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FACT-FINDING IN CONSTITUTIONAL CASES

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I. INTRODUCTION

* Professor of Law, University of California, Hastings College of the Law. I would like to thank the many people who read and commented on various drafts of this article. Of particular assistance were the faculty workshops at which I presented the main themes developed here. I am deeply indebted to the participants of the workshops at Arizona State University, Boalt Hall, Washington & Lee University, University of California, Irvine (Social Ecology), University of Texas, and University of California, San Diego (Psychology). Many individuals as well provided invaluable feedback and were very generous with ideas and suggestions. I would like to thank, in particular, John Monahan, Michael Saks, Chris Slobogin, Scott Sundby, John Robertson, and Wendy Wagner. I also want to thank my wife Lisa, who's sharp editorial eye improved the quality of my writing and saved me from many embarrassing errors. Finally, I want to extend an especially heartfelt thank you to Austin Sarat and his very talented colleagues at Amherst College, both for inviting me to participate in this speaker series and for their insightful comments and enthusiastic response to my talk.

The empirical world informs the Constitution's very meaning as well as its application to daily affairs. From its earliest opinions to today, the Supreme Court has consistently relied on facts to inform its constitutional jurisprudence.[1] Yet the Court has never developed an intelligible constitutional fact jurisprudence. No rules apply to courts' reception of constitutional fact-based evidence. Constitutional facts come to courts' attention through expert witnesses, legislative records, and briefs. Juries occasionally decide them and at other times judges do so. There has never been an attempt to set procedural rules for constitutional fact-finding. Burdens of proof are left, at best, implicit, and are usually overlooked completely. Moreover, no general rules apply concerning the standard of appellate review of constitutional facts. While a few scholars have weighed in on some of the issues presented by constitutional facts,[2] the subject

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[1] *See* David L. Faigman, Laboratory of Justice: The Supreme Court's 200-Year Struggle to Integrate Science and the Law (New York: Henry Holt (Times Books), 2004).

[2] The corpus of scholarship on the immense subject of constitutional fact-finding is relatively small, though the subject has interested some better known scholars. *See* Kenneth Karst, "Legislative Facts in Constitutional Litigation," Sup. Ct. Rev.(1960): 75; Laurence H. Tribe, "Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve," HASTINGS L.J. 36 (1984): 155; Henry P. Monaghan, "Constitutional Fact Review," Colum. L. Rev. 85 (1985): 229; *see also* Rachel N. Pine, "Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights," U. Pa. L. Rev.136 (1988): 655; Dean M. Hashimoto, "Science as Mythology in Constitutional Law," Or. L. Rev. 76 (1997): 111; Adam Hoffman,

remains adrift in an epistemological fog. This article seeks to give some direction to the subject of fact-finding in constitutional cases.

Note, "Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts," Duke L.J. 50 (2001): 1427; Frank R. Strong, "The Persistent Doctrine of "'Constitutional Fact,'" N.C. L. Rev. 46 (1968); Frank R. Strong, "Dilemma Aspects of the Doctrine of 'Constitutional Fact,'" N.C. L. Rev. 47 (1969): 311; Jeffrey M. Shaman, Constitutional Fact: The Perception of Reality by the Supreme Court, U. FLA. L. REV. 35 (1983): 236; Ann Woolhandler, "Rethinking the Judicial Reception of Legislative Facts," VAND. L. REV. 41 (1988): 111.

The theme of this volume is "How does the law know?," which raises the corollary issue of how the law "finds" and "constructs" facts. Fact-finding is one of the great silences in constitutional law. However large a role facts may play in actual constitutional cases, they have received little attention in constitutional jurisprudence. In attempting to redress this state of affairs, I can only offer a modest start here, for the task of establishing a coherent, much less a comprehensive, jurisprudence of constitutional-facts is well beyond the pages accorded me in this volume.[3] Instead, I seek to accomplish three principal tasks. In this first section I provide a general introduction to the subject of constitutional facts. In Section II, I set forth a proposed taxonomy of constitutional facts that furnishes the foundation on which a coherent jurisprudence of constitutional facts might be built. In Section III, partly to demonstrate the solidity of the foundation constructed in the previous section, I address one of the most intractable issues of constitutional fact-finding. Specifically, when, if ever, can a lower court distinguish (and thereby decline to follow) higher court precedent on the basis that the facts supporting that precedent have changed or that our knowledge of them has changed?

Although it is a matter of some controversy, fact-finding is an essential component of both constitutional interpretation and constitutional adjudication. Historically, however, courts and commentators have sought to avoid this essential truth – and for good reason. Facts are highly indeterminate and they inevitably destabilize the sought-after stability of fundamental constitutional values. For instance, many commentators were highly critical of the Supreme Court's seeming reliance on social science research in *Brown v. Board of Education*.[4] In concluding that segregated schools were "inherently unequal," the *Brown* Court cited the work

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[3] Given the range of issues raised by the topic of constitutional facts and the necessary page limitations imposed on participants in this volume, this article is only an initial exploration of the subject. I consider this general topic more comprehensively in "A Unified Theory of Constitutional Facts" [forthcoming, 2006].

[4] 347 U.S. 433 (1954). *See, e.g.*, Edmund Cahn, "Jurisprudence," N.Y.U. L. REV. 30 (1955): 150, 157-58 ("I would not have the constitutional rights of Negroes – or of other Americans – rest on any such flimsy foundation as some of the scientific demonstrations in these records.").

of Kenneth Clark and others that indicated that blacks suffered psychological harm as a result of segregation.[5] Many prominent commentators challenged the Court's use of science on the basis either that the findings were obvious or largely irrelevant. Professor Ronald Dworkin, for example, beginning with a premise from another scholar, argued both of these together:

> "We don't need evidence for the proposition that segregation is an insult to the Black community – we know it; we know it the way we know that a cold causes snuffles." It is not that we don't need to know it nor that there isn't something there to know. There is a fact of the matter, namely that segregation is an insult, but we need no evidence for that fact – we just know it. It's an interpretive fact.[6]

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[5] *Brown*, 347 U.S. at 494 n.11.

[6] Ronald Dworkin, "Social Sciences and Constitutional Rights – The Consequences of Uncertainty," J. L. & Educ. 6 (1977): 3, 5 (*quoting* Cahn, Jurisprudence, 157-58) (emphasis added).

Dworkin's term "interpretive fact" is a component of a legal theory he calls "creative" or "constructive" interpretation.[7] He analogizes constitutional interpretation to the writing of the latest chapter of a chain novel.[8] The interpreter fits his or her interpretations into the prior

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[7] A second component of Dworkin's notion of interpretive facts is his belief that the social sciences are not sufficiently valid to support constitutional rulings. For example, Dworkin argues that "[w]hile in physics it is now thought to be an unsound judgment that rests merely on correlation between observable events unsupported by some notion of the mechanics that translate the cause to the effect, social science is only able to provide correlations without the mechanics." *Id*. Dworkin's criticism displays an unhealthy amount of "physics envy." Today, in fact, many scientific disciplines operate in a methodological world that is essentially based on correlational designs. Indeed, many applied sciences, such as epidemiology, meteorology, cosmology, and ecology, are largely unable to describe the sort of "mechanics" that Dworkin longs for. Dworkin's model of science is more Newtonian than Einsteinian. While I agree that very often social science research is not valid, it sometimes is, and there is no inherent reason why it cannot be conducted in a rigorous manner. *See* David L. Faigman, "To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy," Emory L.J. 38 (1989): 1005.

[8] Ronald Dworkin, Law's Empire (Cambridge, Mass.: Harvard Univ. Press, 1986). *See also* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 540-46 (1982). For an analysis of the chain novel metaphor, see Stanley Fish, "'Working on the Chain Gang'

chapters and, at the same time, extends the overall work in the "best possible" direction. The theory contemplates first that the interpreter identify the "fit" between the interpretive history and the practice being interpreted and, second, that the interpreter impose a "purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[9] The difficulty in Dworkin's formulation, for present purposes, lies in understanding the role of science in this legal-interpretive discourse. Dworkin distinguishes scientific interpretation from legal interpretation, for in the former the data can be said to "speak to" the scientist only metaphorically. Still, when incorporating scientific interpretations into legal interpretations, the proper fit must be ascertained, and the value component inherent in the idea of purpose returns to the equation. But how should scientific interpretation be combined with legal interpretation? Although Dworkin has yet to address this specific issue, his chain of logic can be considered in regard to its application to the matter at hand.

If, as Dworkin apparently accepts, "there is a fact of the matter," even such a fact as the insult attributable to segregation, when is that "real-world" fact relevant and when is its interpretive cousin relevant? If all constitutional facts are repackaged under Dworkin's definition as merely interpretive facts, this solves one problem by creating another one. It solves the problem inherent in basing constitutional doctrine on indeterminate and changeable factual premises. Accordingly, in the *Brown* example, it would not matter what quantum of evidence might later be adduced to demonstrate the salutary attributes of state-sponsored segregation. If the fact is interpretive, no amount of data could ever disprove the "fact" that segregation is insulting. It is so, like other constitutional matters, because the Court says so. The problem this fact-finding by fiat creates, however, is the almost certain erosion of the legitimacy of Court pronouncements. Despite the elegance of Dworkin's efforts, the empirical world still exists outside the Court's dictates. Facts are what they are, and the Court's insistence otherwise will

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Interpretation in Law and Literature," Tex. L. Rev. 60 (1982): 551.

[9] Dworkin (1986), Law's Empire, 52.

sometimes make it appear, at best, didactic and, at worst, dogmatic.

Dworkin's approach relies on an expansive notion of "facts." In his view, facts are elastic enough to be able to serve the normative needs of the Constitution. But the question is, can we make facts mean whatever we want them to mean? Dworkin seems to vacillate between describing constitutional facts as a function of normative judgment and believing them to be a matter of common sense experience. But the former – "normative facts" – are reminiscent of the practices of the Sixteenth Century Catholic Church, and the latter resemble a caricatured version of the Sixteenth Century inductive methods of Francis Bacon. We may know, as Dworkin argues we should know "interpretively," "that a cold causes snuffles." But surely, if the "interpretive" judgment is accurate, valid scientific studies should corroborate that judgment. Science is not irrelevant for demonstrating what everyone believes to be the case, though courts might wish to relegate studies corroborating the relationship between a cold and snuffles to a footnote. And some day, to our surprise, it might turn out that a malady only associated with colds causes snuffles, and that we were wrong the whole time. Certainly, researchers should not be discouraged from studying the question on the basis that we know it to be true because we know it to be true.

In practice, of course, so-called "interpretive facts" play a steadying role. This utility is their virtue. Seen as an interpretive fact, the deleterious effects of segregation are not open to reexamination. An interpretive fact thus corresponds neatly with traditional notions of constitutional doctrine, in that neither need change except by dictate of the Court. Real facts, in contrast, are mercurial. Given their proclivity for change, either because our knowledge of the facts improves over time or the facts themselves change, they provide, depending on your view, a healthily evolving or a disturbingly unsteady foundation for constitutional doctrine. Described as a factual matter, supported by the proffered social science evidence, therefore, the holding in *Brown* that blacks are disadvantaged by segregation would appear vulnerable to refutation by well-designed studies that indicate that blacks are not disadvantaged or, even, are better off with this practice. This is probably not an occurrence to which the Court gave much thought in writing the *Brown* opinion. Almost certainly, the justices would have agreed with the gist of

Dworkin's argument, that changing facts regarding segregation's insult did not undermine the continuing validity of *Brown*. This proposition, however, was eventually tested in a courtroom in Savannah-Chatham, Georgia.

