

**SUPREME COURT FACT-FINDING AND
THE DISTORTION OF AMERICAN DEMOCRACY**

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL COURTS,
OVERSIGHT, AGENCY ACTION
AND FEDERAL RIGHTS

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SUPREME COURT FACT-FINDING AND THE DISTORTION OF AMERICAN DEMOCRACY

TUESDAY, APRIL 27, 2021

UNITED STATES SENATE,
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT,
AGENCY ACTION, AND FEDERAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3 p.m., in Room 226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chair of the Subcommittee, presiding.

Present: Senators Whitehouse [presiding], Leahy, Hirono, Padilla, Ossoff, Cruz, and Tillis.

Also present: Senator Durbin and Blumentha.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chair WHITEHOUSE. All right. It is 3 o'clock, and it is time for the hearing to begin to get underway. Our not being able to see the witnesses makes me ask whether all our witnesses are ready and standing by in the virtual world. Good, thank you. I am delighted to have witnesses here.

We are here on a very technical question of appellate process and appellate propriety that ordinarily would not merit the attention of the Senate. Because of what has transpired and some very important political decisions made by the United States Supreme Court, I think it is important that we take a look at this question. The question is: What is the proper role in an appellate court for fact-finding?

When I was in law school and when I was being mentored as an appellate advocate and later on when I did some mentoring as an appellate advocate, I learned basically that if you are an appellate advocate, you do not want to be raising factual questions in a court of appeal because your odds are terrible. Appellate courts are not supposed to do fact-finding. The limited, limited appellate role that they have over a trial court or a jury's fact-finding is subject to a very, very high standard, which is that the finding has to be clearly erroneous. There has to be no conceivable reading of the factual record that could support the factual conclusion that the court blew—below drew. It is really, really clear that fact-finding is to be done at the trial court level, and it is not to be done at the appellate court level—with one—one minor exception, which is to take judicial notice of something. You only take judicial notice of things that are indisputable, like that Christmas in this particular year

fell on a Wednesday or that Boston is north of Providence. That stuff does not have to be in the record because there is really no doubt about it.

Courts are supposed to say what the law is, appellate courts, anyway, particularly the Supreme Court. The Supreme Court's job, according to Chief Justice Marshall, is to say what the law is—not what the facts are; what the law is.

That brings us to the penchant of the Roberts Court's Republican majority for going off and finding facts—not ones that they could take judicial notice of and not ones where they followed the ordinary appellate procedure of reviewing the factual determination of the court below, subjecting it to the clearly erroneous test, and if it found that it failed, sending it back—back to the trial court for further proceedings.

Interestingly, this problem came up in two decisions in which the factual determinations made by the Republican majority in the Supreme Court were critical hinge points to the result of the decision. These were not observations made in passing. They were factual determinations without which they could not have gotten to the conclusion that they wanted to get to.

Shelby County was one of those cases, a challenge to the Voting Rights Act preclearance provisions. The Roberts majority in *Shelby County* made the finding of fact out of the clear blue sky that “things have changed dramatically” and that minority voters no longer faced a threat of discriminatory laws out to restrict their access to the ballot box.

Even if that fact were true, the Supreme Court had no business making it. If it found the record was insufficient on this or that it wanted to explore more what the facts were, they would have sent it back for a more robust record or clearer findings of fact. They did not. They just made this finding of fact.

How did it turn out? It turned out pretty darn badly. State legislatures in the States that were subject to those Voting Rights Act preclearance provisions went immediately to work to limit minority voting rights. Litigation exploded. Federal judges went to work making findings about what the States were doing, targeting minority voters with, as one court said, “surgical precision.” Preclearance jurisdictions saw poll closures, restrictive voter ID laws, voter roll purges. In fact, in the 24 hours immediately following the Supreme Court's ruling in *Shelby County*, Texas announced a new strict voter ID law. Shortly after, Mississippi and Alabama began enforcing voter ID laws that would previously have been barred by preclearance.

So, clearly, the finding of fact, the conditions in the preclearance States had changed to the point of view that preclearance was no longer necessary, was not only highly questionable as a finding when the Supreme Court majority made it, it was irrebuttably disproven by later events. You simply cannot quarrel with what later events showed to have been the case.

Here is where it gets a little bit interesting, because this is such weird and peculiar behavior that there is no process for what you do in this circumstance. What do you do in a circumstance where the Supreme Court makes a false finding of fact? There is a separation-of-powers quotient to this restriction on what appellate courts

can do, keeps them constrained, tethered to the actual facts before them in the case, less able to go wandering off on policy voyages of their own desires.

What happens, where do you go, when the Supreme Court hinges your decision on a fact that is false and is later proven to be false? What do you do with that? The Supreme Court has made no effort to clean up its factual error in *Shelby County*. Is it owed deference still by the other branches of Government? Isn't Congress just as good at fact-finding? Isn't the executive branch just as good at fact-finding as the Supreme Court?

Upon what merit or basis does a Supreme Court decision stand when the essential fact that allowed that decision to be issued in the first instance is false and indisputably false?

It was not just *Shelby County*. On we go to *Citizens United*, another big political case giving a big political win for the Republican Party, in this case allowing unlimited political spending into our elections. Here there was a fact-finding trifecta by the Republican majority. First, massive corporate political spending in politics could not possibly be corrupting because, second, the unlimited spending would be independent of candidates and campaigns; and, third, the unlimited spending would also be transparent.

