair braiding certification required 228 hours).

0.34 of one percent.²³⁸ The report concluded that “[c]omplaints against braiders are so rare that a person is 2.5 times more likely to get audited by the IRS (8.6 in 1000) than a licensed or registered braider is to receive a complaint of any kind (3.4 in 1000).”²³⁹

In a series of lawsuits, plaintiffs have claimed that these licensing laws violate their substantive Due Process and Equal Protection Clause rights under the Fourteenth Amendment.²⁴⁰ Such lawsuits have been met with mixed success.

In a 1999 case, *Cornwell v. Hamilton*, a district judge in California went through the cosmetology license requirements one by one and found them to be largely irrelevant to hair braiding.²⁴¹ After going through multiple expert depositions and declarations about the threat to public safety, the judge noted that “opinion testimony without sufficient factual foundation are of little assistance.”²⁴² Even on rationality review, the court held this law could not stand because there was no logical connection between requiring a license of the hair braiders and protecting public health (particularly given the lack of chemicals used by the braiders).²⁴³

Not all such lawsuits have met the same fate, however. In 2016, the same sort of law was challenged in Missouri and that court, in *Niang v. Carroll*, held it was inappropriate to even ask about whether the health and safety restrictions on hair braiding were based in fact.²⁴⁴ Dismissing the plaintiffs’ reliance on *Cornwell*, the *Niang* Court explained the connections between hair braiding and public safety were not to be probed.²⁴⁵

Alternative facts about scalp safety are accepted as true in the name of deference despite any reliable evidence to support them, and

²³⁸ ANGELA C. ERICKSON, INST. FOR JUSTICE, BARRIERS TO BRAIDING: HOW JOB-KILLING LICENSING LAWS TANGLE NATURAL HAIR CARE IN NEEDLESS RED TAPE 2, 13 (July 2016), <http://ij.org/report/barriers-to-braiding/>.

²³⁹ *Id.* at 2.

²⁴⁰ *Cornwell*, 80 F. Supp. 2d at 1102.

²⁴¹ *See id.* at 1118 (“[T]he State’s mandated curriculum, on its face and upon review of its actual implementation and associated texts and exam, does not teach braiding while at the same time it requires hair braiders to learn too many irrelevant, and even potentially harmful, tasks.”).

²⁴² *Id.* at 1108.

²⁴³ *See id.* at 1113–14 (finding mandatory exposure to “hazardous chemicals [hair braiders] do not use and otherwise would be able to avoid” as “irrational”).

²⁴⁴ *See Niang v. Carroll*, No. 4:14 CV 1100 JMB, 2016 WL 5076170, at *18 (E.D. Mo. Sept. 20, 2016) (“[Such] stringent review of a state’s asserted interests and how each aspect of the State’s licensing regime promotes those interests is not consistent with Supreme Court case law which holds that those connections are ‘not subject to courtroom fact-finding.’” (quoting *FCC v. Beach Comm’n, Inc.*, 508 U.S. 307, 315 (1993))).

²⁴⁵ *See id.* at *15 (“[I]t is not this Court’s job to adjudicate the weighing of evidence. It is enough that the State has a ‘conceivable’ basis for regulating . . .”).

small business-owners are left to fight cumbersome and costly regulations without any real justification. To be sure, this could be attributed to a deficiency in the applicable standard of review. But the point for now is just to demonstrate another example of alternative facts at work in laws that affect constitutional rights.

III EQUIPPING COURTS TO GUARD AGAINST ALTERNATIVE FACTS

With all of this doom and gloom, it seems unlikely this Article will end happily. And yet there is cause for modest optimism. Evidence suggests that legal training endows judges with “a specialized form of cognitive perception”²⁴⁶—a defense that dilutes the effect alternative facts have on the rest of us. Moreover, down in the trenches, several lower court judges (appointed by both Republican and Democratic Presidents) have shown this resistance in action—fact-checking dubious “experts” and expressing skepticism when skepticism is due.²⁴⁷

Traditionally federal courts have been “reluctant fact-finders,”²⁴⁸ and particularly appellate courts are prone to wash their hands of the controversy and to ignore sketchy authorities in the legislative record all in the name of deference.²⁴⁹ I argue that the time has come for that to change. Indeed, this factual skepticism needs to now be a central feature of judicial review in constitutional cases, at least when a court is applying a heightened standard of review. Borrowing from administrative law principles and highlighting cases where factual inaccuracies have actually been exposed by courts doing laborious fact-checking work, I argue below that courts are indeed capable of rising above the fray created by a factual free-for-all society.

²⁴⁶ Dan M. Kahan et al., “*Ideology*” or “*Situation Sense*”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354–55 (2016) (noting that such legal training “fix[es] judges’ attention on such decision-relevant features of a case notwithstanding the tug of influences that might systematically focus the attention of the public on facts that are irrelevant—and indeed inimical—to impartial legal decisionmaking”).

²⁴⁷ See *infra* Section III.C and Part IV.

²⁴⁸ Borgmann, *supra* note 26, at 6 (noting that federal courts “have certainly disavowed preeminence in fact-finding, preferring to articulate their role, instead, as to decide the law”).

²⁴⁹ See *id.* at 6–7 (noting that “[f]ederal courts have long held that [both congressional and state legislative] findings of empirical fact are entitled to judicial deference”); see also *Whole Woman’s Health v. Lakey*, 769 F.3d 285, 295 (5th Cir.) (“Courts are not permitted to second guess a legislature’s stated purposes absent clear and compelling evidence to the contrary. Such evidence simply does not appear in the record here.” (internal citations omitted)), *vacated in part*, 135 S. Ct. 399 (2014) (mem.).

A. *A Fresh Look at Institutional Competence*

Evaluating judicial reception of facts in constitutional law begs the question: Compared to what? Debates about fact-finding always return to the question of which institution—a court or a legislature—is better equipped to make the factual determination in these hot-button debates.²⁵⁰ Moreover, even for discussions about the judiciary, there is no consensus on which level of court—trial or appellate—has the greater capacity to deal with legislative facts. Both debates need to be revisited in light of the changes to fact-finding highlighted above.

1. *Legislatures v. Courts*²⁵¹

The traditional argument stresses numerous advantages legislatures have over courts in how they process information: Specifically, the advantages of “substantial staff, funds, time and procedures to devote to effective information gathering and sorting.”²⁵² Legislatures, after all, have the power to subpoena witnesses; they can conduct hearings that span a long period of time; they are not constrained by the pace of litigation or the norm of party control; and they are often supported by impressive institutions like the Congressional Research Service.²⁵³ On top of all this, legislatures have the advantage of being politically accountable, thus lending a legitimacy to their findings of fact that courts may lack.²⁵⁴ And—not being bound by *stare decisis*—legislatures can react to changed factual circumstances nimbly in a way courts cannot.²⁵⁵

Of course that is not the full story. As scholars like Neal Devins and Caitlin Borgmann have pointed out, there are “good reason[s] to

²⁵⁰ 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, 882 (2013) (arguing “that justifications for deference based on . . . Congress’s institutional expertise or political legitimacy do not, without more, provide a sufficiently nuanced answer”); Borgmann, *supra* note 26, at 35 (arguing that courts “must be unconstrained in their ability to ascertain the factual basis for legislation”); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1175 (2007) (arguing that broad policy questions “are particularly ill-suited to the judicial process” and better left to the legislature).

²⁵¹ I am limiting my discussion to federal courts. Certainly state courts may possess some of these same characteristics but because federal judges are not elected and hold life-time tenure, they are distinctly situated and I limit my discussion on judicial competence to them.

²⁵² Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994) (noting the legislature’s “unique expertise” in fact-finding); see also Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 5–6 (1986) (similarly noting the difference in institutional competencies).

²⁵³ See Devins, *supra* note 24, at 1178–81 (making these observations).

²⁵⁴ Araiza, *supra* note 250, at 888.

²⁵⁵ Devins, *supra* note 24, at 1180.

doubt whether Congress [and state legislatures have] the incentives to take factfinding seriously.”²⁵⁶ It should shock no one to learn that legislative fact-finding forays can quickly turn into political theater. Committee staff prep expert witnesses to ensure they say what the politicians want them to say; legislative fact-finding hearings are sometimes held before empty rooms or are just opportunities for political grandstanding rather than in-depth probing of one another’s views; and partisan loyalties often take priority over the quest for the truth.²⁵⁷ At the end of the day, “[u]ltimately, with fundraising, constituent service, and other demands, members of Congress cannot pursue knowledge for knowledge’s sake.”²⁵⁸

Still the debate rages on about which institution should get the final say on the factual premise to laws that affect constitutional rights. Some say that the judicial standards of review used to evaluate legislative factual records in constitutional law cases have become too stringent and threaten legislative supremacy.²⁵⁹ Others say that they are not tough enough, particularly when constitutional rights are vulnerable.²⁶⁰ Still others say that there is no explanation for the legal standards in various cases other than mere politics: Judges affirm if they like the factual conclusions and reverse if they do not.²⁶¹

²⁵⁶ *Id.* at 1182; Borgmann, *supra* note 26, at 7–9; *see also* Pilchen, *supra* note 42, at 339 (discussing “the Supreme Court’s proper function when reviewing enforcement legislation” by examining judicial interpretations of post-Civil War amendments).

²⁵⁷ *See* Devins, *supra* note 24, at 1183–84 (noting such examples).

²⁵⁸ *Id.* at 1184. *But see* Laycock, *supra* note 250, at 1175 (“Most of the real discussions in which legislators ‘find’ facts occur *ex parte* and off the record. The laws they enact are legitimate because they are responsible to voters and because this is apparently the best we can do, not because anything about legislative investigations inspires confidence.”).