In 1963, in *Stell v. Savannah-Chatham*,[10] the county defended a desegregation suit on the basis that black children in that locale, unlike in the cities involved in the *Brown* litigation, were not psychologically harmed by attending segregated schools. The plaintiffs argued that the district court had no discretion to reopen this factual question. According to the plaintiffs, it had been conclusively determined by the Supreme Court in *Brown* that segregation harmed black children. The trial court in *Stell* disagreed. The court explained that the lower court in *Brown* had found that "'segregation with the sanction of law ... has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'"[11] The judge stated, "[t]hese are facts, not law," explaining:

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[10] 220 F.Supp. 667 (S.D.Ga. 1963).

[11] *Id*. at 677-78.

> Whether Negroes in Kansas believed that separate schooling denoted inferiority, whether a sense of inferiority affected their motivation to learn was increased or diminished by segregation was a question requiring evidence for decision. That was as much a subject for scientific inquiry as the braking distance required to stop a two-ton truck moving at ten miles an hour on dry concrete.[12]

Based on the expert testimony introduced in the case, the trial court concluded that "prejudices, whether ethnic, religious or racial, increase rather than decrease in proportion to the degree of non-voluntary contact between separately identifiable groups."[13] The court said that this "is a psychological phenomenon which was noted in the time of Periclean Greece."[14] Moreover, modern "studies made of actual intermixing of groups in classrooms confirm the predicted result that an increase in cross-group contacts increases pre-existing racial hostility rather than ameliorates it."[15]

On appeal, the Fifth Circuit summarily reversed the *Stell* district court. The appellate court admonished that "no inferior federal court may refrain from acting as required by [the *Brown*] decision even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law."[16] Moreover, the circuit court discounted the importance of the social

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12 *Id*. at 678.

13 *Id*. at 674.

14 *Id*.

15 *Id.*

16 333 F.2d 55, 61 (5th Cir. 1964).

science evidence for the *Brown* result. "We do not read the major premise of the decision of the Supreme Court in the first *Brown* case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal."[17]

[17] *Id.*

The Fifth Circuit effectively understood *Brown* "interpretively," in that the facts set forth in 1954 had become established law a decade later.[18] This creative approach to constitutional facts can be found in many cases.[19] Typically, the Court's first entry into a particular constitutional arena involves an ostensibly serious evaluation of the relevant factual underpinnings of the eventual holding. Subsequently, however, the precedent hardens into established constitutional doctrine and, as a consequence, the factual premises petrify.[20] If the

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[18] The latter argument – that the major premise of *Brown* depended on the normative proposition that segregated schools were "inherently unequal" – effectively reads the factual dispute out of the decision. This strategy boils down to a later court saying that despite an earlier opinion's stated reliance on a factual proposition, it was really based on a normative judgment. For all intents and purposes, this is the essence of Dworkin's notion of interpretive facts. The Fifth Circuit's first argument – that lower courts cannot reconsider earlier holdings even if the fact on which they were based have changed, raises a host of other issues. These issues are the principal subject of Section III, *infra*.

[19] *See generally*, David L. Faigman, "'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation," 139 U. Pa. L. Rev. 541 (1991).

[20] *See, e.g.*, Akron v. Akron Center for Reproductive Health, 462 U.S. 458 (1983) (Despite changes in medical technology that permitted abortions in 1983 to be performed more

relevant facts were not "interpretive" at the start, they become so once the case has entered the lexicon of settled law.

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safely than childbirth through at least week 16, the Court held that "[t]he *Roe* trimester standard ... continues to provide a reasonable legal framework for limiting a State's authority to regulate abortions."); United States v. Salerno, 481 U.S. 739, 751 (1987) ("'[T]here is nothing inherently unattainable about a prediction of future criminal conduct.'") (*quoting* Schall v. Martin, 467 U.S. 253, 276 (1984)).

Treating facts interpretively solves the problem of having changeable constitutional standards due to a changing understanding of the empirical world. The factual premises are "interpreted" in conformance with the constitutional outcome, notwithstanding evidence to the contrary. But this stability comes at a cost. A rule that has outlived its reasons for being is correctly seen as illegitimate. As various justices have lamented, advancing technology threatens the stability of established precedent in a multitude of constitutional contexts.[21] If, for example, the right of reproductive choice is based on the medical concept of viability – the time after which a fetus is likely to survive outside the womb – the Court's failure to follow advancing technology will undermine the cogency of the precedent. The rule in *Roe v. Wade*[22] provides that states cannot prohibit abortions pre-viability, a point-in-time of around 24-28 weeks in 1973 and closer to 22-24 weeks today. However unlikely it might appear to be, a technological revolution in this area could move viability considerably closer to conception.[23] If a woman's basic right of choice is truly based on the values associated with viability, then the right should change as technology changes. But such a changeable constitutional jurisprudence could itself be derided as illegitimate.[24] Dworkin's interpretive fact approach ingeniously resolves this dilemma, since interpretive facts are as solid as the doctrine demands or as flexible as they need to be in order to allow the doctrine to evolve. Under this approach, because

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[21] *See, e.g.*, Ashcroft v. ACLU, 124 S.Ct. 2783 (2004).

[22] 410 U.S. 113 (1973).

[23] *See generally* Laurence H. Tribe, Abortion (1990).

[24] *See* Washington v. Glucksberg, 521 U.S. 702, 754 (1997) (Souter, J., concurring) (discussing need to avoid establishing constitutional standards on factual premises that might change as more research is done).

constitutional facts are "interpreted" and not "found," justices can employ them with little fear that future researchers might call into question the premises of their handiwork.

Yet, the world does not always cooperate with the wishes of the justices or constitutional scholars. At least on occasion, scientists will demonstrate the errors in the Court's factual premises with enough certainty to engender doubt over the soundness of the Court's logic. Indeed, this can be expected to occur with increasing frequency as basic scientific methods improve or the Court finds facts that are amenable to more definitive proof. Opinions that employ facts interpretively are more reminiscent of holy writ than reasoned and informed legal judgment. But there is no inherent contradiction between enlightened factual investigation and a cogent constitutional jurisprudence. Constitutional doctrine should be informed by contemporary understandings of the empirical world. By necessity, such an approach would take into account the dynamic nature of fact-finding and science, albeit in combination with the paramount need for some measure of steadiness in constitutional doctrine.

II. THE CONFIGURATION OF CONSTITUTIONAL FACTS

Any practical jurisprudence of constitutional fact-finding must have at its base a workable correspondence between the outside world and the task assumed by constitutional lawmakers. The Constitution was intended, and is generally considered, to be an eminently pragmatic document, so legal rules and decisions springing from it ought to be informed by the best evidence available. Facts, whether they are the function of decades of Nobel-level research or the anecdotal observations of a police officer, come to the legal system in a wide variety of ways. Constitutional facts arrive in court through expert testimony at trial, congressional (or other legislative) hearing testimony, *amicus* briefs, a court's own research, and many others. There would be little practical benefit in defining a comprehensive and rigid scheme for the reception of constitutional facts. A more salutary approach is to determine who within the judiciary will be the principal decision-makers, who the ultimate decision-makers, and, most

importantly, the dynamic between them.[25] This dynamic, in turn, depends upon the kinds of factual matters that the Constitution makes relevant. Whether the empirical consequences of segregation by race are relevant, for instance, is a matter of constitutional interpretation. Moreover, whether the focus is on the consequences at a particular school in a particular city or on those effects more generally, is also a matter of constitutional interpretation. In this section, I describe a framework by which the full range of constitutional facts can be classified. Only once they have been sorted can an intelligible jurisprudence be applied to them.

A. A Taxonomy of Constitutional Facts

In a landmark article, Professor Kenneth Culp Davis identified two basic kinds of facts having evidentiary significance.[26] The first he termed "legislative facts," and the second he called "adjudicative facts." According to Davis, legislative facts are those facts that have relevance to legal reasoning and the fashioning of legal rules.[27] In a later text, Davis explained, "[a]djudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent.... Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."[28] Judges typically decide questions of legislative fact. Adjudicative facts, on the other hand, because they are facts particular to the dispute,[29] are usually within the province of the trier of fact (the jury

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[25] To some extent, of course, determining who must decide a constitutional fact will determine how evidence of that fact is received. For example, if a jury is the principal decision-maker, evidence regarding constitutional facts will rarely, if ever, be introduced through *amicus* briefs or independent research.

[26] Kenneth Culp Davis, "An Approach to Problems of Evidence in the Administrative Process," Harv. L. Rev. 55 (1942): 364, 402-03 .

[27] *See* FED. R. EVID. 201(a) advisory committee's note ("Legislative facts ... are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.").

[28] Kenneth Culp Davis, Administrative Law Text, § 7.03, at 160 (3d ed. 1972).

[29] *See id.*; *see also* Davis, An Approach to Problems of Evidence, 402 (noting that the rules of evidence for finding facts that form the basis for creation of law and policy should

or, if there is no jury, the judge) to decide.[30]

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differ from the rules for finding facts specific to parties in a particular case).

[30] Professors John Monahan and Laurens Walker expanded upon the Davis dichotomy by adding a third category that they call "social frameworks." Laurens Walker and John Monahan, "Social Frameworks: A New Use of Social Science in Law," Va. L. Rev. 73 (1987): 559, 563-570. The term "social framework" refers to the use of general conclusions from social science research in determining factual issues in specific cases. *Id.* at 570. A social

framework consists of facts that in part transcend the particular dispute and in part pertain to that dispute. For example, a doctor might be called upon to testify that cigarette smoking has been linked to lung cancer and also be asked to testify that the plaintiff's lung cancer was caused by smoking cigarettes. The former fact is similar to Davis' legislative fact category, in that it transcends particular cases, so that the fact question should have the same answer in every case in which it is asked. In contrast, the latter fact, whether the plaintiff's lung cancer is attributable to smoking, is akin to Davis' adjudicative fact category. Monahan and Walker argue that the judge should decide and instruct the trier of fact regarding facts that transcend the litigation, and the jury should hear evidence on the facts peculiar to the dispute. *Id.* at 592-96.

The social framework concept principally has evidentiary significance and generally falls within the constitutional-adjudicative category in my analysis. The Monahan and Walker thesis initiates a significant debate over the role of the judge versus that of the jury in finding adjudicative facts. Monahan and Walker would give the judge responsibility for finding all facts that transcend the litigation, whether legislative or adjudicative. In contrast, under both Davis' dichotomy and traditional rules of evidence, adjudicative facts of general import are determined by the jury. Thus, for example, the issue whether defendant's substance-X caused the plaintiff's illness-Y would be answered by the jury, even though one part of the question – does substance-X cause illness-Y – is true or false as a general matter and transcends any one piece of litigation. Although Monahan and Walker did not apply their analysis to constitutional cases, it turns out that it works well in that context. At bottom, however, my interest is very different from, and broader than, Monahan and Walker's. They focused on the evidentiary practices that surround the reception of data and the resolution of disputes concerning the meaning of those data. Although these issues do arise in the constitutional cases I discuss, my concern involves how responsibility should be apportioned throughout the governing framework for deciding relevant factual issues under the Constitution. Therefore, while evidentiary issues are central to my enterprise, they comprise just one part. The taxonomy developed here would also be relevant to issues such as the judiciary's obligations vis-a-vis congressional fact-finding, standards of appellate review, and so on.