These factual determinations made by the Court's majority stood on no facts. As Justice Stevens called out very plainly in his dissent, the record in this case, quote, "is not simply incomplete or unsatisfactory, it is nonexistent." Again, all of these facts that the Supreme Court found upon which the *Citizens United* decision hinged are provably wrong. Corruption can exist because of unlimited spending, and, indeed, it has emerged. Just look at the end of climate legislation. Independence between the big donors and campaigns is a mockery, as numerous articles and reviews and analyses have pointed out. All you have to do is turn on the TV to see a fake ad by a phony front group to know that transparency is nonexistent.

Once again, the same problem: The Court spent a decade watching its factual findings be disproven and never stepped in, despite repeated opportunities to clean up the mess that it had made from its error.

So now, we have two very important decisions that played an enormous role in the political outcomes of this country that were both very important to the Republican Party to win. In both cases a Republican majority on the Court invented or created or imagined facts that got them where they needed to go, that helped the Republican Party win those cases. Then they never stood back and cleaned up once their facts were proven demonstrably wrong.

Unfortunately, these two particular decisions figure into a much larger pattern of over 80 decisions in which the Roberts Court Republican majority writes 5-to-4 decisions with all the Republicans lining up, that provide political reward to powerful Republican interests. A lot of those 5-to-4 partisan decisions break rules of appellate practice and principle; a lot of them break what are supposedly the rules of conservative legal practice. In these two cases, it was the rule against appellate fact-finding that was sacrificed.

Imagine that the Court was facing pandemic restrictions, and it reviewed the pandemic restrictions put in place by Governors and

mayors by finding that the virus at the heart of the pandemic could be cured by ingesting disinfectant or bleach. Imagine that that were not true. You would have undercut the Government's ability to deal with the pandemic. You would have done so on a completely false and manufactured factual assertion. Where do you go for that? If it is the Supreme Court, there is no further court of appeal, and if the Supreme Court wants to sit on that fact and never correct it, there is no vehicle to force its hand. Does that then open a role for the other two branches of Government, for the legislative branch or for the executive branch, to step in and say those decisions are founded on a demonstrably false predicate, and when the predicate fell, so did the decision and, therefore, these decisions of the Court are not entitled to the customary deference that we give Court reviews?

To consider this, we have some very knowledgeable and interesting witnesses who are before us today, and I am very grateful that they are here. I will find in a moment my list of them. Here they are. I think we will go in the following order just so that everybody will know.

We will start with Allison Orr Larsen, a professor of law at William & Mary Law School, who teaches constitutional law. She has worked before on this issue and has been published in the media on this issue. She is a fellow law graduate, though far more distinguished, from the University of Virginia and a clerk for Judge Wilkinson from the U.S. Court of Appeals for the Fourth Circuit and for Justice Souter on the Supreme Court.

After her, I will recognize Thomas Fisher, who is the solicitor general of Indiana since 2005, who handles the appellate work for the State of Indiana. He is also a fellow of the American Academy of Appellate Lawyers and adjunct professor of law at Indiana University Maurer School of Law and a former clerk for Judge Michael Kanne of the Seventh Circuit Court of Appeals.

After him, we will hear from Theodore M. Shaw, the Julius L. Chambers Distinguished Professor of Law and the director of the Center for Civil Rights at the University of North Carolina School of Law at Chapel Hill. He teaches civil procedure and advanced constitutional law with particular focus on the 14th Amendment. He has previously served as the director-counsel and president of the NAACP Legal Defense and Educational Fund and has considerable experience with the facts that surround the *Shelby County* decision. He began his career as a trial attorney in the DOJ Civil Rights Honors Program, and as a former DOJ employee, I am always delighted to see that.

Next will be Ilya Shapiro, vice president of the Cato Institute, director of its Robert Levy Center for Constitutional Studies, and publisher of the Cato Supreme Court Review. He has recently written "Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court" and has filed more than 400 Supreme Court amicus briefs and, as well, has been an adjunct law professor at George Washington University and the University of Mississippi.

We will close out with Paul Smith, the vice president for litigation & strategy at the Campaign Legal Center. He is also a professor at the Georgetown University Law Center where he teaches

election law and constitutional law. For 35 years, he has focused on appellate and Supreme Court practice and has argued 21 cases in the U.S. Supreme Court, which is 20 more than I have.

I am delighted to have this panel of witnesses. I should add that Paul was also a law clerk for Supreme Court Justice Lewis Powell.

If I may, let me ask Professor Larsen to lead off with her testimony. Ms. Larsen, the floor is yours, and the camera is alive.

**STATEMENT OF ALLISON ORR LARSEN, PROFESSOR OF
LAW AND DIRECTOR, INSTITUTE OF THE BILL
OF RIGHTS LAW, WILLIAM & MARY SCHOOL OF LAW,
WILLIAMSBURG, VIRGINIA**

Professor LARSEN. Okay. Thank you so much. I am really delighted to be here today. Thank you for inviting me to testify.

The issues that you are confronting this afternoon are ones that I have been writing about and thinking about for over a decade, so I am honored to share my observations with you in any way that can be helpful.

My scholarship focuses on the institutional and information dynamics of judicial decision-making. What does that mean? I have a particular interest in the role of fact-finding at the Supreme Court and the way that the Justices inform themselves about the factual contours of the decisions that they make.

My starting assumption is that technological advances have changed a lot about the way courts desire and digest information. I am concerned that the rules governing fact-finding have not caught up to that change.

Under the current rules of Federal evidence, generalized facts about the world, what academics call “legislative facts,” they are not regulated at all. They are explicitly exempted from the rule about judicial notice. The advisory notes which accompany them and call for their unfettered use date back to 1972. Legislative facts can be but do not have to be the subject of expert testimony at trial, and citations to support these factual claims can be but do not need to come from the record. District court decisions on these legislative facts may but are not entitled to be given deference from the reviewing court.