²⁵⁹ *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 369 (2001) (arguing that the Supreme Court’s constitutional review of federal statutes is misguided because “Congress is not an agency, and the reasons for ‘on-the-record’ review in the administrative context do not apply to the legislative branch”); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 115–16 (2001) (“The Court’s new heightened review of the legislative record has transformed Congress’s role from a coequal branch warranting judicial deference to an entity charged with extensive factfinding responsibilities.”).

²⁶⁰ *See* Borgmann, *supra* note 26, at 3 (“[C]ourts should independently review the factual foundations of all legislation that curtails important individual rights protected by the federal Constitution”); McGinnis & Mulaney, *supra* note 39, at 103–09 (noting that the benefits of the judiciary compared to the downsides of legislatures—the often “impersonal and general data” used in legislation, the benefit of “diversity in experience and background” of a jury, and the ability of “the Supreme Court to invalidate legislation of a branch with greater geographic and socioeconomic diversity”—warrant tougher judicial review).

²⁶¹ *See* Araiza, *supra* note 250, at 881 (explaining the divergent approaches to deference on legislative facts, and acknowledging that “[c]ynics can easily rationalize the divergent results by referring to the [underlying] politics”); Daniel J. Solove, *The Darkest Domain*:

Scholars have called this debate “under-theorized”²⁶² and yet “critically important . . . now more than ever.”²⁶³ I join the voices of skeptics who doubt the “widely accepted view that legislative bodies are better than courts at fact-finding.”²⁶⁴ But specifically, I think the conversation on this question needs to take account of the troubling new trends in the political dialogue discussed above.

Not only do legislators lack the incentives to sort the good facts from the bad ones, but now they are actually further incentivized to tell the people what they want to believe. And technology gives them powerful tools to bend to that temptation. If we are all predisposed to believe factual claims consistent with our social networks, then a smart legislator will feed into those networks (“my team-your team” facts) and not rock the boat by voicing dissent. In other words, in today’s culture, the “compared to what” question starts to paint courts in a better light.

To this end, Dan Kahan and his colleagues have done important work that may provide guidance on the capacity of courts to deal with alternative facts. Recall that, in several studies, Kahan has found “cultural polarization” on questions of fact—that is, “[p]eople endorse whichever position reinforces their connection to others with whom they share important commitments.”²⁶⁵ The reason for this, Kahan submits, is “‘identity-protective’ cognition,” meaning “individuals subconsciously resist factual information that *threatens* their defining values.”²⁶⁶

Kahan and his colleagues also found, however, that there may be ways to “broker peace” in the “culture war of facts.”²⁶⁷ It turns out that how the facts are presented makes a world of difference. For example, in one experiment Kahan showed two reports on climate change to two groups of subjects.²⁶⁸ In both versions, the report described that the planet was warming, that humans were the source of the increase, and that the climate change could have disastrous environmental effects.²⁶⁹ The only difference between the reports

Deference, Judicial Review, and the Bill of Rights, 84 IOWA L. REV. 941, 945 (1999) (“Critiques of deference have remained relatively superficial, often dismissing deference as a mere tool wielded by ideological judges to achieve a particular political result.”).

²⁶² McGinnis & Mulaney, *supra* note 39, at 69; *see also* Solove, *supra* note 261, at 945 (“[T]he concept of deference remains malleable, indeterminate, and not well-defined.”).

²⁶³ 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, 2027 (2014).

²⁶⁴ Borgmann, *supra* note 26, at 2.

²⁶⁵ Kahan, *supra* note 86, at 296.

²⁶⁶ Braman et al., *supra* note 87, at 5.

²⁶⁷ *Id.* at 2.

²⁶⁸ *Id.* at 4.

²⁶⁹ *Id.* at 4–5.

handed to the two groups was in the last line: one called for “increased anti-pollution regulation” whereas the other called for “revitalization of the nation’s nuclear power industry.”²⁷⁰

This last line mattered a great deal. Kahan found that people who received the report ending in the nuclear power suggestion were “less culturally polarized” in their assessment of the other facts about climate change (i.e., anti-pollution reasons).²⁷¹ That is, people whom Kahan had classified as “individualistic and hierarchs” were likely to reject the climate change description if it was packaged in a narrative that included a statement they found to be threatening—that is, the increased pollution regulation—but less likely to reject the factual conclusions if tempered with the conclusion about nuclear power. The way the facts were communicated, in other words, made a difference in how they were received.

What to make of this? And what does it have to do with the debate about institutional competency to digest factual information? For one thing, as Kahan’s research shows, factual narratives matter. And nowhere is this truer than in constitutional litigation. As demonstrated above, modern lawyers seeking constitutional change are hip to this—they take the factual frame very seriously. One way to resist the power of alternative facts, therefore, is to shift focus away from the factual claim itself and instead to highlight the source from which it comes.

Courts are well-suited for this job. Just like the subjects in Kahan’s studies, judges, too, seem to be influenced by factual claims that come from a surprising source. Take, for example, the amicus briefs filed by the military groups and corporations in the 2003 University of Michigan Law School affirmative action case.²⁷² Those briefs—which were brought up in oral argument, cited in the ultimate opinion, and mentioned when Justice O’Connor read her decision aloud from the bench—were powerful precisely “because they [were] written by entities that one would expect to be supporting the other side of the case.”²⁷³ This is Kahan’s insight at work in constitutional litigation. And—due to the nature of litigation—judges are uniquely positioned to spot the “surprising source” of factual information.

²⁷⁰ *Id.* at 5.

²⁷¹ *Id.*

²⁷² See generally Larsen & Devins, *supra* note 122, at 1905 (discussing *Grutter v. Bollinger*, 539 U.S. 306 (2003), as an example).

²⁷³ Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 534 (2003); see also Larsen & Devins, *supra* note 122, at 1905.

More importantly, courts also seem to already possess a resistance to the infection that is plaguing the political discourse. In a study that tested whether political predispositions influence judicial decisionmaking, Dan Kahan and colleagues presented 253 sitting judges and 800 members of the general public with legal problems designed to trigger unconscious bias.²⁷⁴ What they found was quite remarkable: “Judges of diverse cultural outlooks—ones polarized on their views of the risks of marijuana legalization, climate change, and other contested issues—converged on results in cases that strongly divided comparably diverse members of the public.”²⁷⁵ The same held true for lawyers, although not for law students.²⁷⁶

This means there is perhaps an antidote to our toxic post-truth political debates. Kahan concludes that “professional judgment,” and “legal training” can “counter-act” the cognitive bias and motivated reasoning that lead others to accept alternative facts.²⁷⁷ He suggests that lawyers and judges can be “expected to reliably fix *their* attention on pertinent elements of case ‘situation types,’ thereby immunizing *them* from the distorting influence that identity-protective cognition exerts on the judgments of legally untrained members of the public.”²⁷⁸

In light of this insight and the growing rise of alternative facts, the institutional competency debate deserves a reboot. Even if once legislatures had superior fact-finding tools, the skepticism about their incentives to use those tools for truth-seeking has been vindicated in a world of alternative facts. And courts—although certainly not perfect—may be uniquely equipped to focus on the sources of the facts and to resist the motivated reasoning that leads to the proliferation of alternative facts. It is worth exploring, therefore, ways to channel judicial proclivity for objectiveness and the adversarial energy of constitutional litigants in order to protect constitutional law against alternative facts.

At the risk of dampening my optimistic note, a word of caution is due. I must acknowledge that there is a fundamental difference between what judges do and what scientists do. In short, science rejects finality where courts seek it. And these cross-purposes might well mean that the law will never catch up to the current state of scientific knowledge. But the mere fact that there can be more than one truth does not mean that claims can’t be false. Put differently, even if

²⁷⁴ Kahan et al., *supra* note 246, at 349–50.

²⁷⁵ *Id.* at 354.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 374.

the state of science is unsettled on any particular question (which will often be the case), political actors are incentivized to misrepresent the existing science for political gain. And even accepting the limitation inherent in the mismatch between science and law, courts have a greater capacity to aspire to objectiveness—to catch the over-claims and cherry-picking and falsifications—than do their democratically accountable counterparts.²⁷⁹

2. *Trial Courts v. Appellate Courts*

It is not enough to conclude that courts are more capable than legislatures at resisting alternative facts. We must also determine—within the judiciary—whether trial judges or appellate judges are better situated to make these factual calls. This question is a difficult one when it comes to legislative facts. On the one hand, trial courts are historically the better fact-finders generally, but on the other hand legislative facts—by definition—affect more than the parties before the court and involve issues that can transcend the jurisdiction where the trial judge is operating.

Most people see legislative facts to be the business of appellate courts.²⁸⁰ Because legislative facts are entangled with the policymaking function of judging, the argument goes, we should lay that duty at the feet of appellate judges who have larger jurisdiction and more experience generating broad rules. But this, too, is a conventional wisdom worth a second thought. When considering which judicial level is best situated to discern facts from alternative facts, the landscape changes a bit. In fact, when one stops to really think about it, the trial judge may well look better than an appellate judge at fact-finding, even when it comes to evaluating legislative facts.

For one thing, the trial judge has her hands on the levers of the adversarial system—at least more so than an appellate judge—and she can better leverage the fact-checking potential of the parties. A lower court, for example, has more control over the pace of the litigation, can easily request additional briefing or a hearing, and can sometimes observe the witnesses as they testify on cross-examination.²⁸¹ Her appellate counterpart, by contrast, approaches the record cold and is fact-checking with the aid of amicus briefs and other advocacy

²⁷⁹ See generally LEVITAN, *supra* note 193 (referring to politicians' tendencies to oversimplify and cherry-pick factual claims).