A key distinguishing feature between legislative and adjudicative facts is the level of decision-making at which the asserted facts are relevant. Whereas legislative facts ordinarily relate to matters that transcend individual disputes and would likely reoccur in different cases involving similar subjects, adjudicative facts ordinarily are peculiar to a particular case.[31] In *McCleskey v. Kemp*,[32] for example, the petitioner claimed that Georgia's capital sentencing scheme discriminated on the basis of the race of the victim. This allegation was based on an extensive and sophisticated study conducted by David Baldus and his colleagues. Among other things, Baldus concluded that, all things being equal, "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[33] This discrimination claim was based on legislative facts, in that it was directed at the Georgia system as a whole and McCleskey did not allege that he personally was a victim of discrimination. As Justice Powell, writing for the Court, pointed out, "[e]ven Professor Baldus does not contend that his statistics prove ... that race was a factor in McCleskey's particular case."[34] Indeed, of great concern for the Court was that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[35] Legislative facts, as their name connotes, typically have broad impact across large

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[31] The reason I say "ordinarily" is that there is a basic ambiguity inherent in Davis' categories. His division of facts into legislative and adjudicative categories is based on how the fact-finder employs the particular fact. If the fact is used to resolve a particular litigation, it is, by definition, "adjudicative." This is so even though the factual issue may transcend a particular dispute, such as whether second-hand smoke causes lung cancer or silicone implants cause autoimmune disorders. Similarly, if a legislature points to a particular case to support its lawmaking – as occurred in the "right-to-die" controversy involving Terri Schiavo in 2005 – this particularized fact is, by definition, "legislative." The scheme I develop in this section for the constitutional arena largely avoids this ambiguity, because the generality or specificity of the factual inquiry operates as a definitional feature of my framework.

[32] 481 U.S. 279 (1987).

[33] *Id*. at 321.

[34] *Id*. at 308.

[35] *Id.* at 314-15.

areas of the law.

How the constitutionally relevant inquiry is described, therefore, as being at either the adjudicative or legislative level, obviously is of great importance. In principle, the Constitution itself establishes what sorts of facts are relevant under its dictates. In other words, the description of the relevant factual inquiry under a particular provision of the Constitution is an interpretive exercise. In the cases leading up to *McCleskey*, for instance, the Court had indicated that substantial evidence of *systemic* discrimination would constitute an Eighth Amendment violation.[36] The relevant facts under this earlier interpretation of the Eighth Amendment, then, were legislative in character. In *McCleskey*, however, the Court stepped away from this precedent. In its new interpretation of the Eighth Amendment, the Court redefined the level of relevant fact-finding. The *McCleskey* Court said that the relevant facts under the Eighth Amendment were case specific, or adjudicative, and held that claims of systemic discrimination were insufficient to sustain a cause of action. Under both the Eighth and Fourteenth Amendments, according to the Court, claimants had to demonstrate individualized discrimination. McCleskey was thus required to show that the jury, prosecutor, or judge had intentionally discriminated against him.

Davis' dichotomy generally describes the kind of fact-finding that occurs in constitutional cases and it has become the established vocabulary for describing the kinds of facts that are relevant to legal discourse.[37] My approach roughly parallels Davis', though the constitutional arena requires refinement of his approach. Davis' legislative fact category may be further distilled in the constitutional context into two subcategories, "constitutional rule-facts"

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[36] *Id*. at 323 (Brennan, J., dissenting) ("A constitutional violation is established if a plaintiff demonstrates a 'pattern of arbitrary and capricious sentencing.'") (*quoting* Gregg v. Georgia, 428 U.S. 195 n.46 (1976)).

[37] In addition to the Monahan and Walker taxonomy of fact, Judge Robert Keeton has suggested the use of the term "premise facts" to describe any facts that support a reasoned decision of law or policy." Robert E. Keeton, "Legislative Facts and Similar Things: Deciding Disputed Premise Facts," Minn. L. Rev. 73 (1988)1, 11.

and "constitutional review-facts."[38] This revision turns out to have special relevance for constructing procedural rules in constitutional cases.[39]

[38] *See* David L. Faigman, "'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation," U. Pa. L. Rev. 139 (1991): 541, 552-54.

[39] *See* Section III, *infra* (discussing different standards for when lower courts should have the authority to reconsider constitutional legislative facts depending on whether they are rule-facts or review-facts).

Constitutional rule-facts are advanced to substantiate a particular interpretation of the Constitution. Constitutional rule-facts join, and sometimes are a component of, the traditional sources of authority – the text, original intent, constitutional structure, precedent, scholarship, and contemporary values – in establishing the *meaning* of the Constitution.[40] Indeed, one of the most common bases for constitutional interpretation, original intent, is almost wholly fact-based. Most debates over original intent resolve down to disagreements over historical facts, such as whether the drafters of the Fourteenth Amendment expected it to invalidate segregated public schools or whether the Free Speech Clause was intended to cover obscenity. In addition, many arguments based on constitutional structure depend either implicitly or explicitly on hypotheses that might be the subject of political science or sociology. John Marshall's assertion in *Marbury v. Madison*,[41] for instance, that legislators are less likely than judges to be bound by a written constitution, is a rule-fact of this sort.[42] Rule-facts, therefore, are employed to determine or justify the development of rules or standards that apply to all similarly situated cases. Constitutional doctrine, of course, is replete with examples of such rules and standards, including tiered-scrutiny in due process and equal protection, the *Miller* test for obscenity, *Brandenburg's* incitement test, *Crawford's* test of testimonial evidence under the Confrontation Clause, and so on. Many of these were based, in part, on empirical arguments. Moreover, virtually all of them establish constitutional inquiries that are answerable only by review-facts or adjudicative-facts.

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[40] *See id.*

[41] 5 U.S. 137 (1803).

[42] *Id*. at 137 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written").

Constitutional review-facts embody the more generally recognized function of legislative fact-finding in constitutional cases. Courts examine constitutional review-facts under the pertinent constitutional rule or standard in order to determine the constitutionality of the state's action. Review-facts transcend particular disputes and thus can recur in identical form in different cases and varying jurisdictions. Under the Commerce Clause, for instance, the applicable standard asks, among other things, whether the federal law "substantially affects interstate commerce."[43] A good example comes from *Gonzales v. Raich*,[44] in which the Court determined whether Congress had the authority under the Commerce Clause to regulate the home production of marijuana. Under the applicable standard, the Court had to consider whether Congress had a rational basis for concluding that home production of marijuana substantially affects price and national market conditions for marijuana.[45] The Court noted, initially, that "at least nine states ... authorize the use of marijuana for medicinal purposes."[46] The question presented, therefore, implicated facts that transcended a particular dispute and thus involved constitutional review-facts. After reviewing the record and Congress' reasons for regulating, the Court concluded that "the regulation is squarely within Congress' commerce power because production of [marijuana] ... has a substantial effect on supply and demand in the national market for that commodity."[47] The Court explained that "[o]ne need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana ... locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance."[48] The Court concluded that "Congress' judgment is not only rational, but 'visible to the naked eye,' under any commonsense appraisal of the probable consequences of such an

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[43] Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).

[44] 125 S.Ct. 2195 (2005).

[45] *Id*. at 2197.

[46] *Id*. at 2198.

[47] *Id*. at 2197.

[48] *Id*. at 2212.

open-ended exemption."[49]

Constitutional rule-facts and constitutional review-facts refer to factual determinations that transcend particular cases and that are relevant to either the formation of a constitutional rule or the application of a rule to similarly occurring cases, respectively. *Constitutional adjudicative-facts*, in contrast, refer to factual determinations that are relevant to the application of constitutional rules in particular cases. For example, whether a police department "intentionally discriminated" against black police officers when it relied on an exam for making promotion decisions on which whites received significantly higher scores is a constitutional adjudicative-fact. Similarly, the likely consequence of Nazis marching through a predominantly Jewish neighborhood in Skokie, Illinois would be a constitutional adjudicative-fact.

Unfortunately, no bright lines mark the boundaries between different kinds of constitutional facts. Because the procedural standards developed below depend on these categorizations, however, ambiguity in this area is a matter of some consequence. More problematic still, uncertainty surrounding categorization arises across the entire spectrum of constitutional facts. The process of determining what facts are constitutionally relevant and what category they fall into must be determined on a case-by-case, or constitutional-provision by constitutional-provision, basis.

B. Classifying Constitutional Facts

[49] *Id*. (*quoting Lopez*, 514 U.S. at 563).

Constitutional rule-facts are marked by their relevance to the formation or justification of constitutional rules or standards. Recognizing a constitutional rule-fact as such often will be fairly straightforward. One of the most famous examples of a constitutional rule-fact comes from the litigation of *Brown v. Board of Education*. The case was first heard during the Court's 1952-53 term. Led by Chief Justice Vinson, a divided Court decided to hold the case over to the following term. The Court issued a series of questions for the parties to answer upon re-argument. Several of these were directed at the historical question whether the drafters of the Fourteenth Amendment had intended to invalidate segregated public schools by guaranteeing the equal protection of the laws.[50] In the opinion, Warren found that the historical materials were "not enough to resolve the problem with which we are faced. At best, they are inconclusive."[51] The historical fact of the drafters' and ratifiers' intentions regarding the scope of the Fourteenth Amendment was thus ostensibly relevant to the meaning it was to be given, though in the end the Court believed that these facts were known with too little certainty to be relied upon. Other authorities would have to be used.

Frequently, however, the line between constitutional rule-facts and constitutional-review facts is indistinct. The more controversial factual issue in *Brown* involved the Court's citation to research indicating the negative effects of segregation on black school children. But was this

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[50] Historians have since discovered that the Court was never particularly interested in the answer to this question, since, even before reargument, a majority supported invalidating segregation on other grounds. *See* Richard Kluger, Simple Justice (New York: Vintage, 1975). But the year delay had monumental consequences. Chief Justice Vinson died that summer and was replaced by Earl Warren. Chief Justice Warren orchestrated a unanimous opinion in the case that has come to symbolize the inception of modern constitutional jurisprudence.

[51] *Brown*, 347 U.S. at 489. Chief Justice Warren further observed:

> The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

Id.

evidence used to support a categorical rule prohibiting segregation by race, or was it proof that was relevant under a different rule, one that queried whether the state had a sufficient justification for its discriminatory treatment? The cases decided immediately after *Brown* suggest the former interpretation, that the doll studies were employed in service of a new *per se* rule prohibiting segregation by race. After all, following *Brown*, the Court invalidated discrimination in a wide variety of public contexts and, along the way, never again mentioned social science data. Under this interpretation, the social science of *Brown*, to the extent that it had any value at all,[52] was merely employed to justify a new rule of law.