This amounts to a procedural hodgepodge when it comes to legislative facts, and while that may have been fine in 1972, the world of information sharing just looks dramatically different today. The traditional limitations of fact-finding at the appellate level are well known, so these courts, including the Supreme Court, have limited staff, limited resources, limited time. The parties that are briefing them have limited space in which to do so. Appellate courts are just not built to find facts. Thanks to the dawn of the internet age, the Justices and their law clerks have new tools, and they are flooded with information literally at their fingertips. Social science studies, raw statistics, other data—they are all just a Google search away, and they are being pressed by motivated groups seeking the Justices’ attention. Today, if the Justices want empirical support for a factual dimension of their argument, they can find it easily, and they are increasingly being asked to do so by amicus briefs that are filed by outsiders to the litigation at a record-breaking pace.

As a result, Supreme Court decisions today are really fact-heavy. They are longer. They are padded with significantly more citations. They are rich with nonlegal authorities like citations to newspaper articles or online data sets or websites or even blog posts.

I do not think the judges should put their heads in the sand and ignore everything they see online. That is not my position. I also think amicus briefs can be a valuable educational tool. But right now there is just no quality control on those briefs, so the information coming to the Justices is not uniformly reliable, has not been stress-tested through the adversarial system. It is coming in at the 11th hour, and, importantly, it is being provided by nonneutral groups. The norm today are targeted amicus briefs authored by motivated interest groups, often coordinated by the parties, and submitted by well-organized and well-funded players. This matters because the factual authorities they cite—the studies, the statistics, the articles—they are all marshalled by someone with a dog in the fight. This trouble is exacerbated by the ever expanding sea of factual information that is available to all of us now, including the Justices, and the human tendency to look for facts that support and confirm a preexisting worldview.

The suggestions I have made in my work, it is not to abandon the amicus brief or to eliminate appellate fact-finding altogether but, rather, to update the rules to accommodate the new reality, whether it is through increased disclosure rules or awarding deference to facts that have been through the adversarial testing of some sort. I think the time has come to confront fact-finding at the Supreme Court, and I am really delighted that you are thinking of doing so today.

[The prepared statement of Professor Larsen appears as a submission for the record.]

Chair WHITEHOUSE. Thank you very much, Professor Larsen. I will now turn to Solicitor General Fisher of Indiana.

**STATEMENT OF THOMAS M. FISHER, SOLICITOR GENERAL,
STATE OF INDIANA, OFFICE OF ATTORNEY GENERAL
TODD ROKITA, INDIANAPOLIS, INDIANA**

Solicitor General FISHER. The premise of today's hearing, as I understand it, is the suspicion that the Supreme Court regularly flouts both judicial and democratic norms by basing its decisions on factual evidence brought to its attention by obscure sources outside of the adversarial process. The concern seems to be that organizations funded by confidential donors advancing their own private interests seek to influence the Court by filing amicus curiae briefs packed with dubious factual assertions that have never been subjected to adversarial testing. As many lawyers and scholars have recounted, and as today's witnesses will testify, it is indeed the case that various entities, individuals, scholars, and organizations—some, but not all, funded by confidential donors—seek to influence the Court by filing amicus curiae briefs packed with factual assertions, occasionally dubious, but assertions that have not been subjected to adversarial testing.

My view of the matter, however, is that concerns about that phenomenon are overblown. First, as my friend Mr. Shapiro will testify, it is not entirely clear whether the Supreme Court decisions

that are thought to typify this issue—*Shelby County* and *Citizens United*—actually depended on amici-supplied extra-record evidence.

Second, the practice of amici curiae briefs of various types across the ideological spectrum bringing relevant, extra-record evidence to the Supreme Court's attention is not a new phenomenon. Indeed, it has a distinguished pedigree going back at least to the original Brandeis Brief—that is, the amicus brief filed by then-scholar and eventual Supreme Court Justice Louis Brandeis in *Muller v. Oregon* back in 1908. Broadly speaking, the legitimate parameters of Brandeis Briefs are well understood by the legal profession: It is appropriate for such briefs to bring to the Court's attention matters of legislative fact—i.e., facts about the state of the world—but not matters of adjudicative fact—that is, evidence or claims about events or parties relevant to a particular case. Supreme Court Justices and lower-court judges alike can distinguish between the two and ultimately dismiss attempts to advance extra-record adjudicative facts.

That is not to say that no tension exists between the idea of Supreme Court legislative fact-finding and the idea of democratically accountable decision-making. In short, when the state of the world is reasonably disputed, we generally look to legislatures, not courts, to make the critical decisions, as limited by constitutional safeguards protecting individual liberty. Precisely because legislators are accountable to voters, we lodge policy judgments in their hands.

The real problem underlying today's hearing, then, is not the practice of amici supplying the Court with extra-record material concerning legislative facts. It is instead the practice of the Supreme Court, arising largely in the latter half of the 20th century (but continuing to some degree today), of deciding constitutional cases based on vague, multipart balancing tests or standards instead of deciding them based on crisp rules derived from the original public meaning of constitutional text. Balancing tests, in short, amount to policy judgments, not legal reasoning, and they invite the very reliance on extra-record state-of-the-world fact-finding that has prompted this hearing.

Fortunately, the Supreme Court has shown signs in recent decades of retreating from amorphous, policy-laden constitutional standards and advancing toward a constitutional law characterized by rules grounded in constitutional text and history. That, and not any extraneous restraint on amicus practice, is the solution to any problems attendant to Supreme Court fact-finding.

