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# The Precarious Art of Classifying Facts

Allison Orr Larsen

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# THE PRECARIOUS ART OF CLASSIFYING FACTS

ALLISON ORR LARSEN†

In their terrific new article, *Fact Stripping*, Joseph Blocher and Brandon Garrett bring formidable expertise from their respective fields to tackle the inscrutable puzzle of appellate fact review.[1] As they explain, Constitutional law is inevitably steeped in questions of facts.[2] Examples are abundant: the recent Free Exercise case about whether football players felt coerced to participate in prayer turned on facts about what the coach actually said and where he said it;[3] the fate of a California law banning violent video game sales to kids depended on empirical data about juvenile brain development;[4] the challenge to same-sex marriage bans that ultimately led to *Obergefell v. Hodges*[5] started with a trial in Michigan where a sociologist testified that children of same sex couples were disproportionally likely to face "bad life outcomes."[6]



† Alfred Wilson & Mary I.W. Lee Professor of Law, William & Mary Law School. I thank Caroline Olsen for excellent research assistance, and Lydia Culp for terrific editing.

1. *See generally* Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023) (arguing that "Congress can . . . require Supreme Court Justices and appellate judges to view the factual record with some level of deference").

2. *See id.* at 3–4 (noting how "judges make constitutional law based on facts").

3. *Compare* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2430 (2022) (discussing the lack of "evidence that students felt pressured to participate" in Kennedy's "quiet, postgame prayers"), *with id.* at 2434 (Sotomayor, J., dissenting) ("To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts.").

4. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 850–56 (2011) (Breyer, J., dissenting) (highlighting the various studies about video games that the Court considered).

5. Obergefell v. Hodges, 576 U.S. 644 (2015).

6. *See* Blocher & Garrett, *supra* note 1, at 8–9 (explaining the role of the sociological study in DeBoer v. Snyder, 772 F.3d 388, 426–27 (6th Cir. 2014) (Daughtrey, J., dissenting), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015)).

Who gets to make the ultimate decision on these important factual questions? Amazingly, the answer to that question is far from clear. In the words of Garrett and Blocher, the typical choice involves a question of deference between the judicial "umpire" (the trial court) or the "instant replay review" (the appellate court).[7] As Blocher and Garrett persuasively argue, there is another option: Congress.[8] Congressional intervention in setting deference standards for fact-finding (what they call "fact-stripping") is an alternative with precedent—think habeas claims—and one with much to be desired over the status quo.[9] Blocher and Garrett do a slam-dunk job establishing both the wisdom and the Constitutional power for Congress to do this.

Their important article does even more than this, however. By wading into these murky waters, Blocher and Garrett have unearthed a deep foundational problem concerning the review of facts in constitutional adjudication: constitutional facts are in an identity crisis. Claims with very similar features are sometimes labeled "argument" and sometimes labeled "fact;"[10] and then they get further sub-divided into facts that are subject to the rules of evidence and facts that do not. The result is an absolute mess, and a mess that leaves room for serious manipulation.

In this short reply I will add to Blocher and Garrett's illuminating work by exploring a foundational confusion their article exposes. I will first explain why classifying facts as either suitable for trial or not is a very fraught endeavor; I will then argue that this difficulty allows for significant manipulation and the risk of unprincipled application. Finally, I will nod to prior work and forecast future work where I explore re-thinking the labels we currently use altogether.

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7. Blocher & Garrett, *supra* note 1, at 5.

8. *See id.* at 12 ("The central argument of this Article is that there is another approach to addressing how the Supreme Court, and appellate courts more generally, review the factual record: Congress can . . . shape the deference that appellate courts give to lower court factfinding. This is what we call *fact stripping*.").

9. *See id.* at 32–34 (analyzing the Court's fact-finding role in § 1983 cases).

10. For an example of a case where we aren't even clear whether the controversy is a factual one, look no further than the Supreme Court's recent affirmative action case, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023). Justice Sotomayor says the case turned on "dozens of fact witnesses, expert testimony, . . . documentary evidence . . . [and] detailed findings of fact," *id.* at 2240 (Sotomayor, J., dissenting), while Justice Gorsuch dismisses all this as just "arguments." *Id.* at 2215 n.4 (Gorsuch, J., concurring) ("I do not purport to find facts about [race-neutral tools]; all I do here is recount what SFFA has argued every step of the way.").

## I. CLASSIFYING THESE FACTS IS HARD AND CONSEQUENTIAL

Blocher and Garrett take us on a tour of the greatest hits in terms of labels for these sorts of claims: "constitutional fact[s],"[11] "social facts,"[12] "doctrinal facts,"[13] "mixed questions of law and fact,"[14] and the label I love to hate the most, "legislative facts."[15] All of these labels are trying to accomplish the same thing: to sort the "law-like" claims that can be found effectively by an appellate tribunal from the claims that feel like they ought to go to a jury or be the subject of expert evidence at trial.