[52] The question whether the social science cited in *Brown* was truly relied upon by the Court has been debated ever since the opinion was announced. Most commentators have concluded that the studies were a make-weight for a holding reached on other grounds. Elsewhere, I argue that the studies were important to the rhetoric of the decision and permitted the Court to reach a controversial legal judgment under cover of science. *See* Faigman (2004), Laboratory of Justice, 199-204. Long term, however, in regard to the cause of desegregation, the social science research had little consequence.

With the benefit of hindsight, however, it appears that the constitutional issue of segregation's effects is a review-fact and not a rule-fact.[53] The modern rule provides that discrimination by race (or segregation) is unconstitutional unless the state's scheme is justified by a compelling objective and the means used are closely tied to achieving that end. If Michigan, for example, were to create an all-black high school in Detroit that emphasized an African-American curriculum, the state's means and ends would be strictly scrutinized rather than invalidated under some *per se* rule emanating from *Brown* and its progeny. Presumably, any defense of this segregation scheme would be based largely on social science research regarding the benefits that would accrue to black students from a segregated high school education. The rule of *Brown* and its progeny seems to be that segregation by race is highly suspect, but that it may be possible for a state to justify such disparate treatment if its reasons are sufficiently compelling. But, admittedly, the matter is not free of all ambiguity. Nothing inherent in a particular constitutional fact dictates whether it is a rule or review fact. Categorization depends on how a particular court employs the fact, and this might only be

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[53] At oral argument in *Brown*, there was some confusion regarding whether segregation's effect was an adjudicative fact or a legislative fact. In the trials below, the petitioners had produced evidence on both issues, introducing general social science research conducted years earlier and also litigation-generated research in which students in the respective jurisdiction were tested using Kenneth Clark's notorious doll-tests. At the argument, the NAACP's Robert Carter asked the Court to abide by the Topeka case's finding of fact that segregation had deleterious psychological consequences. He told the Court that the district judge's factual findings make a reversal "necessary." He argued, "[i]f there [are inequalities] in fact, that educational opportunities cannot be equal in law." Justice Hugo Black asked him whether that was "'a general finding or do you state that for the State of Kansas, City of Topeka?" Surprisingly, Carter's initial answer was the same as the *Stell* district court reached a decade later. Carter told the justices that "the finding refers to the State of Kansas and to these appellants and to Topeka, Kansas." He added, "I think that the findings were made in this specific case referring to this specific case." Black was troubled by the ramifications of limiting the empirical lesson to the single case of Topeka and asked whether this meant that "then you would have different rulings with respect to the places to which this applies, is that true?" Carter quickly realized his error, though in his haste to backtrack he too readily abandoned the general social science available. He argued, "[n]ow, of course, under our theory, you do not have to reach the finding of fact or a fact at all in reaching the decision because of the fact that we maintain that this is an unconstitutional classification being based upon race and, therefore, it is arbitrary." Mark Whitman, ed., Removing a Badge of Slavery (Princeton, N.J.: Markus Wiener Publishers, 1993), 131-32.

determined in particular constitutional contexts by subsequent case law.[54]

The line distinguishing constitutional adjudicative-facts from other constitutional facts can also be elusive. In principle, adjudicative facts should be readily recognizable. Constitutional adjudicative-facts involve only the case before the respective court and their resolution should have little or no precedential value. Under the *Miller* test, for instance, one of three necessary findings of fact involves whether the allegedly offending materials appeal to the prurient interest.[55] This fact is determined on a case-by-case basis in light of local community standards. A finding in a Lexington, Virginia court that a particular Mapplethorpe photograph is

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[54] The sometimes ambiguous character of constitutional facts complicates the task of establishing a rational constitutional-fact jurisprudence, but it is not fatal to that effort and this level of uncertainty is not unknown in constitutional cases. Consider, for example, the longstanding debate over whether the *Miranda* rule was constitutionally mandated or a judicially enacted remedy that could be revisited by legislative majorities. This ambiguity remained in the law for more than 30 years. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966) (setting forth the now-famous "Miranda warning," but leaving open the question whether it was constitutionally based) *with* Dickerson v. United States, 530 U.S. 428, 444 (2000) ("Miranda announced a constitutional rule that Congress may not supersede legislatively."). At the same time, however, because I prescribe very different rules of procedure for the different kinds of constitutional facts, any ambiguity over what kind of facts are at stake will increase the uncertainty endemic to the process.

[55] Miller v. California, 413 U.S. 15 (1973).

obscene, therefore, does not bind a court in Richmond, Virginia that might be evaluating the same photograph. Similarly, in a libel action under *New York Times v. Sullivan*,[56] the question whether a false statement was made with "actual malice" will be unique to that particular case. Categorizing a fact as adjudicative or legislative will often be a straightforward exercise.

[56] 376 U.S. 254 (1964).

On occasion, however, determining whether a particular constitutional fact is adjudicative in character will not be obvious. Another component of the *Miller* test illustrates this very point. The third prong of the test requires, for a finding of obscenity, that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[57] Although this fact is to be determined in individual cases for specific materials in dispute, the question involves matters that transcend particular cases. Whether Nabokov's *Lolita*, for instance, has serious literary or artistic value is a fact of general import, and is not readily classified into either the review-fact or adjudicative-fact bins. In the end, the decision whether to label a particular fact as adjudicative or otherwise may depend on what procedural path the court wants the fact to walk.[58]

[57] *Miller*, 413 U.S. at 15.

[58] This is the lesson that Professors Ronald Allen and Michael Pardo draw – and advocate – in their excellent article on the law-fact distinction. Ronald J. Allen & Michael S. Pardo, "The Myth of the Law-Fact Distinction," Nw. U. L. Rev. 97 (2003): 1769.

The very act of classifying a fact as a rule-, review-, or adjudicative-fact is an interpretive exercise. A good example of the freedom inherent in classifying constitutional facts, and the policy ramifications that follow from such classifications, comes from the Court's standard for reviewing the constitutionality of abortion regulations. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[59] the Court ruled that regulations that impose an undue burden on the exercise of the right to a pre-viability abortion are unconstitutional. The undue burden standard was operationally defined to include any regulation that created a "substantial obstacle" to the exercise of the right. In *Casey*, the Court invalidated the spousal notification provision of the disputed law applying this rule. The opinion for the Court, written by Justices O'Connor, Kennedy, and Souter, treated the issue as a review-fact, and itself found that research indicated that domestic violence might occur in a small percentage of cases as a result of this notification requirement. There was no suggestion that the claimants before the Court had experienced, or were in danger of suffering, violence due to the spousal notification requirement. Yet the prospect of such violence in the class of possible complainants, even if it constituted only a small percentage of cases, was enough to invalidate the law in all cases.

[59] 505 U.S. 833 (1992).

At the same time, the *Casey* Court upheld the 24-hour waiting provision, finding the proof inadequate to conclude that such requirements unduly burden the right. But is this issue a review-fact or an adjudicative-fact and, if the former, was the appropriate domain the nation or the state? In a *Woman's Choice-East Side Women's Clinic v. Newman*,[60] the Seventh Circuit offered a confusing, if not confused, answer to this question. The district court had enjoined Indiana's informed consent law shortly after it was enacted on the basis that it would constitute an undue burden. Under the Indiana law, women had to wait at least 24-hours after receiving information regarding the risks of the abortion procedure, thus necessitating two visits to the abortion provider. The lower court enjoined this specific provision on the basis of empirical studies conducted in Mississippi and Utah that indicated that the higher costs it imposed would reduce the number of abortions performed in those states by 10% to 13% . Yet, as pointed out by the Seventh Circuit, no research was available regarding the effect that the present requirement would have in Indiana and the researchers had not compared the experience of Mississippi and Utah to Indiana. At the same time, however, depending on how the legal question was defined, the research might not have to apply specifically to Indiana at all for the Indiana law to be invalidated on the basis of that research. In other cases, the Court had employed a national scope for determining when abortion regulations constituted undue burdens. In *Casey* itself, the Court struck down the spousal notification provision based on general research and did not inquire regarding state-wide experience under the challenged Pennsylvania law. In *Stenberg v. Carhart*,[61] the Court similarly used a national focus when it invalidated a Nebraska law that prohibited the use of "intact dilation and extraction," or what critics have dubbed "partial-birth abortion." In subsequent litigation over this issue, in particular involving congressional legislation on the subject, courts have routinely considered the relevant level of analysis to be at the review-fact stage.[62]

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[60] 305 F.3d 684 (7th Cir. 2002).

[61] 530 U.S. 914 (2000).

[62] See *Hope Clinic v. Ryan*, 195 F.3d 857, 884 (7th Cir. 1999) (Posner, J., dissenting) ("The health effects of partial birth abortion should indeed be treated as a legislative fact, rather than an adjudicative fact, in order to avoid inconsistent results arising from the

In cases like *Casey* and *Stenberg*, the national approach served the strong jurisprudential value of ensuring consistent constitutional outcomes from state to state.[63] The *Newman* court explained the Supreme Court's approach:

> [C]onstitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands.[64]

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reactions of different district judges…to different records."), *vacated* 530 U.S. 1271 (2000). Early on in the most recent litigation on so-called partial birth abortions, the Justice Department sought the medical records of the plaintiff-doctors on the theory that a review of these records would help answer the question whether a health exception was necessary to a ban on the procedure. *See* National Abortion Federation v. Ashcroft, 330 F.Supp.2d 436 (S.D.N.Y. 2004). But these records would provide nothing more than anecdotal evidence and would not have been any more constitutionally relevant or empirically valid than any other group of records that could have been selected. In fact, they would have been less useful, since they would not have been selected randomly.

[63] *Newman*, 305 F.3d at 688 ("*Stenberg* shows that the undue-burden standard must be applied at the level of logic, and to the nation as a whole, rather than one state at a time.")

[64] *Id*. *See also Majorek v. Armstrong*, 520 U.S. 968 (1997) (holding that statute preventing non-physician from performing abortions is not unconstitutional, without factual determination whether other medical professionals could perform the operation as safely or the

costs of the rule are unduly burdensome).

The Seventh Circuit, however, after setting forth this sound explication of why the relevant fact is a national legislative fact, devoted the lion's share of its opinion to evaluating the applicability of the research to the operation of the challenged provision *in Indiana*. The court observed that, "because the undue-burden approach does not prescribe a choice between the legislative-fact and adjudicative-fact approaches, we think it appropriate to review the evidence in this record and the inferences that properly may be drawn at the pre-enforcement stage."[65] Based on this analysis – what essentially constituted a state level review-fact analysis – the Seventh Circuit reversed the district court's ruling:

> Indiana is entitled to an opportunity to have its law evaluated in light of experience *in Indiana*.... [I]t is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana ... is entitled to put its law into effect and have that law judged by its own consequences.[66]

The logic of the Seventh Circuit's *Newman* decision is not obvious. If, indeed, *Stenberg* specifically, and this area of the law more generally, "demands" the application of a "uniform approach," then the "experience in Indiana" is not particularly relevant to the ultimate determination. It may very well be that the Mississippi and Utah studies were not sufficiently valid or persuasive to conclude that, on a national scale, informed consent provisions like Indiana's unduly burden the abortion right. But that is a very different determination than saying that the research does not apply in Indiana. Indiana's particular experience is largely irrelevant under *Casey's* and *Stenberg's* apparent interpretation of the relevant level of factual inquiry.