If we are to be governed by a constitutional law of broad standards and judicial balancing tests—inquiries that by their nature invite judicial policymaking—then Supreme Court fact-finding is inevitable, and the current system of liberal Brandeis Briefing is perfectly reasonable. Doing away with amicus briefs that bring extra-record legislative facts to the Court's attention would only cloud a practice that, at present, is relatively open and transparent. The real problem is not how Supreme Court practice copes with decision-making under current doctrines. It is the doctrines themselves. Only by eschewing the vague standards that characterize so many doctrines of constitutional law, and embracing instead rules-based decisions grounded in text and history of the Constitution,

can the Court leave the legislative fact-finding where it belongs—in the Nation’s legislatures.

Thank you.

[The prepared statement of Solicitor General Fisher appears as a submission for the record.]

Chair WHITEHOUSE. Thank you very much, Solicitor General Fisher. I appreciate your joining us from Indiana.

I would turn now to Professor Shaw.

**STATEMENT OF THEODORE M. SHAW, JULIUS L.
CHAMBERS DISTINGUISHED PROFESSOR OF LAW, AND
DIRECTOR, CENTER FOR CIVIL RIGHTS, UNIVERSITY
OF NORTH CAROLINA SCHOOL OF LAW,
CHAPEL HILL, NORTH CAROLINA**

Professor SHAW. Good afternoon. I am grateful for the opportunity to be here and to testify before this Subcommittee, and I hope, Senator Whitehouse, that this is not hubris for me to ask this question: Did you want to swear us in?

Chair WHITEHOUSE. That is not necessary.

Professor SHAW. Okay.

Chair WHITEHOUSE. Witnesses before Senate Committees are automatically deemed to be under oath, and since nobody is giving factual testimony, my practice is not to do so and to rely on the standard rule.

Professor SHAW. Wonderful. Thank you for that piece of education for me.

I—so I want to focus on the Supreme Court’s decision in *Shelby County*, and I also, in my written submission, have something to say about *Citizens United*. Both of these cases, I think, are instances in which the way the Supreme Court has strayed from facts has contributed to the Court being part of what I consider to be a very troubling and dangerous moment in our history. I hope I am wrong about some of this, but I know that with respect to *Shelby County*, I think that not only am I not wrong, but the Court straying from the Congressional Record, as it did in the *Shelby County* case, has led it to be wrong about where the country is now when it comes to racial discrimination and our electoral processes.

I was very much engaged in the process of advocating for the extension of the Voting Rights Act in 2006 and the temporary provisions of the Voting Rights Act. I testified before both the Senate Judiciary Committee and the House Judiciary Committee and also submitted written answers to questions before the Senate Judiciary Committee. As one of the civil rights lawyers who worked to advocate for the extension of section 4 coverage with respect to the workings of section 5, I know that we spent a huge amount of time consciously building the record. As a lawyer, as a litigator in court and trial, the record is everything. That is not only true with respect to litigating cases, it is also true with respect to building a record that would withstand the inevitable controversy and court challenges that were going to follow the extension of the Voting Rights Act.

We were very, very deliberate about that, and although in the *Shelby County* case Chief Justice Roberts wrote that the record that was before the Court in *Shelby County* was old, it was based

upon a nearly half-century-old set of facts, that was not the set of facts that Congress relied upon when it enacted the extension of the Voting Rights Act in 2006. Quite to the contrary, it relied on a record that had been updated that looked at the jurisdictions that were covered under section 5 of the Voting Rights Act and by the coverage formula pursuant to section 4. It based its legislation in 2006 on that record, not the 40- or 50-year-old record to which the Chief Justice appointed.

At one point in *Shelby County*, the Chief Justice said, quote, “In 1965, the States could have been divided into two groups: those with a recent history of voting rights and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along these lines, yet the Voting Rights Act continues to treat it as it is.”

Many of us were deeply troubled when we read that part of the *Shelby County* opinion, but I wonder what the Chief Justice would say today about his comments, his opining with respect to whether the country is divided along those lines, because, in fact, I think what we saw, as, Senator Whitehouse, you pointed out, was an immediate—an immediate opening of some floodgates after the *Shelby County* decision. We saw legislation on State levels with respect to voter ID laws, with respect to gerrymandering, the fourth circuit opinion that talked about “surgical precision” with respect to gerrymandering. We saw a number of States adopting efforts that—and we continue to see them now—that are aimed at reducing the number of people who can vote. The idea that citizens should be able to vote now if they are entitled to is up for grabs. The notion that low voter turnout is not a good thing is up for grabs, in part because the Supreme Court in *Shelby County* seems to have given license to the—to the notion that we should be trying to prohibit people from voting.

Chair WHITEHOUSE. Professor Shaw, I have let you go over a couple of minutes because we had that conversation at the beginning, but if you could please wrap up?

Professor SHAW. Yes. My apologies.

The bottom line is that the country with respect to the right to vote is still deeply divided, that the fact-findings that the Chief Justice made or purported to make in *Shelby County* were inaccurate and wrong, and we need—and we hope that the Senate, that Congress revisits the Voting Rights Act and reactivates its protections.

Thank you, Senator.

[The prepared statement of Professor Shaw appears as a submission for the record.]

Chair WHITEHOUSE. Thank you so much, Professor Shaw. I now turn to Mr. Shapiro.

**STATEMENT OF ILYA SHAPIRO, VICE PRESIDENT
AND DIRECTOR, ROBERT A. LEVY CENTER FOR
CONSTITUTIONAL STUDIES, CATO INSTITUTE,
WASHINGTON, DC**

Mr. SHAPIRO. Chairman Whitehouse and Senators, thanks for this chance to share my thoughts on judicial process.