²⁸⁰ Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016) (“The consensus among appellate courts is that legislative facts are reviewed de novo.”).

²⁸¹ See Devins, *supra* note 24, at 1178–81 (noting these examples).

tools that skew the narrative one way or another.²⁸² Trial courts are used to getting their hands dirty with facts; appellate courts are not. There is value to be gained by relying on the judicial actor who has more experience making credibility calls—even when it comes to generalized facts as opposed to case-specific ones.²⁸³

Indeed, although it may be lying dormant, the procedural skeleton already exists for trial courts to use when addressing complex issues of legislative facts. The federal rules specifically contemplate the use of court-appointed experts and special masters to address complex factual matters that extend beyond the capacity of the adversarial system.²⁸⁴ Although courts rarely take advantage of this power,²⁸⁵ a court-appointed expert could be extremely valuable when considering dueling opinions on complex questions of legislative fact, such as the effect of voter ID laws on minority turnout or the cancer risks of abortion. Similarly, a special master—a court appointed officer instructed to hear evidence and make recommendations to a judge—is rarely used by federal courts, but could be exceedingly valuable to a trial judge strapped for time and constrained with limited expertise in the relevant subject matter.²⁸⁶

²⁸² See Gorod, *supra* note 15, at 4 (“[A]ppellate courts often look outside the record the parties develop before the trial court, turning instead to their own independent research and to amicus briefs, even though the resulting factual findings will not have been thoroughly tested by the adversarial process.”); see also Larsen, *The Trouble with Amicus Facts*, *supra* note 16, at 1807 (noting this phenomenon in the greater context of the role of amicus briefs before the Supreme Court).

²⁸³ See *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1984) (“The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise.”). Indeed, it is a bit unusual that the procedural safeguards we think essential at the trial stage for adjudicative facts are not routinely employed for legislative facts. See Gorod, *supra* note 15, at 59 (“If anything, one might think the opposite would be true Legislative facts will often be more complicated than adjudicative facts.”).

²⁸⁴ FED. R. EVID. 706 (referring to court appointed experts); FED. R. CIV. P. 53 (referring to special masters).

²⁸⁵ See Stephanie Domitrovich, *Fulfilling Daubert’s Gatekeeping Mandate Through Court-Appointed Experts*, 106 J. CRIM. L. & CRIMINOLOGY 35, 42 (2016) (arguing for judges’ increased exercise of their inherent authority to appoint experts through this underutilized rule of evidence); Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL’Y REV. 480, 480–81 (1988) (referring to courts’ reluctance to appoint experts); see also THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., SPECIAL MASTERS’ INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE’S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS 16 (2000) (noting that “[c]onsideration of appointing a Rule 706 expert to testify was rare and appointment of such an expert, even rarer”).

²⁸⁶ See Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 479–80 (2009) (noting that following the 2003 amendment to the Federal Rules of Civil Procedure, “courts expanded special masters’ roles to include supervising pre-trial discovery disputes, conducting settlement negotiations in complex

According to a leading survey of district court judges conducted by the Federal Judicial Center, these tools are not commonly used now because “[j]udges view the appointment of an expert as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts.”²⁸⁷ This well-entrenched intuition is in need of an update. With legislative facts on the rise and “my team-your team” facts infecting the adversarial system, these rarely-used judicial tools could not only alleviate time and resource constraints but could also attach legitimacy to the ultimate result by assuring the losing side that all possible care was taken to marshal an objective decisionmaker. And the best part, of course, is that district courts already have these tools at their disposal.

Moreover, even without the special tools, there are other reasons why a trial court is well-situated to guard against alternative facts. Trial judges are more keenly attuned to the possibility of reversal than are appellate judges. This reality derives simply from the nature of the Supreme Court’s discretionary docket, as opposed to appeals of right in lower courts.²⁸⁸ The possibility of reversal could make a difference. As between the two actors, the feedback mechanism of reversal may incentivize a district court judge to fact-check, more so than an appellate judge who faces reversals less often.

Finally, although this requires more speculation, appellate judges—particularly those considered “on deck” for a potential Supreme Court pick—run in elite circles and may be too close to politics to be truly interested in the less glamorous fact-checking necessary to sort the bunk from the real evidence. This may not be true of trial court judges. Indeed, although admittedly not a comprehensive study, the district court judges I found who are laudably in the weeds debunking alternative facts were appointed by presidents of both political parties.

cases, implementing and enforcing post-judgment orders and decrees, and administering and distributing limited settlement funds”).

²⁸⁷ JOE S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 5 (1993).

²⁸⁸ See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14–15 (1993) (noting that “aversion to reversal [is] . . . fairly unimportant [to federal appellate] judges because [most] reversals . . . reflect differences in judicial philosophy or legal policy rather than mistake or incompetence by the appellate judges”); see also Jennifer Barnes Bowie & Donald R. Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals*, 62 POL. RES. Q. 393, 398 (2009) (arguing that the fear of reversal does not significantly motivate federal circuit court judges in their decisionmaking).

Granted, to accept my argument one must be comfortable with more cases going beyond summary judgment and resulting in longer litigation. This is a price I am willing to pay. There is a value to the testing that comes with the adversarial system—it is much harder to hide behind emotional anecdotes and unsubstantiated claims when one knows he is subject to cross-examination. In the words of David Boies upon completing his work on the same-sex marriage trial in California:

In political debates, . . . it [is] too easy to “throw around opinions [that] appeal to people’s fear and prejudice,” and “cite studies that either don’t exist or don’t say what you say they do.” In a trial, . . . “you’ve got to stand up under oath and cross-examination When they come into court and they have to support those opinions and they have to defend those opinions under oath and cross-examination, those opinions just melt away. . . . [A] witness stand is a lonely place to lie. And when you come into court, you can’t do that.”²⁸⁹

If courts are capable of resisting the temptation to believe alternative facts—particularly trial courts—the law must make sure we are harnessing that power by ensuring judges are probing the facts relevant to constitutional law. The alternative is that judges will just incorporate the bias experienced by everyone else, and the post-truth culture will infect our most sacred rights.

B. Wading Through the Confused State of Deference with Respect to Facts in Constitutional Cases

So what would it look like to take the resistance to cognitive bias judges seem to possess and to channel it in a way that combats the infection of false facts into constitutional law? To answer that question one must first wade into the murky waters that govern deference to factual questions in constitutional cases. And “murky” may be an understatement. There are multiple levels of confusion in this area concerning two deceptively straightforward questions: (1) How much should a court defer to the empirical judgments underlying a piece of legislation? And (2) how much should a reviewing court care about a lower court’s evaluation of those same factual claims?

This area of the law is a mess on both levels. On the first question, courts have been “vague and inconsistent.”²⁹⁰ Sometimes judges

²⁸⁹ YOSHINO, *supra* note 128, at 7–8 (quoting David Boies).

²⁹⁰ See David Parker, Note, *Policing Procedure Before Substance: Reforming Judicial Review of the Factual Predicates to Legislation*, 99 VA. L. REV. 1327, 1327–28 (2013) (laying out the confusion on this question and then arguing for more deference to “properly motivated legislature[s]” that take “[their] fact-finding role seriously”).

will evoke separation of powers and argue for deference, claiming that legislatures are “‘better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon’ legislative questions.”²⁹¹ Sometimes, however, judges will approach a legislative factual record with skepticism, treating government actors (in the words of Bertrall Ross) “as witnesses in their own trial by testing the credibility of the evidence they offer in support of their actions.”²⁹²

The difference cannot be fully explained by the applicable standard of review. The general rule is that the level of skepticism due for factual contentions in a legislative record should follow the corresponding level of deference in a constitutional case.²⁹³ On rationality review, a court will give the government the benefit of doubt and generally trust its factual contentions; on a form of heightened scrutiny—when a fundamental right or a suspect class is involved—a court is authorized to be more suspicious of a legislature’s factual record.²⁹⁴ Put differently, only on heightened scrutiny will a court open the trunk and kick the tires of a law in order to make sure the state is actually pursuing sufficiently weighty goals in a permissible way.

The problem, however, is that these rules allow for much wiggle room (What is a factual conclusion versus a legal one? How much factual uncertainty is too much?) and hence they are not followed with any precision. Sometimes—as in *Gonzales v. Carhart*, the partial-birth abortion decision—the Supreme Court chooses deference even in light of medical uncertainty and even on heightened review.²⁹⁵ Other times—as in *Shelby County v. Holder*, the case striking down a critical part of the Voting Rights Act—the Court evaluates findings of fact with a healthy dose of skepticism and (while purporting to apply rationality review) “essentially dispose[s] of the remainder of the 15,000 page congressional record supporting the Act in one sentence.”²⁹⁶

Indeed, even the same justice can wear different deference hats when tasked with answering this question in different circumstances.

²⁹¹ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 662, 665 (1994) (plurality opinion)).

²⁹² Ross, *supra* note 263, at 2031 (using *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), as his chief examples).

²⁹³ *See id.* at 2031 (“In the past, the relevant constitutional tests provided the framework for scrutinizing the permissibility of state actions.”); *see generally* Araiza, *supra* note 250.

²⁹⁴ *See* Araiza, *supra* note 250, at 921–22 (noting that “heightened scrutiny requires that the reviewing court have in front of it the actual facts of the situation,” whereas rationality review “allows deference to even temporally inconsistent findings”).