As already emphasized, the issue of what level of factual inquiry – i.e., adjudicative-, review-, or rule-fact – should be employed in a particular constitutional context is an interpretive

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65 *Newman,* 305 F.3d at 688-89.

66 *Id*. at 693 (emphasis in original).

matter. Both *Casey* and *Stenberg* appear to treat the applicable inquiry under the undue burden standard as a nationally-defined review-fact. It is possible, however, to distinguish the 24-hour waiting provision from the *Casey* and *Stenberg* subjects of spousal notification and late-term abortion. Whereas the *Casey* and *Stenberg* subjects do not vary from place to place, a 24-hour waiting provision might be more or less burdensome depending on the state in which it operates. Waiting 24 hours might be a very substantial obstacle in Oklahoma or Utah, but not particularly burdensome in Rhode Island or Delaware, because of the respective distances some women might have to travel to obtain abortion services. Regardless, whatever the judgment regarding the level of fact that is relevant under a particular constitutional provision, it should be an explicit part of the constitutional analysis.

Although sorting constitutional facts into their respective categories appears to be somewhat haphazard, certain conclusions can be offered in regard to this process. First of all, the distinction between adjudicative-facts and review- and rule-facts in constitutional cases is mainly clear in theory, though not always in practice. Adjudicative-facts pertain to specific cases and have little or no precedential force, while review- and rule-facts are general in nature and usually have import as a matter of precedent. These general facts will sometimes be relevant to the definition of the constitutional rule itself (i.e., constitutional rule-facts) or, more often, will be relevant when some rule is applied to a set of general facts (i.e., constitutional review-facts). Second, the decision whether the relevant fact under a particular constitutional rule falls into one category or another is an interpretive judgment; and it is a judgment that should always be made explicitly. Under *Casey's* undue burden standard, as discussed above, the determination whether a 24-hour waiting provision constitutes a "substantial obstacle" could be an adjudicative-fact or a review-fact. Indeed, at the review-fact level, the pertinent scope for fact-finding could be national, state-wide, or the respective court's jurisdiction. What measure of fact-finding is ultimately deemed appropriate must depend on the constitutional principles or values at stake. Finally, the choice made regarding what kinds of facts are relevant under a particular constitutional provision will affect the process by which those facts are found. The sort of evidence used to prove adjudicative-facts typically differs markedly from the sort of evidence

used to prove review-facts.

Defining the kinds of facts that are relevant under particular constitutional provisions is an essential prerequisite to establishing the processes by which these facts are found or the precedential force of having found them. As noted above, a court's finding, for instance, that a particular book "appeals to the prurient interest" in Lexington, Virginia has no precedential force in an obscenity case arising in Richmond, Virginia. As a consequence, it would be unsurprising for the United States Court of Appeals for the Fourth Circuit to affirm a civil verdict *against* the publisher in Lexington but *for* the publisher in Richmond based on this prong of the *Miller* test. Constitutional-review facts, in contrast, present considerably more challenging issues, since, by definition, they transcend individual disputes. For instance, if defined as a constitutional-review fact, the Fourth Circuit's ruling that *Lolita* has redeeming literary value would presumably be binding on district courts in that circuit. The next section takes up these issues, and considers the particularly vexing question of whether a lower court should have the power to reconsider higher court authority when the facts on which that precedent was established have changed.

II. Lower Court Review of Higher Court Fact-Finding

A. General Considerations

It almost goes without saying that the judiciary is structured hierarchically. Higher court legal judgments are binding on lower courts. This would appear to be especially so in the constitutional arena. After all, it was John Marshall who famously declared that it was his Court's duty to "say what the law is."[67] But what happens when settled law relies upon changeable facts? If the predicate facts of a higher court's holding should change, should subsequent courts revisit the holding given this new information? The answer to this might very well depend on an assortment of considerations. Indeed, this subject implicates many foundational premises of the American constitutional system. Given the richness of the subject

[67] Marbury v. Madison, 5 U.S. 137 (1803).

and the large role facts play in constitutional decision making, it is surprising that the Court has given so little attention to this matter.

Perhaps the only time that the issue was squarely presented regarding a lower court's power to distinguish precedent on the basis that predicate facts had changed was in *Roper v. Simmons*.[68] The principal issue in *Roper* concerned the constitutionality of imposing the death penalty on those who were sixteen or seventeen years-old when they committed their crimes. In 1989, in *Stanford v. Kentucky*,[69] the Court had held that this practice did not offend the Constitution. In 2003, however, the Missouri Supreme Court distinguished *Stanford* on the basis that the predicate facts on which that decision rested had changed and ruled that executing those who had committed their crimes when they were under 18-years of age violated the Eighth Amendment's prohibition of cruel and unusual punishment. In particular, the Missouri Court in *Roper* found a shift in public sentiment nationally indicating that such punishment now ran afoul of contemporary standards of decency.[70] The Supreme Court granted *certiorari* on two questions. The first was the constitutionality of executing those who had committed their crimes as juveniles. The second concerned the question at issue here: "Once this Court holds that a particular punishment is not 'cruel and unusual' and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?"[71]

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[68] 125 S.Ct. 1183 (2005).

[69] 492 U.S. 361 (1989).

[70] State ex. rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003).

[71] *Roper v. Simmons*, Questions Presented for Review, Supreme Court of the United

States (2005), http://www.supremecourtus.gov/qp/03-00633qp.pdf.

Justice Kennedy's opinion for the Court, however, did not mention, or even allude to, this question. The Court, instead, limited its analysis to the principal question presented, the constitutionality of executing minors. Affirming the Missouri decision, the Court held that imposing capital punishment on juveniles violated the Eighth Amendment's ban on cruel and unusual punishment. The Court relied on three grounds for its holding, all of which involved statements of scientific or social scientific fact. First, based on surveys of state practice, the Court agreed with the Missouri court that since *Stanford* the national consensus had shifted sufficiently to cast doubt that executing juveniles met modern "civilized standards of decency."[72] In addition, second, the Court found that juveniles were distinguishable from adults in three ways that indicated that they "cannot with reliability be classified among the worst offenders."[73] These grounds included juveniles' (1) underdeveloped sense of responsibility and general immaturity as compared to adults, (2) susceptibility to outside influence and peer pressure, and (3) lack of fully formed characters. These three characteristics indicated juveniles' diminished culpability which, according to the Court, meant "that the penological justifications for the death penalty apply to them with lesser force than to adults."[74] The final argument advanced by the

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[72] *Id*. at 1190.

[73] *Id*. at 1195.

[74] *Id*. at 1196. The Court rejected the possibility of evaluating each juvenile defendant's maturity on a case by case basis. "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id*. at 1197. In effect, the Court resolved juveniles' physiological and psychological capacities as a constitutional review-fact, rather than

Court to support its holding was "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[75]

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a constitutional adjudicative-fact.

[75] *Id*. at 1187.

While the majority opinion ignored the question of a lower court's power to find facts contrary to higher court authority, the separate dissents of Justices O'Connor and Scalia did not. Both justices took extreme umbrage at the lower court's temerity. O'Connor wrote that she took "issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our controlling decision in *Stanford*."[76] She conceded that the Eighth Amendment rule calling for a contemporary assessment of "evolving standards of decency" meant that "significant changes in societal mores over time may require us to reevaluate a prior decision."[77] But, she emphasized, "it remains '*this* Court's prerogative *alone* to overrule one of its precedents.'"[78] Finally, she warned, "[b]y affirming the lower court's judgment without so much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents."[79]

Justice Scalia similarly found the insolent behavior of the lower court intolerable. As an initial matter, he rejected the entire premise that the Eighth Amendment's meaning changes with evolving standards of decency.[80] Scalia said that it "add[s] insult to injury" that the "Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*."[81] The lower court's insolence, according to Scalia, was a product of a jurisprudence that permitted the Constitution's meaning to change as

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[76] *Id.* at 1209 (O'Connor, J., dissenting).

[77] *Id.*

[78] *Id.* (*quoting* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (emphasis added by O'Connor)).

[79] *Id.* at 1209-1210.

[80] *Id.* at 1217 (Scalia, J., dissenting) ("What a mockery today's opinion makes of Hamilton's expectation [that the judiciary will be the least dangerous branch], announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years – not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution *has changed*.") (emphasis supplied by author).

[81] *Id.* at 1229.

circumstances changed. He observed as follows:

> The Court has purported to make of the Eighth Amendment ... a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?[82]

[82] *Id*. at 1229-30.

In addition, Scalia noted that this danger was not limited to any "special character" of the Eighth Amendment. "Nothing in the text reflects such a distinctive character – and we have certainly applied the 'maturing values' rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause."[83] Left unchecked, Scalia warned, the majority's permissiveness would allow lower courts to reinterpret the Constitution "whenever they decide enough time has passed for a new snap shot."[84] This outcome "leaves this Court's decisions without any force," a result that "crown[s] arbitrariness with chaos."[85]

Possibly the starkest example of the nightmare Justice Scalia envisions, and one that might unsettle the more liberal-minded justices as well, comes from *Stell v. Savannah-Chatham*, discussed in Section I. The *Stell* district court distinguished *Brown v. Board of Education* on the basis that black children in its locale, unlike those in Topeka, were not psychologically harmed by attending segregated schools. The trial court concluded, therefore, that whatever the state of the facts existing in 1954 in Topeka, the weight of the evidence indicated that in 1963 in Savannah-Chatham County, black and white children would mutually benefit from separate schooling.

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[83] *Id*. at 1228 n.9 (*citing* Laurence v. Texas, 539 U.S. 558, 571-573 (2003), United States v. Virginia, 518 U.S. 515, 532-534 (1996), Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-850 (1992)).

[84] *Id.* at 1230.

[85] *Id.*

In summarily reversing the *Stell* district court, the Fifth Circuit stated that "no inferior federal court may refrain from acting as required by [the *Brown*] decision even if such a court should conclude that the Supreme Court erred as to its facts or as to the law."[86] Further, the circuit court discounted the importance of the social science evidence for the *Brown* result. "We do not read the major premise of the decision of the Supreme Court in the first *Brown* case as being limited to the facts of the cases there presented. We read it," the court observed, "as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal."[87]

The Fifth Circuit, therefore, made two arguments for why the *Stell* trial court had erred. The first was that a lower court was bound by the factual findings and legal conclusions of a higher court, and the second was that the holding in *Brown* had not depended on the factual findings set forth in the opinion. The latter argument was not controversial in itself, since it simply concerned the appellate court's assertion that the trial court had misinterpreted the *Brown* decision. Whereas the trial court had believed that *Brown* was premised on the fact-based psychological consequences of segregation, the Fifth Circuit held that it rested on the legal principle of equality. No one seriously believes that a lower court should have the power to reassess a higher court's *legal* judgments. If this legal assessment had been the full extent of the Fifth Circuit's decision, it would have been unremarkable.

The Fifth Circuit's former statement – that the trial court had inappropriately reconsidered factual findings previously made by a higher court – is considerably more open to question. The Fifth Circuit essentially held that lower courts do not have the power to reconsider the predicate facts of otherwise binding precedent. But the court did not explain the basis for this conclusion. It simply assumed that it was obviously correct much as Justices O'Connor and Scalia assumed the obviousness of this conclusion in *Roper*. The conclusion that lower courts

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[86] 333 F.2d at 61.