I actually think the hearing title is a bit loaded: first, because the Supreme Court does not generally engage in fact-finding in the way trial courts do; and, second, because however much our democracy is “distorted,” a reactive institution like the Court is hardly at fault. Indeed, the Court is the most respected Government institution other than police and the military, so hand-wringing over its legitimacy arises when progressives are frustrated there is a major institution they do not control. The Chairman himself threatened the Court in a brief last year.

It is uncontroversial when the Court takes facts into account to assess reliance interests and such. There is a difference between “adjudicative” and “legislative” facts. Appellate courts are not supposed to develop adjudicative facts. Legislative facts are different because they explore the consequences of potential rulings. Justice Breyer in particular is known for internet searches, but all the Justices do it.

Yet something tells me that this hearing was not called to survey appellate review of summary judgment determinations or the difference between clear error and abuse of discretion. Nor is this a seminar on the proper scope of judicial notice; otherwise, we should all yield our time to Professor Larsen and her groundbreaking empirical work.

Instead, this is a collateral attack on decisions that Professor Larsen called “fact-y”—that is, legal rulings “infused with factual observations,” specifically *Shelby County* and *Citizens United*. Neither judicial fact-finding nor even legislative facts in amicus briefs mattered much in those cases. I certainly would not lump them in with *Brown v. Board* or *Roe v. Wade* or *Grutter v. Bollinger*.

Before turning to the cases, I want to comment, though, on the role of amicus briefs where I have plenty of so-called lived experience. My briefs are not a good example of fact-finding because we make legal arguments rather than filing Brandeis Briefs. Cato has no expertise in biology, sociology, or technology. Instead, we maintain an unwavering commitment to liberty through constitutional Government. That is our only interest, and we do not hide it.

Despite the Chairman’s quixotic crusade against amicus brief funding, there is nothing fishy about donations to nonprofits involved in strategic litigation. It is done on the left and the right, and even by libertarians. Cato is funded 75 percent by individuals and 20 percent by foundations. We also get a tiny bit of corporate funding, about 3 percent, much less than the Chairman gets from corporate PACs.

The attack on amicus briefs misplaces the causation arrow. Advocacy groups advance many causes, and donors, both individual and corporate, fund the causes they support.

Because of a Constitution that is classically liberal, the Supreme Court is one of the few friends in Government for advocates of liberty. For example, the term *Shelby County* was decided, Cato was the only group to have filed on the winning side not only there, but in *Fisher v. UT Austin* and *Obergefell v. Hodges*. Moreover, Cato was the only group in the entire country to have filed for both Jim Obergefell and, 5 years later, Jack Phillips, the owner of the Masterpiece Cakeshop bakery.

On *Shelby County*, the Constitution does not let Congress do whatever it wants regarding voting. Section 2 of the 15th Amendment says that, quote, “Congress shall have power to enforce this article by appropriate legislation.” What “appropriate legislation” means is disputed. In 2009, the Court unanimously ruled that the Voting Rights Act “imposes current burdens and must be justified by current needs.”

So, legislation passed to protect voting rights may be constitutional when enacted but cease to be when the underlying conditions change. We can argue over when that point comes, but it is not fact-finding; it is judging.

It should not be surprising that *Shelby County* eased out what was supposed to be a temporary provision to oversee State elections based on that era’s racial disparities. The Court simply founded that the coverage formula for jurisdictions subject to preclearance was based on 40-year-old data, so covered jurisdictions no longer corresponded to discrimination. Had Congress updated section 4 when it renewed section 5, the Court would have had a harder time finding the coverage formula outdated.

In other words, just as the Court was correct in 1966 to approve the constitutional deviation that preclearance represents as an uncommon remedy to the exceptional conditions in the Jim Crow South, it was correct in 2013 to restore the constitutional order on the basis of legal findings. While Justice Ginsburg compared ending preclearance to throwing away your umbrella in a rainstorm because you are not getting wet, it is actually more like stopping chemotherapy when the cancer of actual Jim Crow is eradicated.

Citizens United is even less fact-dependent. The question it asked was entirely a legal one: Does the First Amendment allow Government to restrict corporate or union independent speech? Some argue that the case relied on a factual finding that independent spending does not corrupt politics, but the majority opinion is grounded in law. The only constitutional justification for restricting political speech is to prevent quid pro quo corruption or its appearance. Debating campaign finance is beside the point because *Citizens United* did not involve policy judgments.

In sum, there may be real problems with in-chambers research. Studying that issue is worth the Subcommittee’s time. But associating it with the debates over *Shelby County* and *Citizens United* or polemics about our democracy detracts from that project.

Thank you, and I welcome your questions.

[The prepared statement of Mr. Shapiro appears as a submission for the record.]

Chair WHITEHOUSE. Thank you very much, Mr. Shapiro.

Finally, we have Mr. Paul Smith from the Campaign Legal Center. Mr. Smith, proceed.

**STATEMENT OF PAUL M. SMITH, VICE
PRESIDENT, LITIGATION & STRATEGY,
CAMPAIGN LEGAL CENTER, WASHINGTON, DC**

Mr. SMITH. Thank you, Mr. Chairman and Members of the Subcommittee. I appreciate the honor of appearing before you today to talk about a really important topic: how the Supreme Court comes up with the factual assumptions that underlie its constitutional de-

cisions, especially in key election law cases like *Citizens United* and *Shelby County*.