²⁹⁵ *Gonzales v. Carhart*, 550 U.S. 124, 161–65 (2007) (deferring despite “documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women”).

²⁹⁶ Ross, *supra* note 263, at 2061–62 (discussing *Holder*, 133 S. Ct. 2612).

In *Brown v. Entertainment Merchants Ass'n*, the violent video games case from California, Justice Breyer's position—even on strict scrutiny—was that “[t]his Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence.”²⁹⁷ But, in *Whole Woman's Health v. Hellerstedt*, abortion decision described above,²⁹⁸ Justice Breyer sang a different tune. The judiciary, he explained, “retains an independent constitutional duty to review factual findings where constitutional rights are at stake;” this evidence-based balancing, Breyer explained, includes a careful evaluation of all factual claims submitted by the state, found by the district court, and claimed by amici.²⁹⁹

Similarly, in *Burwell v. Hobby Lobby*, Justice Alito dismissed a claim made in an amicus brief about the costs of health care for employees on the basis of a supposed judicial resistance to looking outside the record for arguments that are “intensely empirical” (which, as all lawyers recognize, sounds a bit like “there is too much math in here”).³⁰⁰ But in the video games case discussed above, Justice Alito was not shy with the empirical; he anchored his opinion with dozens of secondary authorities about the neurological harm caused by these games, provoking Justice Scalia to actually chide him for his “considerable independent research” on questions of fact beyond what the legislature considered.³⁰¹

The confusion does not stop there. As alluded to above, this rickety question of deference is then layered with a second rickety question of deference: How should a reviewing court deal with a lower court's evaluation of fact? When, for example, a district court finds that voter ID laws suppress minority votes, is that subject to clear error review or de novo review or something else?

The conventional wisdom—although never clearly stated by the Supreme Court—is that adjudicative facts are reviewed for clear error but legislative facts get de novo review.³⁰² But as Kenji Yoshino and

²⁹⁷ *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 855 (2011) (Breyer, J., dissenting).

²⁹⁸ See discussion *supra* Section II.A.2.

²⁹⁹ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (emphasis omitted) (quoting *Gonzales*, 550 U.S. at 165).

³⁰⁰ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2776 (2014).

³⁰¹ *Entm't Merchs. Ass'n*, 564 U.S. at 798 (referencing the empirical citations in Justice Alito's concurrence, *id.* at 818–19 nn.13–18).

³⁰² See Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1199 (2013) (noting that “[i]t is generally understood that federal appellate courts must conduct an independent or de novo review of any issues of law, while” reviewing “a trial court's findings of fact” for clear error); Yoshino, *supra* note 280, at 254 (stating “that appellate courts generally grant clear error deference only to adjudicative facts” whereas “legislative facts are reviewed de novo”).

Caitlin Borgmann have thoroughly explained, the actual practice in applying this rule is in “disarray.”³⁰³ Across the ideological spectrum the justices are flatly inconsistent about what level of deference is due to a lower court’s finding of legislative fact.

In *Glossip v. Gross*, for example, both Justice Alito’s majority opinion and Justice Sotomayor’s dissent used clear error review to evaluate whether the three-drug lethal injection protocol caused significant pain to constitute cruel and unusual punishment.³⁰⁴ This occurred even though the central factual question in *Glossip* was about whether the drugs “generally rendered ‘any individual’ unconscious”—a legislative fact about the world—as opposed to the effect on the plaintiffs in that particular case.³⁰⁵

The confusion persists. Just a few years earlier, in the same-sex marriage cases that reached the Court, Justice Alito took a different tack. He argued that “it would be absurd for an appellate court to accord clear error deference to a district court’s findings of legislative facts.”³⁰⁶ Justice Alito did not mince words on this subject:

[S]ome professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are ‘clearly erroneous.’ . . . Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.³⁰⁷

Constitutional law scholars have indeed offered their own contributions to this debate. On the first point (about judicial review of facts found by a legislature), Bertrall Ross suggests courts look for failures in the political process and only defer to factual conclusions when it seems the process functioned adequately.³⁰⁸ Caitlin Borgmann suggests no deference is appropriate whenever fundamental rights are at

³⁰³ See Yoshino, *supra* note 280, at 254 (noting inconsistent practice by the Supreme Court on the subject).

³⁰⁴ *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015); *id.* at 2786 (Sotomayor, J., dissenting).

³⁰⁵ Yoshino, *supra* note 280, at 259–60 (quoting *Glossip*, 135 S. Ct. at 2741); see also DAVID L. FAIGMAN, *THE SUPREME COURT’S CONFUSED EMPIRICAL JURISPRUDENCE* (2015) (discussing *Glossip* and whether the facts in question were legislative or adjudicative facts).

³⁰⁶ Yoshino, *supra* note 280, at 261–63 (discussing *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

³⁰⁷ *Windsor*, 133 S. Ct. at 2719 n.7 (Alito, J., dissenting).

³⁰⁸ See Ross, *supra* note 263, at 2035 (arguing that in “instances of process malfunction, it may be appropriate for courts to discount the record and engage in their own fact-finding”).

stake.³⁰⁹ By contrast, Ruth Colker and James Brudney suggest that the current patterns of judicial scrutiny of legislative fact-finding amounts to a large transfer of power from democratically accountable institutions to non-accountable ones.³¹⁰ And Daniel Crane argues that legislative facts are highly normative and thus “squarely within the legislative power.”³¹¹

As to deference from one level of court to the next, both *de novo* review and clear error review have their champions and their critics. Some say deference to trial courts is too expensive—it would encourage more trials,³¹² and “[u]pend the [h]ierarchical [s]tructure of the [c]ourts.”³¹³ Others (including myself)³¹⁴ have warned that giving the appellate courts the power to evaluate these facts (what would result from *de novo* review) encourages faulty fact-finding through amicus briefs and unrestricted internet research, thereby bypassing important checks from the adversarial process.³¹⁵

C. *What Should Be Done? Two Concrete Suggestions to Improve the Standards of Review*

These questions are not easy and there is more work to be done in sorting out the answers. What follows, however, are two concrete suggestions to retool the standards of review for questions of fact in constitutional cases. They are intended to reflect the new modern

³⁰⁹ See Borgmann, *supra* note 26, at 38 (“[I]nstitutional respect for the legislative process weighs less heavily against the substantial concerns of important individual rights.”).

³¹⁰ See Colker & Brudney, *supra* note 259, at 119–20 (arguing that the “approach is further flawed in that it overlooks the important democracy-based aspects of information gathering”).

³¹¹ Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 GEO. L.J. 637, 637 (2014) (limiting his arguments to congressionally-found facts that have gone through bicameralism and presentment).

³¹² See John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) (arguing that trials are not the best way to establish legislative facts).

³¹³ Yoshino, *supra* note 280, at 276; see also Borgmann, *supra* note 26, at 35 (arguing for courts to engage in independent fact-finding “when a law threatens essential individual rights and liberties”).

³¹⁴ See generally Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 16 (arguing that in light of the digital revolution, “we need to seriously contemplate the implications of in-house judicial fact finding”).

³¹⁵ Kenji Yoshino has endorsed an intermediate standard of review (building on a brief filed in the same-sex marriage litigation by Erwin Chemerinsky and Arthur Miller). This standard of review—the suggestion that drew the ire from Justice Alito in *United States v. Windsor*, 133 S. Ct. 2675 (2013)—would give “significant weight” to a lower court’s findings but only if they are made through the adversarial system. I throw my hat in the Yoshino-Chemerinsky camp but with a twist (described *infra* Section III.C.2). See Yoshino, *supra* note 277, at 279–82.

realities of fact-finding, and they are offered as an attempt to harness the power of trial court judges—the actors I think are best equipped to guard against the power of alternative facts.

1. *Using Caution with the Label “Legislative Fact”*

One partial fix to all of this confusion is to more carefully police the line between adjudicative facts and legislative facts, or perhaps to rethink the utility of the distinction altogether. Recall that the distinction was drawn eighty years ago by administrative law scholar, Kenneth Culp Davis.³¹⁶ In administrative law, of course, the difference between adjudication and legislation is very important and often discussed. Generally speaking adjudication is backwards-looking and relates to specific identifiable individuals while legislation is forward-looking and relates to unnamed theoretical future individuals.³¹⁷

This is the backdrop against which Davis coined the terms “legislative fact” and “adjudicative fact.” Despite its name, “legislative fact” does not mean facts found by a legislature. The label refers to the nature of the fact: generalized observations about the world that often involve predictions and are not limited to the named individuals before the court. And this label carries significant consequences. Legislative facts (but not adjudicative facts) are exempt from the federal judicial notice rule, meaning a judge is permitted to look outside the record to learn about the subject.³¹⁸ And legislative facts (but not adjudicative facts) are typically reviewed *de novo* by appellate courts.³¹⁹

As described above, U.S. constitutional law has grown to rely tremendously on legislative facts over the past several decades—likely well beyond what Davis could have imagined when he was writing long ago. It is possible that the Davis distinction can’t bear the weight of the growth spurt. Consider two examples. When a court is faced with a law based on the premise that abortion may cause breast cancer, most would label that factual premise a “legislative fact.” By contrast, a claim that a particular vaccine causes an increased risk of autism is labeled an “adjudicative fact.” And yet what is the real difference? Both facts involve questions of science and empirical evi-

³¹⁶ Davis, *supra* note 45, at 402–03.

³¹⁷ See JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 21 (1927) (“What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity.”).

³¹⁸ See *supra* notes 45–49 and accompanying text (discussing legislative facts).