[87] *Id.*

cannot revisit constitutional facts – and, in due course, higher court constitutional precedent – is not at all obvious. This statement of the law is too broad, for it fails to consider the different kinds of constitutional facts that percolate up and trickle down the hierarchy of the courts. While this principle of deference might be obviously correct regarding some kinds of constitutional facts, it is not as regards all kinds of constitutional facts. The three basic kinds of fact – rule, review, and adjudicative – present very different issues regarding their place in the lexicon of constitutional doctrine.

B. Specific Considerations

A basic argument of this article is that facts should be taken seriously when they are offered as a component of constitutional decision making. Implicit in this argument is the assumption that "facts" are out there to be found. I don't mean to suggest, however, that constitutional facts – of whatever variety – can always be found with a high degree of certainty or without a good deal of baggage associated with the socially constructed worlds of their finders. Facts, whether they concern the question of when a fetus has the lung capacity to survive outside the womb or the question of the empirical consequences of locating adult-entertainment establishments in particular neighborhoods, are known with more or less certainty. The potential for error associated with virtually all fact-finding means that, as a normative matter, the law must allocate the risks associated with making a mistake. The law primarily accomplishes this through procedural devices such as burdens of proof and presumptions. In criminal cases, for instance, where the consequences of making an error of guilt ("false positive") are substantial, the "beyond a reasonable doubt" rule is used; in civil cases, in which similar errors of inclusion have less gravity, the more lenient "preponderance of the evidence" standard is employed. In constitutional fact-finding, the prospect of error (whether of the false positive or false negative variety) should be a key element in the development of rules of procedure. As a consequence, therefore, the issue of how well the fact must be known is a legal determination. Viability, for example, is actually a statistical prediction of fetus survivability. Whether the probability of survival must be 10% or 90%, estimates that directly correspond with gestational age, must be resolved as a matter of law. What the probability of survival is at, say,

27 weeks, on the other hand, is a constitutional review-fact.

An additional, and fundamental, consideration in devising rules of procedure for constitutional facts is the variety of players who might be involved in the fact-finding process. For present purposes, the principal actors in this drama range from jurors to Supreme Court justices, with trial and appellate judges in between. Any viable procedural scheme will have to be tailored to the respective roles these participants are assigned to play under the Constitution. In general, for instance, jurors are limited to deciding facts in particular cases, while judges are obligated to say what the law is, a task that includes, at the least, finding rule and review facts. But the realities of this seemingly simple division of authority are rather more complicated in practice. Procedural rules must account for this complexity, and create a rational dynamic between the respective finders of fact at every level of constitutional process. The rationality of this dynamic must be found in the Constitution itself.

Professor Davis' original division between legislative and adjudicative facts was based largely on the identity of the fact-finder deciding the fact, rather than the legal relevance of the fact. If the fact was found by lawmakers, it was legislative, and if found by the trier of fact (jury, or, if none, judge), it was adjudicative. There was thus a degree of circularity in his taxonomy. The very same fact might be described as adjudicative, because it was part of a jury's deliberations, and legislative, because a lawmaker used it to form or interpret the law. To a large extent, I turn Davis' scheme on its head. In my taxonomy, facts are classified on the basis of the demands of constitutional doctrine. What facts are material to the resolution of a constitutional dispute, therefore, depend on a reading of the Constitution. Thus, for example, whether the issue of the factual consequences of a spousal notification provision, as presented in *Casey*, is a review-fact or an adjudicative-fact depends on the values inherent in the Due Process Clause. As a general matter, very different consequences follow depending on what type of constitutional fact is involved. The costs and benefits associated with those consequences are a matter of constitutional import. The following sections consider some of those costs and benefits in regard to the single issue of whether a lower court should have the authority to reconsider higher court

precedent when the facts on which that precedent depend have changed.

1. Constitutional-Rule Facts

Constitutional-rule facts are relevant to the definition of, or establish the foundation for, a constitutional rule or standard. Although the line between rule and review facts can sometimes be blurry, in most cases the distinction will be clear. The distinction is based on the difference between interpreting the Constitution and applying it. In *Roe v. Wade*, for instance, the Court established the end of the second trimester – viability – as the point in time when the state's interests were sufficiently compelling to justify prohibitions of abortion, subject to exceptions for the health of the mother. In *Casey*, the Court reaffirmed this rule, calling it the "central holding" of *Roe*. The selection of viability was based on a host of arguments, including historical practices, the nature of the doctor-patient relationship, precedent, and, in the end, the Court's assessment of the strength of the state's interest in preserving the potential life of the fetus. The Court balanced the nature of the right against the strength of the state's interest and established a standard that was fastened to the point at which a fetus was likely to survive outside the womb. Viability thus became the rule to be applied in subsequent cases.

Describing viability as the rule to be applied suggests that if medical technology were to change, the contour of the "right" would change as well. Indeed, this is one of the principal features of employing rules that depend on possibly different circumstances occurring from those that existed when the rule was first defined. It could be argued that the compromise point – viability – was really chosen for certain unstated reasons, such as giving the pregnant woman sufficient time to exercise her right to an abortion. Under this interpretation of *Roe*, the "rule" is not viability at all, but rather the end of the second trimester – 24 weeks – approximately the time at which viability occurred in 1973. Of course, changes in technology or medical science would not affect the 24-weeks rule. But the Court never said that the rule was 24-weeks; it said, and thereafter has maintained, that the rule is "viability" – presumably whenever that should occur.

The issue of what the "rule" is in *Roe* is reminiscent of the debate following *Brown v. Board of Education* as to whether the holding in that case depended on the factual question of segregation's effects or on the inherent inequality of separate schooling. If the former, then subsequent research could result in different outcomes and segregated education might pass constitutional muster. This, of course, was the *Stell* district court's reading of *Brown*. If the latter, the rule would be that segregated schools are *per se* unconstitutional, the Fifth Circuit's reading of the case. Given the modern test of strict scrutiny, it appears that the district court's interpretation of *Brown* was the more accurate one and that, at least if the state's interests were compelling enough, segregated public schools would be constitutionally permissible. If this interpretation is correct, then the *Stell* court's attempt to distinguish *Brown* based on different factual circumstances was wrong because it got the facts wrong, not because it should have refrained from any reconsideration of how the equality rule of *Brown* should be applied when the factual circumstances have changed.[88]

Similarly, subsequent precedent should reveal whether the rule in *Roe* was viability or 24-weeks. If the former, then changing technology should lead the Court to contemplate an alteration in the 24-week point-in-time, whereas if the latter, then 24-weeks should remain inviolate, subject always to the possibility of it being replaced with another rule. The answer seemed to come from *Webster v. Reproductive Health Services*.[89] In *Webster*, the Court upheld a Missouri law that, among other things, required physicians to use medically appropriate tests to determine whether a fetus was viable at twenty or more weeks of gestational age.[90] Although the

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[88] *Stell* also got it wrong because it interpreted *Brown* to create an adjudicative-fact question, since it thought the issue was the consequences of segregation in its locale. Pretty clearly, however, the Court had cited the research at a general level and thus, if the *Stell* Court were to make the argument, it would have had to have been as a changed review-fact.

[89] 492 U.S. 490 (1989).

[90] *Id*. at 526. The statute provided that a twenty-week-old fetus was presumed valid, so that viability testing effectively placed the burden of proof on the woman to disprove viability.

Court did not discuss the issue explicitly, it effectively accepted the Missouri scheme of treating viability as a constitutional adjudicative-fact. After 20 weeks, the viability of every fetus was to be measured individually. In contrast, if *Roe* had stood for an inviolate rule of 24-weeks, the Missouri viability testing provision would have been invalid as a matter of law. Under *Roe*, therefore, at least as it is presently applied, viability is the rule and, in some situations, will be applied on a case-by-case basis.

But the decision to adopt a rule employing the medical concept of viability also depended partly on factual arguments. In particular, Justice Blackmun cited extensive historical sources regarding both ancient and more contemporary abortion practices. Indeed, justices contemptuous of *Roe's* holding have long expressed particular disdain for this historical analysis.[91] What if, then, a lower court had access to a new and definitive examination of the historical issues surveyed in *Roe*, should that Court have the authority to reconsider the rule of viability? Or suppose that a treasure trove of historical documents were discovered that indicated unequivocally that the drafters and ratifiers of the Fourteenth Amendment uniformly believed that adoption of the Equal Protection Clause would not result in integrated public schools. Would a lower court have the power to employ these new facts to reassess the continuing validity of the holding in *Brown*?

The answer to these and similar questions is no. Lower courts cannot have the authority to reevaluate the empirical bases for constitutional rules or standards. An essential question raised in these sorts of cases is whether the rule would be different if the facts were to change. Any procedure that would allow lower courts to distinguish higher court precedent and come to a different conclusion about the Constitution's meaning would have to be able to answer this question in the affirmative. By their nature, however, constitutional-rule facts are almost invariably set-forth as part of a litany of premises offered to support a rule or standard. Rarely

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[91] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 174-75 (Rehnquist, J., dissenting) ("As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature.... By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.").

do they stand alone, and when they do they are often considered – at the time or later – as proxies for normative principles or values. The historical premises underlying conclusions regarding original intent are routinely buttressed by arguments from the text, precedent, and constitutional structure. The Constitution's meaning is stitched together from a patchwork of authorities and a change in the understanding of one or two will not necessarily undermine the soundness of the rule.

As a practical matter, therefore, the boundary between fact and value is nearly impossible to ascertain when a doctrine is premised on constitutional-rule facts and other considerations. Given the entangled relationship between values and facts in interpreting the Constitution's meaning, this would be impossible in the vast majority, if not in all, cases. The authorities the Court relies upon to discern the Constitution's meaning tend to be a mixture of normative and empirical. In most cases it would be impossible for a lower court to disentangle the empirical from the normative or be able to say whether the Constitution would mean something different if the facts were to change or our knowledge of them changed.

2. Constitutional-Adjudicative Facts

Adjudicative-facts occupy the opposite pole from that of rule-facts in constitutional cases. Whereas rule-facts affect whole areas of law and are an inextricable component of law-making, adjudicative-facts have minimal impact outside the immediate litigation in which they are found.[92] Because constitutional adjudicative-facts are unique to particular cases, they appear to present little difficulty on the question of lower court power to reconsider higher court

[92] Constitutional adjudicative-facts have somewhat greater impact than ordinary adjudicative-facts simply because of their constitutional genesis. Although their resolution might not have any direct consequences for other cases, there may be substantial indirect consequences. For example, in the area of free speech, an adjudication that certain materials are obscene in one locale could chill their dissemination in other areas, even though the materials might not be deemed "obscene" in those areas.

precedent. And this will be true in most situations, mainly because there will be no higher court rulings on the specific factual question. In a defamation case, for instance, the application of the *New York Times v. Sullivan* "actual malice" test will be highly context-specific. The question of whether a statement was made "with knowledge or reckless disregard of its falsity," will have to be determined on a case by case basis.[93] At the same time, however, two aspects of constitutional adjudicative fact-finding implicate principles that transcend individual cases. The first involves the obvious one that the initial definition of the applicable test is a matter of law. The choice of the "actual malice" standard itself, then, is a rule that could only be reconsidered by the Supreme Court. The second aspect of constitutional adjudicative-facts is a component of the first, but worthy of separate consideration. The burden of proof that must be met in constitutional cases is set as a matter of law.