These kinds of factual assumptions, known as legislative facts, involve questions of how the world works or how a particular legal rule will operate in practice. In applying the Constitution, for example, in deciding whether a law passed by Congress is constitutional or not, the Supreme Court needs a factual basis. In my experience as a student of the Court, it generally functions better when it derives those facts from a trial court record or a legislative record. By contrast, some of the least defensible Supreme Court rulings have come about when the Court disregards the evidence in the legislative record or the trial record and relies on factual assumptions that do not turn out to be remotely accurate.

Take *Citizens United*, for example. As laid out in my written testimony, the Court relied on the factual assertion that so-called independent expenditures in political campaigns, as distinguished from contributions to candidates, can never be corrupting. What was the basis of that assertion? That certainly was not a factual assumption accepted by Congress when it passed the provision of the Bipartisan Campaign Reform Act that was at issue. To the contrary, Congress relied on its intimate knowledge of how campaigns operate in deciding to extend the existing limits on corporate independent expenditures back in 2002.

Nor was there any trial record supporting the Court's assertion about the noncorrupting nature of independent expenditures. There could not be because *Citizens United* had decided not to make the argument that the law issue was facially unconstitutional until the Supreme Court converted the case to a facial challenge after it was already up on appeal.

Ironically, there was an extensive factual record on this very issue being developed by lawyers at the Federal Election Commission at precisely the same time. That was in a case called *SpeechNow*. That evidence became irrelevant once the Court announced in *Citizens United*, essentially as a matter of law, that independent expenditures are per se noncorrupting.

How did this all work out? *Citizens United* led directly to the creation of super PACs, large PACs receiving unlimited contributions that make only independent expenditures. They evolved, in many cases, into single-candidate super PACs working hand in glove with candidates and their campaigns. The notion that large, unlimited contributions to that kind of entity can never buy undue influence or corrupt the candidate seems just silly. These institutions, these entities are indistinguishable, for all practical purposes, from the campaign contributions which Congress continues to limit.

Shelby County presents a different but equally troubling scenario. In 2006, Congress had to decide whether to renew section 5 of the Voting Rights Act, which required preclearance of voting changes in States mostly in the Deep South. Based on exhaustive evidence, it decided that this region continued to exhibit a desire to suppress voting by African Americans and Latinos and, therefore, should remain subject to the preclearance regime. Congress then passed the extension of that law almost unanimously.

How did the Supreme Court respond? The majority in a 5-to-4 ruling simply rejected the factual conclusions of Congress and all

of the evidence on which they were based. It issued a novel constitutional ruling invalidating this important act of Congress premised on the notion that the States subject to preclearance had changed so much that this highly effective barrier to vote suppression was no longer necessary.

The result was predictable and unfortunate. State after State passed laws that would have clearly failed preclearance because they were very, very likely to diminish access to the franchise for Black and Latino voters. The ability of advocates to push back on these laws was severely impaired, and often even when the challenges that were brought were successful, the legislatures simply turned around and passed more laws aimed at vote suppression.

That is precisely what section 5 was intended to prevent, that kind of whack-a-mole legislating, constant new innovation in means of vote suppression.

To be sure, there are times when the Justices need to make their own best judgments about the legislative facts in deciding cases. Not every case has a factual record, but the enforcement of constitutional rights has to continue. It would be better if the Court minimized those situations and relied on well-documented actual records wherever possible.

Thanks for allowing me to testify today. I would be happy to answer any questions you may have.

[The prepared statement of Mr. Smith appears as a submission for the record.]

Chair WHITEHOUSE. Thanks very much, Mr. Smith.

We have participating in the hearing former Chairman Leahy, current Chairman Durbin, and Senators Hirono, Padilla, and Ossoff, as well as Senator Tillis on the Republican side. I am going to be here until the end, so I am going to withhold my questioning. The order of questioning at this point is going to be Leahy, Tillis, Durbin, Hirono, Padilla, Ossoff, unless other Republican Members come, in which I will intersperse them.

With that, let me turn it over to our distinguished President Pro Tempore Chairman Leahy. Senator Blumenthal just joined us, too, so he fits into the roster by seniority.

Senator LEAHY. Thank you, Mr. Chairman, and thank you for holding the hearing. You and I have discussed these things many times, as have most of the people around here. As you know, I think that two of the most harmful Supreme Court decisions of our lifetime are *Shelby County* and *Citizens United*, and I have not been at all shy about my criticisms.

I look at *Shelby County* ignoring the massive bipartisan record Congress assembled, and I was here at the time. We held over 21 hearings, 15,000 pages of evidence, and every Member of the Senate, Republican and Democratic alike, agreed that section 5 of the Voting Rights Act remained essential to preventing serious and widespread intentional discrimination, a 98-to-0 vote. You normally do not see a 98-to-0 vote around here to say the sun rises in the east. But the—as Justice Ginsburg’s dissent pointed out, the Court made no genuine attempt to consider the overwhelming evidence Congress gathered by both Republicans and Democrats in determining the scourge of discrimination was not yet eliminated. Instead, they just did away with it and said, “Start all over again.”

Could I ask, Professor Shaw, why was the Court's decision to dismiss the massive bipartisan record Congress built in support of the 2006 Voting Rights Act reauthorization such a major mistake? Why did it lead to a decision divorced from the facts?

Professor SHAW. I have been puzzled, at best, by the Supreme Court's decision—I should say the majority of the Supreme Court's decision in *Shelby County*. I just want to underscore again the record that supported the extension of the Voting Rights Act, and, in particular, the coverage formula, relied on State reports, on Subcommittee hearings in both the Senate and the House, on the National Commission on the Voting Rights Act. It relied on descriptions of court decisions and evidence in those decisions, as well as a review of section 5 objections. The record was massive, as I am sure you well remember. I am puzzled at best at trying to understand how the Supreme Court majority arrived at the conclusion that there was no contemporary evidence that supported the extension of the Voting Rights Act. That was simply not consistent with the facts, although the Supreme Court does have the final say.