³¹⁹ Yoshino, *supra* note 280, at 254.

dence; both facts are largely outcome-determinative to the legal doctrine they influence; both facts affect not only the parties to the litigation but also future parties not identified.

Given the vast legal consequences that follow from whether a fact is dubbed a legislative fact or an adjudicative fact, perhaps courts should be more careful deciding what goes in which bucket. Indeed, it may be time to rethink the contours of the boundaries between the two concepts altogether. Why does the distinction exist? Davis articulated this line principally out of concerns of notice and prejudice to the parties.³²⁰ It is unfair to the parties for a court to take “judicial notice” of a fact that may determine the outcome of their dispute but without party participation in evaluating it. And, by contrast, it is unfair to allow specific individuals to take control over a fact that will affect many others not before the court.

But of course some factual questions typically labeled as adjudicative (Does the lethal injection protocol cause serious pain in capital punishment? Do vaccines increase a risk of autism?) have effects way beyond the parties before the court. And some factual questions typically labeled as legislative (Do video games increase violent behavior in kids? Is a partial birth abortion ever medically necessary?) also have serious implications for the parties before the court and can indeed be outcome-determinative.

The answer may be that the distinction was written into the laws of evidence long before courts became so involved in disputes that were accompanied by generalized questions of fact.³²¹ Indeed, our modern “fact-y” society means that legislatures today often take traditionally moral or political arguments and cloak them in claims of fact.³²² Relatedly, because courts are hungry for legislative facts, sophisticated litigants know to provide them freely and effectively.

³²⁰ See Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 941 (1980) [hereinafter Davis, *Facts in Lawmaking*] (“When legislative facts importantly affect the Supreme Court’s lawmaking, the Court should consider whether procedural fairness requires parties to have a pre-decision opportunity to challenge the facts. The Court usually fails to provide such an opportunity.”); Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 958 (1955) [hereinafter Davis, *Judicial Notice*] (“Only rarely have courts specifically articulated the distinction between legislative and adjudicative facts for purposes of judicial or official notice.”).

³²¹ See Davis, *Judicial Notice*, *supra* note 320, at 958 (detailing how evidence scholars distinguished facts about the parties and facts about questions of law early on but that courts only did so rarely); Keeton, *supra* note 49, at 14 (“[R]elatively little explicit discussion of this distinction has appeared in judicial opinions.”).

³²² See Borgmann, *supra* note 26, at 9 (“If legislatures think that courts will defer to their factual findings, they are likely to present what are really moral positions or legal conclusions as factual findings.”).

We are thus driving an old distinction through new and rougher terrain. It is time for an update. I suggest that when deciding whether a fact is adjudicative or legislative, a judge should not ask just about whether it is generalized or specific, but instead should ask a practical question: Is this the type of question that would benefit from adversarial testing and expert testimony?³²³ If so, perhaps it is not a legislative fact at all, and is instead well suited for trial. This change will bring us back to the roots of the rules of evidence and it would more significantly moor the legislative-fact/adjudicative-fact distinction to the rationale that generated it in the first place.

2. *Even for True Legislative Facts, Deference Should Follow Process*

Even if courts are more careful with the “legislative fact” label, there will still remain the question of what should be done with the truly generalized factual questions about the way the world works—questions that do seem separate and apart from the parties litigating them. I certainly do not argue for blind deference to trial court findings any more than I endorse such deference to a legislative record. Instead, I believe deference should be earned by the process of fact checking at both levels.

In today’s age of alternative facts, in other words, the time has come for courts to take a granular approach to the facts presented by the legislature and to the courts. Put simply, the standards of review should closely probe the process through which the factual claims were made. Instead of just focusing on whether the legislature’s purpose was rational or important or compelling, the Court should look at the factual record and attempt to assess the process that led to it.

Questions to be asked include: Is the factual assertion backed by peer-reviewed studies? Is more than one study cited? If the fact is the product of a legislative hearing, was it bipartisan or more likely political theater? Would the experts cited hold up on cross-examination? Do they have degrees in the relevant fields? If a minority view in the field, do the authorities acknowledge and explain the inconsistency and is the methodology used accepted by the industry? The more complete the process behind the factual statement, the greater defer-

³²³ Ann Woolhandler was ahead of the curve on this topic. In 1988, she pushed back on the traditional definition of legislative fact and suggested instead that the focus be on what type of evidence is required in each case. See Woolhandler, *supra* note 46, at 114 (“The key difference between adjudicative and legislative facts is not the characteristics of particular versus general facts, but rather, evidence whose proof has a more established place and more predictable effect within a framework of established legal rules as distinct from evidence that is more manifestly designed to create the rules.”).

ence should be due from a court. By contrast, if the scientific evidence has been cherry-picked or over-simplified or even fabricated or baldly asserted, then the factual record deserves very little deference at all.

Of course, focusing on the fact-finding process is not an exact science and surely will not eliminate all personal bias. But at the very least the goal of these questions would be to sniff out the easily rebuttable facts identified in Part II. To be concrete and a little blunt about it, West Virginia can require its doctors to warn women seeking abortions that they have an elevated chance of breast cancer as long as the elected representatives have done their homework and produced authorities such that a fact-checker would feel satisfied a connection was plausible.

This type of granular process-based probe may seem onerous but it is not unprecedented. In many ways it is the same logic used in administrative law.³²⁴ When courts are deciding whether an agency is entitled to deference for a policy decision, they ask whether the agency took a “hard look” at the problem and they evaluate whether the agency used sufficient procedures to do so.³²⁵ Similarly, under what has been called “*Chevron* Step Zero,” courts examine the procedures the agency used before deciding whether to grant deference on a question of law.³²⁶ The basic idea of both doctrines is that when more process is used beforehand we can assume the decision will be better and thus it is more worthy of deference from those reviewing it.³²⁷ So, for example, an agency that carefully undergoes the time-consuming process of notice and comment rulemaking will “earn”

³²⁴ As described above, the analogy to administrative law is an apt one when one is talking about legislative facts given the origin of the phrase. See *supra* notes 316–20 and accompanying text (discussing Davis).

³²⁵ See *Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983) (articulating and endorsing the “hard look” doctrine).

³²⁶ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness” (footnotes omitted)).

³²⁷ See Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1263–73 (2011) (explaining how agencies earn *Chevron* deference with process); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873–89 (2001) (describing *Chevron* Step Zero). Incidentally, the same idea is used even further down on the administrative law deference scale: So-called *Skidmore* deference largely turns on the circumstances surrounding the decision and whether deference is justified. And for those ad-law junkies paying close attention, “hard look” review—used when a court reviews agency policy making under an “arbitrary and capricious” standard follows the same theme.

Chevron deference to its resulting decision, but an agency position quickly penned in an amicus brief will not.³²⁸

Although these doctrines of judicial review in administrative law have their share of critics, they have also drawn praise from those who recognize the positive side effects.³²⁹ In addition to encouraging transparency in decisionmaking, incentivizing additional procedures allows “affected parties to detect improper motives by government actors or expose agency capture by a well-organized interest group, and thus assign blame to the appropriate agency actors.”³³⁰ When a court focuses on procedure before awarding deference it is in effect policing bad behavior that is hard to detect otherwise. That at least is one rationale for withholding deference to agencies unless they have earned it by using thorough procedures in their decision-making.

In short, what I propose is the same thing here: a *Chevron* Step Zero or “hard look” inquiry for legislative facts. This standard of review would work on two levels: (1) A legislature deserves more deference when it “shows its work” and undergoes more process before making a factual claim, and (2) a lower court deserves more deference from an appellate court when it gets its hands dirty with the facts as well. Just like when a court reviews an agency’s legal conclusion or policy decision (under the *Chevron* or hard-look doctrines, respectively), a judge will accord more deference to a decision she is reviewing if it appears the decision was the product of sophisticated procedure.

To be clear, I am not arguing for a complete change in the constitutional standards of review, nor am I suggesting that the level of deference (at either level) should be absolute. Instead, I want the current standards of review to focus less on the purpose of the legislature (the

³²⁸ See *Mead*, 533 U.S. at 226–27 (holding that *Chevron* deference can be earned through notice-and-comment rulemaking but not customs classifications); see also *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (holding that the Department of Labor’s position in an amicus brief is not due deference because the lack of process would create “unfair surprise” of regulated parties).

³²⁹ See Holper, *supra* note 327, at 1264–66 (noting that “[f]ormal procedures promote ‘fairness and deliberation,’” “maintain constitutional checks and balances,” and “allow[] agencies to engage in a cost-benefit analysis” (quoting *Mead*, 533 U.S. at 230)); see also Merrill & Hickman, *supra* note 327, at 882–88 (explaining how *Chevron* Step Zero ensures *Chevron* deference is only used when earned by the agencies); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 227 (2006) (“*Mead* is evidently motivated by a concern that *Chevron* deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures.”).

³³⁰ Holper, *supra* note 327, at 1266; see also Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 602–04 (2009) (observing that “[c]omplex questions typically benefit from agency expertise, and contentious legislative issues typically benefit from continuing political debate at the administrative level” and arguing for an interpretive theory that captures these advantages).

way they do now) and more on the process used to generate the factual record.³³¹ It is a refocus rather than a revolution. This change, as I see it, has several benefits to it.

First, judges are good at evaluating process; at the very least they are more comfortable doing that than they are at impugning legislative purpose. This task is not that far afield from other questions that are part of the judicial homework already: What is privileged authority versus non-privileged? Who counts as a qualified expert and who doesn't? Sure, the line drawing can be difficult, but we ask judges to draw hard lines all the time and weighing authorities is a function within the judicial wheelhouse.