The subject of burdens of proof is considerably more complex than the usual discussions among legal practitioners would indicate. There is little question that the "ultimate" burden of proof must be set as a matter of law and is binding on lower courts. For example, in *Addington v. Texas,*[94] the Court held that the state must meet the "clear and convincing" evidence standard in order to civilly commit an allegedly mentally ill and dangerous person. But this seemingly straightforward requirement hides a fair amount of empirical complexity. In particular, consider the element of "dangerousness" that, together with mental illness, must be demonstrated by the

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[93] A higher court, of course, retains the power to independently review a trial court's findings of fact. If the case were remanded, the lower court would be obligated to act in accordance with the directions of the higher court – both as to the facts and the law. But the specific facts of the case are not likely to recur exactly in any other case, and so lower courts are not bound to adjudicative fact-finding done by higher courts in other cases.

[94] 441 U.S. 418 (1979).

state. Most recently, this issue has been discussed in the sub-class of potential committees popularly referred to as "sexually violent predators" (SVP).

In SVP cases, the Court has held that the state must prove that the defendant is both mentally abnormal[95] and dangerous. The Court, however, has yet to say how dangerous an alleged SVP must be in order to satisfy the second prong of the test, though it is likely to be at least by clear and convincing evidence and possibly by a stricter standard yet. If clear and convincing evidence is estimated as approximately a 75 percent likelihood, and proof beyond a reasonable doubt as exceeding a 90 percent likelihood, very few alleged SVPs would in fact qualify for commitment. The level of social scientific technology is not sophisticated enough to permit predictions with this level of certainty.[96] But if these levels of proof mean something different, then the state might be able to meet its evidentiary burdens with today's technology.

Although the Supreme Court has yet to consider the issue of what quantum of proof of future violence is constitutionally mandated in SVP cases, state courts have weighed-in on the matter. In *People v. Ghilotti*,[97] for instance, the California Supreme Court interpreted a California statute that provided for the commitment of a person who has a "diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody."[98] The State argued that "likely" does not mean "probable" or "more likely than not." The State urged that likely meant "a significant chance, not minimal;

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[95] In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court held that civil commitments of sexually violent predators were not constitutionally limited to those who suffered mental *illness*. "Mental abnormality" would suffice, together with "dangerousness," as a basis for commitment.

[96] David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, Modern Scientific Evidence: The Law and Science of Expert Testimony (2006).

[97] 44 P.3d 949 (Ca. 2002).

[98] *Id*. at 915.

something less than 'more likely than not' and more than merely 'possible.'"[99] The defendant, in contrast, argued that "likely" meant "highly likely," or at least "more likely than not."[100] The California court sided with the state and found that "'likely to engage in acts of sexual violence' does not mean the risk of reoffense must be higher than 50 percent."[101] The court explained as follows:

> [T]he phrase requires a determination that, as the result of a current mental disorder which predisposes the person to commit violent sex offenses, he or she presents a substantial danger – that is, a serious and well-founded risk of reoffending in this way if free.[102]

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[99] *Id*. at 916.

[100] *Id*. at 915-16.

[101] *Id*. at 916.

[102] *Id*. Oddly, the court sought support for its definition of the word "likely" from thesauruses rather than dictionaries. As Justice Werdegar pointed out in dissent, "[o]ne should look to a dictionary, rather than a thesaurus, for a definitive statement of a word's meaning." *Id.* at 931 n.3 (Werdegar, J., dissenting). She found that such a search supported a "more likely than not" meaning for the word "likely." *Id.*

Under California law, therefore, the *kind* of proof required is the substantial danger test.[103] Yet, the burden of proof under the applicable statute is the beyond a reasonable doubt standard. The court found no incongruity in asking juries to determine whether, by proof beyond a reasonable doubt, the defendant "presents a serious and well-founded risk of committing new acts of criminal sexual violence."[104] In effect, the California test asks the jury to determine with near certainty ("beyond a reasonable doubt") that there is a significant probability (something less than 50%) that the defendant will be violent. And, indeed, when it comes to scientific

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[103] *Id*. at 923 n.14. Examples of contrary authority include, In re Leon G., 26 P.3d 481, 488-89 (Ariz. 2001) ("likely" means "highly probable"); Commonwealth v. Reese, 2001 WL 359954 *15 (Mass.Super.Ct. April 5, 2001) ("Likely" means "at least more likely than not"); Matter of Linehan, 557 N.W.2d 171, 180 (Minn. 1996) ("likely" means "highly likely"); In re Commitment of W.Z., 801 A.2d 205, 216 (N.J. 2002) ("An individual may be considered to pose a threat to the health and safety of others if he or she were found, by clear and convincing evidence, to have serious difficulty in controlling his or her harmful behavior such that it is highly likely that the individual will not control his or her sexually violent behavior and will reoffend."); State v. Ward, 720 N.E.2d 603, 609 (OhioApp. 1999) ("Likely" requires "a firm belief of conviction that an offender will more likely than not commit another sex offense in the future").

[104] *Id*. at 924n.15. Under the law, the jury would also have to find beyond a reasonable doubt that the defendant "(1) previously was convicted of qualifying violent sex crimes, [and] (2) has a mental disorder which seriously impairs volitional control of violent sexual impulses." *Id.*

statements of fact, it is not unusual to speak in these terms. It would not be incongruous, for instance, for a meteorologist to express 95 percent confidence that the chance of rain tomorrow is 60 percent. In the same way, as Ghilotti arguably requires in California, juries must determine by proof beyond a reasonable doubt (90-95%?) that the defendant is likely (25-30%?) to be sexually violent.

3. Constitutional-Review Facts

So far, there has been little of great controversy in my elucidation of constitutional facts in this section, in that I have concluded that rule-facts should be decided as matters of law and adjudicative-facts should largely be subject to ordinary fact-finding rules. Although most judges and scholars have given little attention to these issues, if they had, virtually all would agree with at least the broad outlines of my analysis to this point. But such agreement likely ends here. By far the most difficult situation is presented by constitutional review-facts, a category that includes the vast majority of facts in constitutional cases. Review-facts are relevant under a particular interpretation of the Constitution – i.e., some constitutional rule or standard – and, by definition, their resolution has precedential import in other cases. There is no shortage of examples, including some of the better known being the point at which the fetus becomes viable,[105] the effects of segregation on black school children,[106] the general and specific consequences of child pornography,[107] the group dynamics associated with jury-size,[108] the effects of spousal notification provisions,[109] and so on.[110] As regards these sorts of facts, lower

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105 *Roe*, 410 U.S. at 113; *Casey*, 505 U.S. at 833.

106 *Brown*, 347 U.S. at 483.

107 New York v. Ferber, 458 U.S. 747 (1982).

108 *Ballew*, 435 U.S. at 223.

109 *Casey*, 505 U.S. at 833.

110 See generally, Faigman, Laboratory of Justice.

courts should have the authority to distinguish higher court rulings when there is substantial proof that the facts themselves have changed or our knowledge of the facts have changed, so long as those facts were necessary and sufficient for the earlier ruling.

In *Casey*, for example, the Court set forth the "undue burden" standard which, in turn, established the relevance of the factual issue of whether a challenged regulation poses a "substantial obstacle" to the exercise of the abortion right. In *Casey* itself, the Court invalidated the Pennsylvania spousal notification provision primarily on the basis of research indicating its potentially burdensome nature, at least in a small percentage of cases. The Court, however, refused to invalidate the 24-hour waiting provision, with the Joint Opinion observing that the research had yet to demonstrate that this waiting requirement posed a substantial obstacle to the exercise of the abortion right. Presumably, the Court understood that research might someday demonstrate this fact and, moreover, that other regulations might be challenged as being unduly burdensome. Lower courts should have the latitude, indeed the obligation, to review the evidence to determine whether the regulation passes muster under the *Casey* standard.

The power to review the predicate facts of precedent would not, however, give lower courts *carte blanche* to challenge higher court authority with which they disagree. When assessing the continuing validity of a precedent, lower courts would have to resolve two issues in a satisfactory and unequivocal way. First, the court would have to determine that the changed fact was necessary and sufficient for the earlier ruling; and second, it would have to put forward sufficient proof to support the new findings of fact.

The first consideration, whether the review-facts were necessary and sufficient for the earlier ruling, will sometimes be a delicate task. This assessment is easiest, of course, when essentially only one review-fact is offered to support an outcome. In *Ballew*, for example, the single basis for the outcome was the empirical assertion that juries are less effective when their numbers fall below a certain total, with six-member panels somewhat arbitrarily chosen as minimally required under the Constitution. Similarly, viability is based on a fairly concrete and

unitary empirical proposition – the point-in-time when a fetus can survive outside the womb. In *Roper v. Simmons*, discussed in Section I, in contrast, the empirical arguments were somewhat more complex. The Court listed three factual bases for concluding that those who kill as juveniles cannot be subject to capital punishment under the Eighth Amendment. These included surveys of state law indicating acceptance or renunciation of such punishments, the physiological and psychological developmental differences between children and adults, and a survey of international practice and opinion. Suppose, after some period of time, the evidence for one of these three premises indicates a changed empirical landscape, should a lower court be entitled to rely on that basis alone to distinguish the *Roper* precedent? The answer is that there is no definite answer. Like virtually all aspects of constitutional law, there is no formula applicable under such circumstances. The lower court would have to determine to the best of its capacity whether the fact that has changed was the central premise for the otherwise controlling precedent. It might be, for instance, that a changed landscape as regards state death penalty practices would be enough, but not if the changed landscape concerns international standards. But this is a judgment call.

Moreover, before challenging an established precedent, a lower court would also have to find that the research data are substantial enough to support the new empirical conclusion. The question for courts in subsequent cases would be whether research conducted after the earlier decision was substantial enough to warrant reaching a different conclusion than was reached in the earlier case. In the situation of the 24-hour waiting provision, for example, lower courts would not be able to reassess the research data that had been available to the Court in 1992 when *Casey* was decided. A court's assessment of an existing body of research data should be binding on lower courts. In fact, lower courts should act in this realm only when the research data are very robust and largely unambiguous. This is especially so when a Supreme Court precedent is in issue. Given the gravity of distinguishing a Supreme Court decision on a factual basis, lower courts should, and can be expected to, tread carefully over the new research terrain.

There are an assortment of significant advantages that come from adopting a procedural

rule by which lower courts can reevaluate precedent when research data clearly indicate that predicate constitutional review-facts have substantially changed. First of all, it advances the legitimacy of constitutional law-making by keeping it in line with contemporary knowledge of the facts underlying constitutional decisions. As Oliver Wendell Holmes, Jr. put it, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[111] When a constitutional rule is applied to a stated set of facts, the legitimacy of the outcome is undermined to the extent that those facts are not what the court says they are. The rule ought to fit the facts as they are known today.