Senator LEAHY. I understand the final say, and I respect that. I find it hard to find any case where it has been so overwhelming in the dedication to the facts that there was in this one. As Justice Ginsburg said, the Congress' powers are at its height when it acts to confront the most invidious forms of discrimination.

You have five Justices who suddenly decided to ignore the overwhelming conclusion of Republicans and Democrats alike in Congress trying to prevent voter discrimination. I know, Professor Larsen, you testified on this. Did the Court in *Shelby County* give any explanation for why it suddenly thought it was better positioned to do this fact-finding than the democratically elected branches of Government?

Professor LARSEN. I think reasonable minds can disagree about whether the decision in *Shelby County* was a factual one or a legal one that rested on a factual premise. What I have written about before is, you know, there is a consequence of using "fact-y" language beyond even the consequences of striking down the Voting Rights Act, and that is, there is sort of a retreat to facts. It makes it sound more neutral and objective and almost quasi-empirical and scientific. I think there is a change not just in the information the Court is using to support their factual assertions, but also in the legal decisions themselves that rely on the factual claim. I guess—

Senator LEAHY. In fact, those factual claims came from 15,000 pages of evidence that every Member of the Senate had relied on. It was not—it was not the Senate saying, "Here, here is the law," but instead saying, "Here are the facts, 15,000 pages backing it." Across the political spectrum, we agreed to that.

Does that give us some pause if the Court is willing to ignore that? We are not talking about the law. We are talking about the facts.

Professor LARSEN. Right. I tend to think that anytime the law is premised on a factual claim like that, even if it is a legal question, that the facts being asserted should be deferred to if they have been through a significant process. Here, as you mentioned, the Congressional Record had been through—it was bipartisan. It had

been recently reenacted. I do think in that situation the deference to the legislative record was warranted because of the process that went into the creation of the factual record.

Senator LEAHY. Thank you, Mr. Chairman.

Chair WHITEHOUSE. Thank you very much, Senator Leahy.

We turn now to Senator Tillis. We have also been joined by Senator Cruz, who will be next in rotation on the Republican side.

Senator TILLIS. Thank you, Chairman. Just a quick question or a couple of questions for Mr. Shapiro and Mr. Fisher. The first question is: Do you believe it is ever appropriate for the Supreme Court to engage in fact-finding?

Mr. SHAPIRO. I will go first, I guess. Not adjudicative fact-finding and not—you know, finding judicial notice is perfectly appropriate, and beyond that, you know, Professor Larsen has done good work on how that is done and the adversarial process and so forth. You do not want to have kind of a battle of experts in footnotes and things like that. I would say it is sometimes appropriate, yes.

Senator TILLIS. Mr. Fisher, I would like your input. Maybe as you do—and, Mr. Shapiro, I should have started by welcoming Professor Shaw, welcome to DC. I wish I was in North Carolina with you. Then, Mr. Fisher, if you could answer that question as well, but then also talk about maybe a notion of standards, whether there should be a different standard for the Supreme Court versus other appellate courts.

Solicitor General FISHER. Thank you. The main concern I have got is that the Supreme Court, when it makes decisions, constitutional decisions, that it do so in a way that permits evenhanded application and not in a way that is articulated in terms of balancing tests and standards that can permit facts in different cases to lead to different outcomes, because that only heightens the significance of any arguments about facts in the Supreme Court. I think the Supreme Court operates as a court just like other courts, and I am frequently in the position of defending State laws where courts are making inquiries about whether we have a sufficient factual record, and we are making those arguments based on what is in the record, and occasionally we will see amicus briefs that show up.

I think we should also, you know, point out that the kinds of legislative facts we are talking about do not always come just from amicus briefs. They come from party briefs, too. I think that when you have got, you know, a Supreme Court that is embracing broad standards as opposed to crisp, articulated rules, inevitably you are going to run into this problem, and it is going to trickle down to the lower courts as well.

Senator TILLIS. Mr. Shapiro, on the point of possibly a different standard for the Supreme Court versus lower appellate courts, do you have an opinion?

Mr. SHAPIRO. I think the Supreme Court sits as a court of review. I mean, perhaps it has need to look at broader perspectives and, therefore, different kinds of legislative facts, because, after all, it is the Court of last resort. It sets the rules for the entire country with no possibility of appeal short of Congress changing the law in a statutory case or amending the Constitution in a constitutional one. There is more weight to it and perhaps more consideration

needed, but that is a difference of degree, I would say, rather than kind.

Senator TILLIS. Professor Shaw, just a quick question for you. What are the possible harms from prohibiting appellate courts, including the Supreme Court, from conducting fact-finding?

Professor SHAW. I think the—and, by the way, it is a lovely day here in North Carolina. I think that we know that trial court judges sit closest to the facts, to the witnesses. They can make judgments that appellate judges are not in a position to make. When the Supreme Court makes fact-findings, what it is doing is displacing those well-grounded, well-founded judgments and substituting its own judgments, and probably without a real clear basis for doing so. I think the danger is to credibility of the Supreme Court.

Senator TILLIS. Thank you all. Thank you, Mr. Chairman.

Chair WHITEHOUSE. Thank you very much, Senator Tillis. I see Senator Durbin and Senator Blumenthal do not seem to be present at the moment, so I will turn to Senator Hirono.

[No response.]

Chair Whitehouse, over to you.

Senator CRUZ. Thank you, Mr. Chairman. It is the first time I have ever been introduced as “Senator Hirono.” It is good to be with you. Welcome to each of the witnesses. Thank you for being here.