Of all the labels, Kenneth Culp Davis's two phrases (coined in 1942) are the industry standard here: legislative fact and adjudicative fact.[16] A "legislative fact" gets its name not because it was found by a legislature but because it is the sort of claim that might inform a legislative judgment.[17] You can think of these as facts about the way the world works. Adjudicative facts, by contrast, are what I have called in the past "whodunit" facts—they are claims about what the specific parties did and under what circumstances.[18] Kenji Yoshino helpfully illustrates the distinction with examples, writing:

> An adjudicative fact might provide the answer to whether a driver exceeded the speed limit, whether a signature was forged, or whether a person read a contract before signing it. Cognate legislative facts might clarify whether underage drivers are more likely to speed,

11. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230–31 (1985).

12. *See* Caitlin Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1197 (2013).

13. *See generally* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008) (describing doctrinal facts as instruments to interpret the Constitution).

14. Blocher & Garrett, *supra* note 1, at 29.

15. *See id.* at 13.

16. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

17. *See id.* at 403–04 (referencing Supreme Court opinions authored by Justice Brandeis in which the Justice conducted his own research, gathering facts from committee reports and other legislative sources).

18. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1255 (2012) ("Many of the Supreme Court's most significant decisions turn on questions of fact. These facts are not of the 'whodunit' variety.").

> whether forged signatures are easy to detect, or whether people generally sign standardized contracts without reading them.[19]

But distinguishing legislative facts from adjudicative facts is much easier said than done. Consider a pair of high-profile examples.

First, *Glossip v. Gross*[20] was a case brought by a group of death row inmates challenging Oklahoma's lethal injection protocol as unconstitutional cruel and unusual punishment.[21] The plaintiffs claimed that midazolam, the anesthetizing first drug, would not last long enough, and an inmate, paralyzed by the second drug, would be unable to communicate the extraordinary pain caused by the third drug.[22] There was a trial on this question with expert pharmacology testimony and a finding by the district court that midazolam lasted long enough to prevent cruel and unusual pain.[23]

What is the right "label" for the assertion that midazolam will last long enough to prevent pain in lethal injection? It is not a question of law by our usual definitions; it is a claim that can be tested as either true or false and no amount of statutory or Constitutional interpretation will resolve the question.[24] Is it a legislative fact because it is about the way drugs work generally? Or is it an adjudicative fact because it is about one particular drug affecting these particular people? In *Glossip*, Justice Alito applied "clear error" review,[25] presumably opting for an adjudicative fact—the sort of fact that deserves deference to the trial judge. Writing for the majority, he stressed that an appellate judge is not entitled to "overturn a finding 'simply because [he is] convinced that [he] would have decided the case differently.'"[26]

Now, compare Justice Alito's position in *Glossip* to his position on the facts underlying the same-sex marriage litigation. In *Hollingsworth v. Perry*[27] (the marriage equality litigation coming out of California in

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

20. Glossip v. Gross, 576 U.S. 863 (2015).

21. *Id.* at 867.

22. *See id.* at 885.

23. *See id.* at 884–85.

24. The law versus fact debate is far too difficult to enter here, but for thoughts on my working definition of a fact, see Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 67–73 (2013).

25. *See Glossip*, 576 U.S. at 881.

26. *Id.* (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)).

27. Hollingsworth v. Perry, 570 U.S. 693 (2013).

2008), the district court had made several "findings of fact" on the origin of marriage and the effect same-sex marriage would have on "opposite-sex marriage."[28] This time, Justice Alito was not convinced that these factual findings should get deference at all.[29] He essentially declared that "it would be absurd for an appellate court to accord clear error deference to a district court's finding of legislative facts."[30] And he did not mince words, stating:

> [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.[31]

Consider the similarities here. Both the lethal injection facts (about the drug's endurance in anesthetizing) and the same sex marriage facts (about the effect on life outcomes for children raised by gay parents) went to a trial; both were the subject of expert testimony; both affect the litigants in front of the court and also future litigants. They are both the sort of facts that would inform legislation. The conflicting policy considerations are also the same. Do we want seriatim trials on each of these issues? Do we want to defer to one lone trial judge in one lone district? Do we want appellate judges to pick and choose evidence from amicus briefs or online research? But what about the fact that appellate courts get superior briefing and have more time? If you are left scratching your head, you are not alone.

It is tempting to conclude that affixing the label and the corresponding deference standard turns on whether a judge *wants* to apply deference, meaning whether he or she agrees with the decision below. To return to Blocher and Garrett's sports analogy, it is like using instant replay (or VAR for soccer fans) only when you want to help the team that was called offsides and not using it when you don't.