In addition, giving lower courts authority to reconsider constitutional review-facts will have a salutary effect on the Supreme Court's sometimes harum-scarum reliance on such facts in its jurisprudence. Just the knowledge that lower courts might revisit factual premises for their holdings should lead the justices to be more careful in explaining the reasons for their decisions. In *Brown*, for example, few, if any, constitutional scholars believe that the social science research was anything more than a make-weight for an outcome reached on other grounds. But what were those other grounds and why didn't the Court simply cite them instead? The truth is that in the early 1950s none of the other authorities unambiguously supported the outcome. The text itself was ambiguous, the precedent was weak or contrary, and original intent was inconclusive. Social scientific authority provided a seemingly neutral basis for the outcome, though in retrospect it was not seriously relied upon. Similarly, in *Roe*, it appears fairly clear that Justice Blackmun used "viability" as a convenient placeholder for a sensible compromise between the fundamental right of women to control their bodies and the compelling interests of the state. Although *Webster* might suggest otherwise, I suspect that few constitutional scholars (or justices) believe that if viability were to move, say, to 10-weeks, the abortion right would follow suit. By giving lower courts the authority to reconsider precedents based on outmoded

[111] Oliver Wendell Holmes, Jr., "The Path of the Law," Harv. L. Rev. 10 (1897): 457, 469 .

review-fact premises, the Court should hesitate before expounding empirical reasons that are not real reasons for the outcome.

It might be argued, however, that taking away the Court's ability to find facts "normatively" or "interpretively" will limit the Court's flexibility to achieve outcomes it wishes to reach. Only if facts are understood interpretively can they be used rhetorically to support whatever outcome is sought. Especially when the Court operates at the vanguard of societal evolution, as it did in *Brown* and *Roe*, when traditional authorities militate against the "enlightened" path the Court has chosen, interpretive facts might play an essential rhetorical role. And, indeed, one should be reluctant to advocate any jurisprudential approach that would have made deciding *Brown* more difficult.

Although I am sympathetic to the argument that the Court sometimes needs the latitude interpretive fact-finding gives it, I ultimately find it unpersuasive. The principal reason the Court relies on scientific arguments, as in *Brown* and *Roe*, is that the usual so-called neutral principles of interpretation are not available. The Court, ever solicitous of its legitimacy, which has been historically associated with restraint and reliance on neutral principles, is reluctant to sometimes give the true reason for its decisions. It was easier to say in *Brown* that social science revealed the inequality that was inherent in segregation than to say that the Court had reached the moral conclusion that segregation was wrong under virtually all circumstances, despite an ambiguous text, contrary precedent, and original intent that was, under only the most generous historical view, inconclusive. The argument from a moral basis makes the justices seem platonic guardians. Similarly, in *Roe*, viability as a scientific concept sounded more neutral than an opinion that instituted an "arbitrary" line at 24-weeks, on the basis of little more than that at least five justices agreed that it was a reasonable compromise between two fundamental and irreconcilable principles.

The approach proposed here would thus take an important rhetorical arrow out of the Court's quiver. It might also weaken the Court's legitimacy, to the extent anyone paying

attention continues to believe that members of the Court actually adhere exclusively to non-subjective neutral principles for their constitutional opinions. To the extent that taking facts seriously will accomplish anything, it is hoped that it will lead the Court to be more plain-spoken about the reasons for what it does. This might pierce the judicial veil, but it will contribute in one very salutary way more generally. In the United States, the people are the ultimate sovereign. The people, therefore, should be fully engaged in the dialogue that takes place every time the Court decides a constitutional case. If the bases for decision are hidden beneath a scientific facade, and the true reasons are not made plain, then meaningful dialogue cannot occur. The Court, perhaps, has no greater obligation than giving reasons for its decisions. It should be candid about those reasons. Anything less and its legitimacy should be jeopardized.

Another significant advantage of giving the authority to lower courts to reevaluate constitutional review-facts is that it will facilitate the introduction of new information into the law. Although discovery of constitutional review-facts is not limited to the adversarial process – since they can be brought to the attention of courts through *amicus* briefs or even independent research – they are likely to be developed most fully if first put into issue at the trial court level. The multiple-layers of the trial and appellate process are well-suited to the full exploration and development of the empirical record upon which disputed constitutional review-facts rest. Moreover, the courts' taking constitutional facts seriously sends an important message to researchers. Good research will be valued and potentially relied upon whenever it is done. Previous decisions relying on early research data, therefore, do not foreclose reconsideration in light of the publication of substantial new data.

One striking change that would follow from a jurisprudence that permits lower courts to reconsider constitutional review-facts would be on the Supreme Court's control over its own docket. By distinguishing a controlling precedent on the basis of changed constitutional review-facts, a federal appellate court or a state's highest court could effectively force the Supreme Court to grant *certiorari*.[112] The Court uses its control over its docket partly to manage the

[112] Federal district courts and intermediate state courts, of course, could also

timing of constitutional decisions, sometimes waiting considerable time for an issue to mature in the lower courts. The rule proposed here would give lower courts some leverage in forcing the High Court to enter a field (or return to a field) when, perhaps, the Justices would have preferred to avoid the issue altogether.

Although loss of full control of its docket is a danger of the proposed rule, it is not one of great consequence. Even when the Supreme Court feels its hand has been forced, it need not issue an opinion that resolves the dispute on the merits. In the most extreme instances, the Court could reverse the lower court summarily, simply as being contrary to controlling precedent, and provide no further explanation. This is not likely to happen often, however, since the Court may feel compelled to explain why the changed factual situation does not alter the application of the constitutional rule. It might also be argued that the Court's loss of some control over its docket could itself be a salutary event. There is nothing sacred about the Court's *certiorari* power and, indeed, such absolute control is a relatively recent phenomenon. The proposed rule injects a measure of democracy into the High Court's docket, an outcome that might increase its responsiveness to the pressing and most dynamic issues of the day.

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reevaluate constitutional review-facts, but superior courts short of the United States Supreme Court, could check any unrestrained enthusiasm in this regard.

Finally, it is worth emphasizing that lower courts are unlikely to exercise their power to distinguish higher court precedent very frequently. They are likely to do so only when they have enough empirical ammunition to overwhelm the opposing precedent. This will not occur often. In most of the areas in which the Court employs empirical arguments, there is limited amounts of research available and much of it tends to be fairly soft social science. Even a considerable number of research studies on many social science subjects will not be enough to sustain a court's reconsideration of a higher court's holding in a particular review-fact context. Also, many of the empirical questions the Court resolves concern highly complex matters that even the best efforts of mainstream scientists will not soon conquer. In *Kansas v. Crane*, for instance, the Court discussed the scientific research involved in defining "lack of volitional control," the principal component of the mental abnormality requirement in the commitment of sexually violent predators. Psychologists, psychiatrists, and neuroscientists are some distance from obtaining a good understanding of this construct. Many of the facts the Court employs share this level of complexity. Once the Court has weighed in with a review of the evidence and has provided an answer based on contemporary research, a lower court should be disinclined to revisit any particular constitutional review-fact without substantial research data supporting its holding. As Holmes, quoting Emerson, said, "When you strike at a king, you must kill him."[113]

IV. CONCLUSION

The basic theme of this article could be said to be that courts should take constitutional facts seriously. The first section outlined an alternative conception, one in which facts are found "interpretively," such that they serve the interpretive outcomes of constitutional adjudication. Facts under this view have a normative function and are used rhetorically to buttress a conclusion largely reached on other grounds. Accordingly, the deleterious consequences of

[113] Bartlett's Familiar Quotations 433:30 (1992 16th ed., Justin Kaplan, editor) (*quoting* "Recollected by Oliver Wendell Holmes, Jr. from Max Lerner," The Mind and Faith of Justice Holmes (1943)).

segregation are put forth in order to support the conclusion that segregated schools are "inherently unequal." Any research offered subsequently to demonstrate the benefits of segregation is irrelevant under this conception, since the empirical accuracy of the data was never intended to be taken seriously. As discussed in the first section, however, such fact-finding by fiat suffers serious limitations. Principal among these is the threat to the Court's legitimacy when the facts upon which it bases its rulings are demonstrated to be wrong.

Section II sets forth a taxonomy by which the variety of constitutional fact-finding could be understood. I identified three basic types of constitutional facts – rule-facts, review-facts, and adjudicative-facts. Constitutional rule-facts are relevant to the definition of a rule or standard to be applied in a set of cases. These facts are instrumental in the process of *interpreting* the Constitution's meaning and are typically used in conjunction with, and are sometimes a component of, traditional constitutional authorities, such as the text, precedent, original intent, and constitutional structure. Perhaps the best-known type of constitutional rule-facts are historical facts used to determine "original intent." In contrast, the remaining two categories of facts are associated with the *application* of constitutional rules or standards. Constitutional review-facts involve facts that are relevant under a particular interpretation of the Constitution and which transcend individual cases. Constitutional adjudicative-facts similarly involve the application of the Constitution, but they are peculiar to individual cases.

Section III considers the operation of these three kinds of facts in regard to a seemingly intractable issue in constitutional fact-finding. Specifically, this section considers the issue whether lower courts should have the power to distinguish (and thereby ignore) higher court precedent when the facts on which that precedent is based have changed or our knowledge of them have changed. The answers I provide to this question vary depending on the type of fact involved.

Constitutional rule-facts are employed in the service of interpreting the Constitution and, therefore, are ordinarily combined with an assortment of textual, normative, and structural

considerations. In practice, it would be virtually impossible for lower courts to disentangle the importance of fact-finding to the development of a particular rule and thus lower courts cannot have the power to revisit rule-making, even when the facts on which a rule sits have demonstrably changed. It is not that these facts should not be taken seriously, but that their reconsideration upon a new record must be carried out by the level of court that found them originally. On the other end of the spectrum sit constitutional adjudicative-facts. Because these facts are particular to the case, they generally recur in different form and thus, by their very nature, will be considered *de novo* by lower courts. Adjudicative facts are invariably taken seriously, since they ordinarily are highly disputed between the parties. Lying in the middle ground, with attributes of both rule-facts and adjudicative-facts, are constitutional review-facts. Taken seriously, these facts present the most controversial answer to the question whether lower courts can revisit higher court authority when the facts have changed. I conclude that they should, so long as the review facts were necessary and sufficient for the earlier ruling and substantial new research is available that unambiguously indicates that the facts have changed or our knowledge of them have changed.

In *Abrams v. United States,*[114] Justice Holmes, in a dissenting opinion, hypothesized "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[115] He added, somewhat laconically: "That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."[116] Holmes, as perhaps the first legal realist, well understood the interaction between the Constitution's words and societal consequences. The Constitution may promulgate theories, but only life provides experimental test. A well-functioning Constitution must be fully grounded in the empirical world and responsive to empirical demands. A Constitution is measured by its practical consequences. Constitutional provisions divorced from the world in which they operate are destined to become empty articles

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[114] 250 U.S. 616 (1919).

[115] *Id*. at 630.

[116] *Id.*

of faith. Their legitimacy resting on repetition rather than reason. Our Constitution was "intended to endure for ages to come," and, as a consequence, must "be adapted to the various crises of human affairs."[117] Only through a candid and realistic constitutional fact jurisprudence will this intention be met.

[117] McCulloch v. Maryland, 17 U.S. 316, 515 (1819).