Moreover, the intensity of the fact-checking can correlate with the standard of review. How much process is due will depend on whether a court is engaged in rationality review or some form of heightened scrutiny.³³² Thus, although I must concede that a fact-checking standard of review will burden the already over-worked judiciary, it is at least a burden that need not be felt in every case.

Second, this twist to the standards of review will reset the game rules for the litigants and encourage quality sleuthing for facts as opposed to the quantity fact-battle we now witness. As discussed above modern litigants are increasingly sophisticated at growing the facts they need to make constitutional change. By reading signals, setting frames, participating in an intense amicus boom, and fueling law office history to the extreme, we are witnessing a bit of an arms race among advocates when it comes to gathering factual experts. This can be dangerous, as discussed above, but perhaps the adversarial energy behind it can be channeled in a different and useful way.

Recall that Kahan teaches that narratives and packaging matter a great deal in our cognitive perception of facts.³³³ By retooling the standards of review to look closely at the process behind factual claims, we can police those packages with greater scrutiny. The goal is to leverage the power of the adversarial process and give it more heft in the enterprise of policing facts.

³³¹ Doctrinally, I imagine this fact-checking inquiry would most likely fall within the question of the law's "fit" is it rationally-related, or narrowly-tailored, etc. But I can also imagine if the facts justifying a law are exposed as patently false, that could shed light on an impermissible purpose.

³³² I am aware of a current debate about rationality review and whether it is constitutional. See, e.g., Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1630 (2016) (claiming that rationality review is problematic constitutionally because "[t]here is no textual basis in the Constitution to justify reviewing legislation for its rationality"). Without wading into those waters today, I only note that my proposed standard is flexible enough to accommodate either position.

³³³ See discussion *supra* Section III.A.

There are also positive consequences within the judiciary that will flow from this fact-specific retooling of the standards of review. Most obviously, it will clarify the confused standards of review currently used when an appellate court reviews a district court's evaluation of legislative facts. If the district court takes the time to carefully fact check the record before it, then an appellate court should defer to this hard work.

This additional layer of deference will also reward industrious judges who take on the admittedly time-intensive burden of fact-checking. The intelligent design case in Pennsylvania and the Prop 8 same-sex marriage case in California provide good examples.³³⁴ Those two judges (Judge Jones in Pennsylvania and Judge Walker in California, both appointed by Republican Presidents) held lengthy trials, listened to dozens of witnesses, culled through pages of testimony and other evidence and ultimately wrote extremely lengthy opinions with detailed fact-finding.³³⁵

This work is not glamorous. It is the nitty-gritty of judging: comparing authorities, digging into proffered reasons, searching for inconsistencies, and (perhaps most importantly) defending one's conclusion step by step in a written opinion. It is work to be valued—even if judges don't get it right every time.

As it currently stands, however, this fact-checking work is too often swept aside. Recall, for example, that Vincent Rue was exposed as unreliable by three different district court judges—appointed by Presidents of different stripes.³³⁶ These judges were able to spot Rue's lack of credentials and catch that his testimony on post-abortion syndrome ran counter to the vast amount of authorities on the subject.³³⁷ Through some very advanced fact-checking involving digging into email correspondence, one judge was even able to detect Rue's fingerprints on subsequent experts who testified in abortion restriction cases

³³⁴ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010); *Kitzmilller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

³³⁵ See generally *Schwarzenegger*, 704 F. Supp. 2d 921; *Kitzmilller*, 400 F. Supp. 2d 707.

³³⁶ See discussion *supra* Section II.A. Judge Alsop (Minnesota) was appointed by Nixon, Judge Yeakal (Texas) was appointed by George W. Bush, and Judge Thompson (Alabama) was appointed by Carter.

³³⁷ See *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014) (noting that Rue's involvement with the State's expert witnesses negatively impacted their credibility); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333–34 (E.D. Pa. 1990) (concluding that “[b]ecause Dr. Rue lacks the academic qualifications and scientific credentials possessed by plaintiffs’ witnesses” his testimony was not credible); *Hodgson v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986) (“Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs’ expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs’ witnesses.”), *rev'd on other grounds*, 853 F.2d 1452 (8th Cir. 1988).

in their own names but relied on Rue's coaching. He expressed "dismay[] by the considerable efforts the State took to obscure Rue's level of involvement with the experts' contributions."³³⁸

Nevertheless, this work was undone by appellate courts who claim it is not a judge's job to "second guess legislative factfinding, 'improve' on, or 'cleanse' the legislative process by allowing relitigation of the facts that led to the passage of a law."³³⁹ As the Fifth Circuit said in *Abbott*, there is no such thing as "empirical basis review."³⁴⁰ Indeed, that appellate court even cited with favor the same experts that the district court had found were being coached by the discredited Vincent Rue.³⁴¹ The reversals are done all in the name of deference to the legislature and through arguments about the proper burden of proof.³⁴²

A similar dynamic occurred in South Dakota. A law there requires that women seeking abortion be warned that abortion carries an increased risk of suicide.³⁴³ The district court, in a challenge to that law, noted that any connection between abortion and suicide has been rejected by both the American College of Obstetricians and

³³⁸ *Lahey*, 46 F. Supp. 3d at 680 n.3; see also *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1387 (M.D. Ala. 2014) ("The court was struck by the flimsiness of Anderson's basis for reliance on Rue and by his failure to obtain basic information about the affiliations, credentials, or employment of the consultant whose report he submitted as his own.").

³³⁹ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583, 594 (5th Cir. 2014); see also *Whole Woman's Health v. Lakey*, 769 F.3d 285, 294 (5th Cir.) ("As explained in *Abbott II*, if the State establishes that a law is rationally related to a legitimate state interest, we do not second guess the legislature regarding the law's wisdom or effectiveness."), *vacated in part* by 135 S. Ct. 399 (2014) (mem.); *Planned Parenthood of Minn. v. Rounds*, 686 F.3d 889, 897–98 (8th Cir. 2012) (allowing for the disclosure that the risk of suicide or suicidal ideation is higher among women who receive abortions without proving any causal link).

³⁴⁰ See *Abbott II*, 748 F.3d at 596 (stating that the first step in analyzing an abortion regulation "is rational basis review, not empirical basis review").

³⁴¹ Compare *id.* at 592–93 (referring to the testimonies of Drs. Peter Uhlenberg and James Anderson without critique or acknowledgement of Vincent Rue's coaching) with *Lahey*, 46 F. Supp. 3d at 680 n.3 ("[A]lthough the experts [Dr. Anderson and Dr. Uhlenberg, among others] each testified that they personally held the opinions presented to the court, the level of input exerted by [Vincent] Rue undermines the appearance of objectivity and reliability of the experts' opinions. Further, the court is dismayed by the considerable efforts the State took to obscure Rue's level of involvement with the experts' contributions.").

³⁴² See *Lahey*, 769 F.3d at 295 ("Courts are not permitted to second guess a legislature's stated purposes absent clear and compelling evidence to the contrary."); *Abbott II*, 748 F.3d at 594 ("The court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power.").

³⁴³ S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (Supp. 2017).

Gynecologists and the American Psychological Association, and was not supported by any evidence provided by the state.³⁴⁴

None of that mattered to the Eighth Circuit. It held that “in order to render the suicide advisory unconstitutionally misleading or irrelevant, Planned Parenthood would have to show that abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides.”³⁴⁵ The appellate court, in other words, washed its hands of the fact-checking and articulated the rules so that the district court was not permitted to do it either.

I think this is a mistake. If a district court has gone to the trouble of comparing authorities, scrutinizing methodologies, and evaluating resumes, then that process should be rewarded with some deference from a reviewing court. Of course a district court can be wrong on the facts (and for that reason I don’t argue for an absolute un-reviewable sort of deference). But when a record has been carefully assembled and intensely scrutinized by a trial judge, that record should be appreciated and respected on review – even for legislative facts. Not only will this promote truth-seeking in the courts, but it will also have the laudable collateral benefit of bolstering the public’s faith in government. When judges “show their work,”—particularly after a trial that puts generalized factual claims to the test—this may help stem the harm from echo chambers and factual exchanges on social media.

At bottom, my argument rests on the notion that courts can and should fact-check in constitutional cases; and when they do (at whatever level), that work should be valued on appeal. Unlike perhaps methodological differences about interpreting the Constitution (which are entrenched and hard to shake), we should expect courts to be able to evaluate the legitimacy of the legislative facts submitted to them. After all, the law has always relied on judges to evaluate evidence and to separate the good from the bad. Perhaps the rise of “alternative facts” just requires a tweak in what is required of courts tasked with evaluating them. It is a job our democracy is crying out for, and it is a job that courts are up to doing.

IV

ALTERNATIVE FACTS CAN BE EXPOSED: JUDICIAL SUCCESS STORIES

Finally, I wish to end this Article with a series of judicial success stories. I have found several examples where courts do put factual

³⁴⁴ *Planned Parenthood of Minn. v. Rounds*, 650 F. Supp. 2d 972, 983 (D.S.D. 2009).

³⁴⁵ *Planned Parenthood of Minn. v. Rounds*, 686 F.3d 889, 900 (8th Cir. 2012).

claims to the test and they have been able to debunk facts that deserve debunking. On subjects ranging from vaccination, to abortion restrictions, to the teaching of intelligent design, to claims that children do not fare well in homes with same-sex parents, judges—and judges appointed by Presidents of both parties—are not only capable of fact-checking when needed, but they also are rising to the occasion. Touring a few examples of these “judicial success stories” provides some lessons about what can be done to combat alternative facts in the future.