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28. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 936 (N.D. Ca. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

29. *Perry* was decided on the same day as *Windsor*, although the former involved a California law, and the latter involved a federal one. United States v. Windsor, 570 U.S. 744 (2013). Justice Alito dissented in *Windsor* but used that opportunity to discuss the trial in California. *See id.* at 815 (Alito, J., dissenting); *see also* Yoshino, *supra* note 19, at 261–62.

30. *See* Yoshino, *supra* note 19, at 260 (discussing *Perry* and *Windsor*).

31. *Windsor*, 570 U.S. at 815–16 n.7 (Alito, J., dissenting) (citations omitted).

## II. THIS IDENTITY CRISIS OPENS DOORS FOR OPPORTUNISTIC BEHAVIOR

This cynicism is exacerbated because good lawyers know how to take advantage of slippery labels. Consider, for example, a Second Amendment case that went to trial in Oregon this summer—a case challenging the state's ban on high-capacity magazines.[32] Central to the claim was the commonality and history of these magazines by ordinary citizens—facts the court must consider after the Supreme Court's decision in *Bruen*.[33]

The challengers in Oregon insisted the commonality and history of high-capacity magazines were legislative facts and thus not subject to the rules of evidence.[34] This would be a decision of high consequence; it means these claims can be pressed to the court through law review articles or even unpublished studies on SSRN or blogs, and no expert needs to be called to court or cross-examined.[35] At trial, the plaintiffs insisted: "[W]hen it comes to legislative facts . . . the Court can decide for itself . . . . [F]or these types of facts the rules of evidence are not the right rubric to be applying . . ."[36] This argument "flummoxed" the trial judge (her words), who said:

> [W]here we have disputed facts, [they must be] presented through evidentiary principles. That's the only way I can determine if the information is reliable and assess credibility. Not just through throwing law review articles at me that might be, for example, written by somebody who's funded by, you know, a pro gun control group or pro Second Amendment group.[37]

Clearly exasperated, she explained, "[Y]ou're trying to fit, I think, a round peg in a square hole."[38]

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32. Or. Firearms Fed'n v. Kotek, No. 2:22-cv-01815-IM, 2023 WL 4541027, at *1 (D. Or. July 14, 2023).

33. *See id.* at *5 ("[A] court must determine whether the weapon . . . is 'in common use today for self-defense' . . . then affirmatively prove that the challenged regulation is consistent with the historical tradition of firearm regulation."); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

34. *See Or. Firearms Fed'n*, 2023 WL 4541027, at *3 n.2.

35. *See* Larsen, *supra* note 18, at 1267 n.57 (citing Fed. R. Evid. 201(a) advisory committee's note).

36. Transcript of Proceedings of June 2, 2023 at 44–46, Or. Firearms Fed'n. v. Kotek, No. 2:22-CV-01815-IM, 2023 WL 4541027 (D. Or. July 14, 2023) (on file with the *Duke Law Journal*).

37. *Id.* at 42–43.

38. *See id.* at 45.

One cannot help but feel sympathetic to this trial judge who is attempting to apply a distinction that is hopelessly murky, with the knowledge that any choice she makes can be undone on appeal. Reading her opinion, you can feel the frustration when she notes that appellate courts and trial courts just see facts differently.[39] There is a lot of wisdom to this simple observation: appellate courts see legislative facts everywhere while trial courts see adjudicative facts everywhere. And that is the identity crisis in a nutshell: the act of classifying the fact happens after the consequences of that classification are already spelled out. It is like deciding whether instant replay is appropriate while in the heat of the game and only after the play is under review. To continue the analogy, instead of every goal getting reviewed, we let the referee decide which goals to review after she knows who scores.

What to do about all this? Particularly as constitutional tests increasingly require historical analysis, this identity crisis for generalized factual claims is vexing the lower courts. That is my subject for another day. It may be time, as I have said before, to rethink the old legislative fact and adjudicative fact labels altogether.[40] Doing this would require a more nuanced approach that focuses not on whether the factual question is generalized or specific, but instead asking whether the question is of the sort that would benefit from adversarial testing at trial.[41] One thing is for sure: Such an entrenched identity crisis makes Blocher and Garrett's proposal even more inviting—it seems almost impossible for courts to figure this out on their own.

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39. *See Or. Firearms Fed'n*, 2023 WL 4541027, at *3 n.2 ("While legislative facts are often considered by appellate courts deciding Second Amendment challenges, this Court is a trial court. It is the function of the trial court to receive evidence and testimony that has been tested through the adversarial process." (citations omitted)).

40. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 234 (2018) ("We are thus driving an old distinction through new and rougher terrain. It is time for an update."). Although beyond the scope of this short response, I do think there are other ways to sort the facts that deserve trial and deference from the ones that do not. *Id.* at 231–40.

41. *Id.*