First, consider what has happened in court to claims that vaccinations cause autism. The factual claim is that the common MMR (measles mumps rubella) vaccination and/or the vaccinations’ preservatives are linked to an increase in autism rates in children.³⁴⁶ This factual assertion got a lot of traction following a well-publicized 1998 study by Dr. Andrew Wakefield and his colleagues published in *The Lancet* medical journal.³⁴⁷

Following dissemination of the Wakefield study, vaccination rates in Britain dropped sharply—from ninety-two percent to seventy-three percent and as low as fifty percent in parts of London.³⁴⁸ The scare took hold in the United States as well. Dr. Paul Offit, director of the Vaccine Education Center at the Children’s Hospital of Philadelphia, concluded there was “no doubt” a connection between a measles outbreak in the United States and the factual claims coming from Wakefield’s study.³⁴⁹

As vaccination rates dropped, litigation rates over vaccination soared.³⁵⁰ To deal with the large number of cases involving a common factual issue, the Federal Office of Special Masters (OSM) proposed a special procedure by which the OSM could most efficiently process

³⁴⁶ For a history of the litigation and description of the claim, see Gordon Shemin, *Mercury Rising: The Omnibus Autism Proceeding*, 58 AM. U. L. REV. 459, 478–79 (2008).

³⁴⁷ Andrew J. Wakefield et al., *Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 351 LANCET 637 (1998). *The Lancet* later retracted the piece, but the article’s theory has refused to die. See, e.g., Nick Trigg, *Wakefield and Autism: The Story That Will Not Go Away*, BBC NEWS, <http://news.bbc.co.uk/2/hi/health/8481583.stm> (last updated Jan. 28, 2010) (calling it “the story that just rumbles on and on”).

³⁴⁸ Mike Stobbe, *Will Autism Fraud Report Be a Vaccine Booster?*, BOS. GLOBE (Jan. 6, 2011), http://archive.boston.com/lifestyle/health/articles/2011/01/06/will_autism_fraud_report_be_a_vaccine_booster/.

³⁴⁹ Jim Axelrod, *Doctor Blames Discredited Autism Research for Measles Outbreak*, CBS NEWS (Feb. 10, 2015) (quoting Dr. Paul Offit), <http://www.cbsnews.com/news/doctor-blames-discredited-autism-vaccine-link-research-for-measles-outbreak/>.

³⁵⁰ See Shemin, *supra* note 346, at 462 (estimating the number of claims to be about 4900).

the autism claims.³⁵¹ The name of this special procedure was the “Omnibus autism proceeding.” The idea was a group effort: The proceeding was proposed after holding several informal meetings in 2002 with plaintiffs and counsel for the Secretary of Health and Human Services. The special proceeding had two steps: First, a large-scale inquiry into the general causation issue involved in these cases—i.e., whether the vaccinations in question can cause autism—and then, second, separate proceedings that would apply the evidence obtained in that general inquiry to the individual cases.³⁵²

A team of petitioners’ lawyers was selected to represent the interests of the autism petitioners during the course of the initial general causation inquiry.³⁵³ This inquiry included “a lengthy period of discovery concerning the general causation issue, followed by a designation of experts for each side, an evidentiary hearing, and finally a ruling on the general causation issue by a special master.”³⁵⁴

The evidence produced during this lengthy litigation revealed that the science linking autism to vaccination was seriously flawed. For one, Dr. Wakefield’s study was marred by a significant conflict of interest. It turns out the study was funded by lawyers who wanted evidence of a link between vaccines and autism in a suit against vaccine manufacturers, and the parents of some of the children in the study were clients of the attorney as well.³⁵⁵ Upon learning of this conflict, *The Lancet* retracted Wakefield’s study from their journal.³⁵⁶ Furthermore, in several large subsequent studies, the vast medical consensus shows time and again that there is no link between vaccinations and autism, even in children at high risk for the disease.³⁵⁷

³⁵¹ For an in-depth procedural history of the Omnibus autism proceeding, see *Cedillo v. Secretary of Health & Human Services*, No. 98-916V, 2009 WL 331968, at *7–8 (Fed. Cl. Feb. 12, 2009).

³⁵² *Id.* at *7.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ Brian Deer, *Revealed: MMR Research Scandal*, *SUNDAY TIMES* (Feb. 22, 2004), <http://briandeer.com/mmr/lancet-deer-1.htm>.

³⁵⁶ *Retracted Autism Study an “Elaborate Fraud,” British Journal Finds*, CNN (Jan. 5, 2011), <http://www.cnn.com/2011/HEALTH/01/05/autism.vaccines/>.

³⁵⁷ See *No MMR-Autism Link in Large Study of Vaccinated vs. Unvaccinated Kids*, *AUTISM SPEAKS* (Apr. 20, 2015), <https://www.autismspeaks.org/science/science-news/no-mmr-autism-link-large-study-vaccinated-vs-unvaccinated-kids> (“In the largest-ever study of its kind, researchers again found that the measles-mumps-rubella (MMR) vaccine did not increase risk for autism spectrum disorder (ASD). This proved true even among children already considered at high risk for the disorder.”); see also *CTR. FOR DISEASE CONTROL, SCIENCE SUMMARY: CDC STUDIES ON THIMEROSAL IN VACCINES*, <https://www.cdc.gov/vaccinesafety/pdf/cdstudiesonvaccinesandautism.pdf> (last visited Jan. 15, 2018) (reporting that nine studies conducted by or with the involvement of the CDC showed no link between vaccines and autism); *INST. OF MED. OF THE NAT’L ACADS.*,

Overwhelmingly, therefore, the vaccination courts got it right.³⁵⁸ They scrutinized the science and resisted an alternative fact that still continues to plague the public discourse on the subject.³⁵⁹ Indeed despite the debunking of the Wakefield study and persistent insistence by the medical community that vaccines are safe, a recent poll revealed that, while thirty-nine percent of Americans think the news media exaggerates childhood vaccine health risks, twenty-four percent still believe the media does not take the health risks seriously enough.³⁶⁰

If politicians and their constituents are still divided on this issue, why has the judicial reaction been virtually uniform in rejecting the disputed science? What is unique and interesting about this example of successful judicial fact-checking is that a national factual controversy was litigated in a coordinated way using a special master and a special court—but in a way that ensures buy-in from both sides. Certainly there are aspects about the vaccination controversy that make this coordination effort easier (not the least of which is the existence of the federal national vaccine compensation program), but perhaps its success at resisting alternative facts should provide a hopeful example that such judicial efforts—particularly when creatively marshalled—can be successful.

Even without the nationwide coordination effort, lone district judges are also resisting alternative facts. I have already mentioned several district court abortion cases and their judges' efforts to debunk

IMMUNIZATION SAFETY REVIEW: VACCINES AND AUTISM 1 (2004) <http://nationalacademies.org/HMD/Reports/2004/Immunization-Safety-Review-Vaccines-and-Autism.aspx> (“[T]he body of epidemiological evidence favors rejection of a causal relationship between thimerosal-containing vaccines and autism.”).

³⁵⁸ See, e.g., *Dwyer ex rel. Dwyer v. Sec’y of Health & Human Servs.*, No. 03-1202V, 2010 WL 892250, at *1 (Fed. Cl. Mar. 12, 2010) (rejecting petitioners claim that vaccination caused a developmental disorder in their son); *King ex rel. King v. Sec’y of Health & Human Servs.*, No. 03-584V, 2010 WL 892296, at *1 (Fed. Cl. Mar. 12, 2010) (similar); *Mead ex rel. Mead v. Sec’y of Health & Human Servs.*, No. 03-215V, 2010 WL 892248, at *1 (Fed. Cl. Mar. 12, 2010) (similar); *Cedillo v. Sec’y of Health & Human Servs.*, 89 Fed. Cl. 158, 164 (2009) (similar); *Hazlehurst v. Sec’y of Dep’t of Health & Human Servs.*, No. 03-654V, 2009 WL 332306, at *1 (Fed. Cl. Feb. 12, 2009) (similar). For an explanation of the debunking of the science, see LEVITAN, *supra* note 193, at 195–96.

³⁵⁹ See *Childhood Vaccines and Autism* (C-SPAN television broadcast Dec. 10, 2002), <https://www.c-span.org/video/?174176-1/childhood-vaccines-autism> (“I have yet to find any scientist who will say that there is no doubt that the mercury in vaccines does not contribute to autism. Now they’ll say there’s no scientific evidence there’s no to studies or anything that proves that yet. But turn that around. There are no studies that disprove it either.” (comments of Rep. Dan Burton) (transcript compiled from uncorrected Closed Captioning)).

³⁶⁰ CARY FUNK ET AL., PEW RESEARCH CTR., VAST MAJORITY OF AMERICANS SAY BENEFITS OF CHILDHOOD VACCINES OUTWEIGH RISKS 67 (2017), <http://www.pewinternet.org/2017/02/02/public-views-of-media-coverage-on-childhood-vaccines/>.

experts in need of debunking,³⁶¹ but yet another judicial success story here comes in the case of *Planned Parenthood v. Strange*.³⁶²

The district court judge in *Strange*, Judge H. Myron Thompson, could teach a master class on the benefits of trial and cross examination on alternative facts. In a methodical forty-two page opinion, Judge Thompson literally goes through witness by witness in this case about an Alabama statute which required all abortion providers to have admitting privileges at nearby hospitals.³⁶³

Appropriately, Judge Thompson calls himself “a trial court in the trenches,”³⁶⁴ and he not only goes through the testimony of all the witnesses, but then makes the determination city by city in Alabama whether any abortion provider would be left to provide services after the statute goes into effect.³⁶⁵ In the process, the judge was able to sniff out the undeclared influential fingerprints of the discredited Vincent Rue on the state’s expert,³⁶⁶ to discover the decimal point “error” made by Dr. Thorpe in purporting to establish abortion complication rates,³⁶⁷ to identify methodological flaws in a poll purporting to establish that other surgical procedures require admitting privileges at nearby hospitals,³⁶⁸ and to impeach a state medical witness who admitted on cross-examination to knowing very little about the medical procedure of abortion.³⁶⁹ Judge Thompson was also able to recognize witnesses whose testimony deserved crediting: those whose research appeared in peer-reviewed journals, was based on years of data collection, and was based on qualitative and quantitative methods.³⁷⁰

³⁶¹ See *supra* Section II.A.

³⁶² *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014).

³⁶³ *Id.* at 1332.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 1348–51.

³⁶⁶ *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1386–88 (M.D. Al. 2014) (debunking Dr. James Anderson).

³⁶⁷ *Id.* at 1394 (noting that Dr. Thorpe had “a disturbing apathy toward the accuracy of his testimony”).

³⁶⁸ *Id.* at 1388–89 (discussing testimony of Dr. Jeffrey Hayes).

³⁶⁹ *Id.* at 1390 (discussing testimony of Dr. Christopher Duggar, who admitted: “To be honest with you, I don’t know how they do first-trimester abortions. From what you hear, you know, there’s a combination of both surgical and medical management, but that’s my limit of knowledge.”).

³⁷⁰ Judge Thompson found that:

Freedman testified that quantitative research had shown that doctors who are trained in abortion often do not perform abortions and that her own qualitative research sought to explain why that was so. Her research was developed over the course of extended interviews, which she analyzed using text-analysis software in order to identify patterns and themes. . . . This methodology was sufficient, both in its data and its approach, to assist the court in its fact-finding.

Being a trial court “in the trenches” is hard work. The *Strange* litigation lasted over three years, culminating in a trial that took ten days and required the judge to pay concentrated attention to almost a dozen witnesses—not to mention the detail he paid to deposition testimony.

But, as this example demonstrates, putting faith in the adversarial system pays off. With hard work, Judge Thompson was able to separate the credible from the not credible. And his work in this regard was focused not just on who he believed in an abstract nebulous way, but rather by hunting down process errors in the state’s factual claims: misplaced decimal points, ghost-writing witnesses, admissions of ignorance on cross, etc. These are things that the adversarial system was meant to catch when testing facts.

Indeed, the payoff can run beyond the case at hand. As discussed above, news of the debunking of some of these witnesses (Rue and Thorpe) spread to other courts in other states facing similar factual claims.³⁷¹ The “trenches” in other words can be shared by judges (with access to Westlaw and Google) who are tasked with evaluating common factual claims behind constitutional challenges.

Another example of the power of fact-checking can be found with the studies purporting to establish that children do not thrive in homes with two same-sex parents. Several district courts—notably one in Michigan and one in California—have shown a willingness to compare competing authorities on this question and to evaluate each one at a micro-level.³⁷² The district court in the Michigan case, *DeBoer v. Snyder*, provides a helpful example. After reviewing the evidence presented at trial, Judge Bernard Friedman (appointed by Ronald Reagan) went through each expert’s testimony one at a time in his opinion.³⁷³ He compared notes on the statistical methodology of each study and was able to weigh the credibility of each.³⁷⁴

Id. at 1392–93.

³⁷¹ See, e.g., *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 973 n.24 (W.D. Wis. 2015) (acknowledging that Rue “ghost wrote or substantively edited portions” of at least two expert witnesses’ reports which subsequently one expert could not explain his report himself during trial); *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014) (“The court finds that, although the experts each testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts’ opinions.”).

³⁷² See, e.g., *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 761–68 (E.D. Mich. 2014) (discussing the parties’ witnesses and determining whether the testimony for each was credible); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980–81 (N.D. Cal. 2010) (stating the testimony and exhibits relied upon by the court).

³⁷³ *DeBoer*, 973 F. Supp. 2d at 761–68.

³⁷⁴ *Id.*

Cross-examination in *DeBoer* revealed that a study relied on to establish that children do not thrive with same-sex couples (led by sociologist Mark Regnerus) suffered from a significant conflict of interest³⁷⁵—it was funded by the Witherspoon Institute, an organization founded to oppose same-sex marriage.³⁷⁶ Judge Friedman ultimately concluded that:

Regnerus's testimony [was] entirely unbelievable and not worthy of serious consideration. The evidence adduced at trial demonstrated that his 2012 "study" was hastily concocted at the behest of a third-party funder, which found it "essential that the necessary data be gathered to settle the question in the forum of public debate about what kinds of family arrangement are best for society" and which was "confident that the traditional understanding of marriage will be vindicated by this study."³⁷⁷

Finally, lest one think district court fact-checking always leads to left-leaning results, remember that the impressive and laudable fact-checking in the 1999 hair-braider case, *Cornwell v. Hamilton*, resulted in a win for economic liberty and the conservative Institute for Justice.³⁷⁸ Further, at least one gun control enthusiast has been discredited as overreaching on historical claims by courts in litigation involving Second Amendment rights.³⁷⁹ Moreover there are also several voter ID cases where district courts have done diligent work expressing skepticism for blanket claims that such laws harm minority voters.³⁸⁰

³⁷⁵ *Id.* at 766.

³⁷⁶ Plaintiffs' Motion in Limine to Exclude Testimony of Mark Regnerus at 16–17, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-cv-10285), 2014 WL 1681586.

³⁷⁷ *DeBoer*, 973 F. Supp. 2d at 766 (quoting Plaintiff's Motion, *supra* note 376).

³⁷⁸ See *supra* notes 241–43 and accompanying text (discussing *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999)).

³⁷⁹ Michael A. Bellesiles's initially highly acclaimed book, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000), which purported to paint a historical account of a gun-free America was subsequently undermined as historically inaccurate and borderline fraudulent. See James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 *YALE L.J.* 2195 (2002). This caused the Ninth Circuit to actually amend an earlier opinion and remove a citation to Bellesiles's work. Compare *Silveira v. Lockyer*, 312 F.3d 1052, 1057 n.1, 1078 n.37 (9th Cir. 2002), <http://news.findlaw.com/hdocs/docs/gunlawsuits/silvlckyr120502opn.pdf> (citing Bellesiles), with *Silveira v. Lockyer*, 312 F.3d 1052, 1057 (9th Cir. 2003) (as amended) (removing Bellesiles citations).

³⁸⁰ See, e.g., *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1337 (M.D. Fla. 2004) (challenging the view that these laws harm minority voters). One controversial example is the recent North Carolina voter ID case. See N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 344–48 (M.D.N.C. 2016) (discussing the enactment of the voter ID law). The challenge alleged that the law—particularly the sections that require ID and decrease early voting time—disproportionately depressed voting by African Americans. *Id.* at 348. Following a bench trial, the district court judge, Judge Thomas D. Schroeder, issued a one hundred-page opinion with extensive factual

At the end of the day the point of all this is to underscore what Kahan found—that judges are capable of combatting the risk of alternative facts and cognitive bias—and to stress the need to actualize that potential. We need to build the deference doctrines around that judicial capacity for objectiveness: by instructing courts to fact check as part of their constitutional doctrine, and then by awarding deference based on the level of procedure used (both when debating deferring to a legislature and deciding whether an appellate court should defer to a trial court).

CONCLUSION

There is a new epidemic in our culture of looking to friends for facts, only accepting news sanctioned by sympathetic sources, and distancing oneself from anyone who holds a contrary view. Judges live in this same culture, and they are surrounded by evidence put forth by lawyers who also breathe it in daily. The scary bottom line is that the “my team-your team” mentality that comes from alternative facts is a contagious disease and the law is not immune to it. The time has come

findings. He engaged in much of the nitty gritty fact-checking work that I argue is now necessary in our federal courts. He uncovered that one of plaintiff’s witnesses used outdated data to reach a conclusion about modern conditions, *id.* at 365, spotted that plaintiff’s witnesses interviewed out-of-state residents on their knowledge of voter ID exceptions but used that information to draw conclusions about minority North Carolina voters, *id.* at 373, and he further observed that there is considerable uncertainty by experts on whether early voting actually improves turnout by minority voters. *Id.* at 513. The district court ultimately upheld the law, concluding that there was insufficient evidence of intentional race discrimination in it. *Id.* at 529–30.

The Fourth Circuit reversed. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016). The appellate court “commend[ed]” the trial court for its “thoroughness,” but ultimately held that the district court clearly erred in its “consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis Any individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context.” *Id.* at 214, 233. The Fourth Circuit emphasized the procedural quirkiness in how this law was enacted (amended quickly by the legislature after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)) as well as the history of racial discrimination that has plagued North Carolina politics for a long time. *McCrory*, 831 F.3d at 223, 227. Under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), therefore, the Court found intentional race discrimination. *Id.* at 233.

Evaluating the fact-checking in this case is complicated. It seems the district court correctly spotted significant weaknesses in the plaintiff’s case—and thus, on my argument, deserves deference for doing so—but it also seems that the Fourth Circuit correctly took a bigger-picture view. This case may be an example of both levels of court doing what they do best. The lower courts can spot the alternative facts, but the appellate courts are there as a backstop in case the focus on the faulty facts leads to a problem in application of the law.

to arm our courts with doctrines that allow them to guard against alternative facts in constitutional cases before law joins the ranks of a “post-truth” discipline.