Mr. Shapiro, let us start with you. You and I have known each other. We have been friends for north of 20 years now. You have been at Cato a long time. You do an awfully good job. For Cato, you have worked on a lot of amicus briefs. Let us start off at the beginning. Are amicus briefs some sort of deep, mysterious tool for dark money to deceive the United States Supreme Court?

Mr. SHAPIRO. They are not. The disclosures that are currently in place about whether you have been funded by a party or whether the brief has been written by a party demonstrate whether there are any conflicts like that. Beyond that, it is just someone having a problem with the organization generally.

Senator CRUZ. I guess I could understand the concerns of the majority. I mean, after all, amicus curiae is Latin for “corrupt purveyor of lies,” is it not?

Mr. SHAPIRO. There is some dispute now, I suppose, whether it is really a “friend of the court” or a “friend of only the party that you are supporting.” I take your point.

Senator CRUZ. Mr. Fisher, General Fisher, it is good to see you as well. You and I served as fellow solicitors general in Indiana and Texas, respectively. You have been doing this job a long time. From your perspective, what is the importance of amicus briefs filed by the State attorneys general?

Solicitor General FISHER. I think it is critical that the Court understand what impact its decisions may have on States. I think there was a time when the States and the Supreme Court, the status of States in the Supreme Court, was not really what it should be in our constitutional system where States have sovereign authority. The Supreme Court rules, as you know, give States the right, when filing under the name of the attorney general, to file an amicus brief in the Supreme Court. I think it is critical that we

do that in cases where we have an interest so that the Court understands not simply what the Federal Government might think about an issue, but what States think about issues as independent sovereigns.

Senator CRUZ. What do the initials CVSG stand for at the Supreme Court?

Solicitor General FISHER. That is for Calling for the Views of the Solicitor General, typically used with reference to the Solicitor General of the United States, but occasionally and I have seen in at least one circumstance where the Court has called for the views of the solicitor general of the State of Texas.

Senator CRUZ. The Supreme Court finds the views of amici helpful. It has a formal process to regularly call for the views of the United States solicitor general and, indeed, the United States Department of Justice is the most frequent amicus before the Court. The Court has also called for the views of the solicitor general at the State level as well, so the Court itself has recognized that amici can be important. Indeed, with some regularity, the Court allows amici to present oral argument. Is that correct?

Solicitor General FISHER. That has happened in a number of instances, and, indeed, I can think of at least one instance where the Court invited a State to make an argument as an amicus. I think it finds that sort of input very valuable.

Senator CRUZ. General Fisher, I will note that when your office was defending the State of Indiana's photo ID law for voting, I was at the time SG of Texas and drafted an amicus for a number of States in support of Indiana's law. When that case went to the U.S. Supreme Court, the State of Indiana prevailed. The Court agreed with Indiana. The Court agreed with Texas and the other State amici and upheld the requirement of photo ID. The decision was 6-to-3. Justice John Paul Stevens, one of the most noted liberals on the Court, wrote the majority opinion upholding Indiana's photo ID law and explained that photo ID laws enhance the integrity of elections and protect the right of voters to cast legal votes and not have those votes diluted by illegal votes that are cast fraudulently. Is that right?

Solicitor General FISHER. Yes, that is what the Court said, and we were grateful for the reasoning and the outcome and for the support of Texas' amicus in that case.

Senator CRUZ. Mr. Smith, it is good to see you as well.

Mr. SMITH. Good to see you, Senator.

Senator CRUZ. You have long experience as a litigator and Supreme Court advocate. What do you see as the role of amicus briefs before the Court?

Mr. SMITH. I am sure you know, Senator, I have filed many, many of them, and I think the Court finds them very helpful. Many of the ones I filed do, in fact, contain what you would call legislative facts for organizations like the American Psychological Association. I think the Court needs access to some facts like that. As Senator—Professor Larsen said in her written testimony, the Court draws lines between the people—the briefs it trusts and the briefs it does not trust a lot of the time.

My concern is, though, when they pull facts out of the air that are not well supported, even by amicus briefs, and those facts end

up being ossified and become kind of facts as a matter of law that all the other courts in America are forced to accept even if they are not true.

Senator CRUZ. I guess one of the more notorious examples of that would be Justice Blackmun's opinion in *Roe v. Wade*, which reads like, I think, a poorly written medical journal where he opines on a whole series of medical facts that we have since discovered many of which are incorrect. Would you agree that the majority opinion in *Roe v. Wade* included a whole lot of things stated as facts that are found nowhere in the trial court record?

Mr. SMITH. I am not an expert on that case, but it is certainly true that the opinion is very "fact-y," to use Ms. Larsen's term, and there is considerable controversy about much of what Justice Blackmun said way back in 1973.

Senator CRUZ. Thank you very much.

Chair WHITEHOUSE. Thank you, Senator Cruz.

Senator HIRONO, my apologies for the mix-up.

Senator HIRONO. Thank you, Mr. Chairman.

I do not see how anybody can look at either the *Shelby County* or, in fact, the *Citizens United* case and not come to the conclusion that, especially with regard to the *Shelby County* case, where there were thousands of developed testimony, thousands of pages and all of that, and suddenly the Supreme Court says, "We do not care about all that." It is just astounding activism on the part of the Supreme Court.

The same thing for *Citizens United*. What started off as a very narrow case on whether a 90-minute on-demand video should be deemed a corporate campaign advertisement suddenly gets to—the Court decides to treat it as a case that would determine the constitutionality of the Bipartisan Campaign Reform Act and the Court decides out the window. If that is not Court activism that undoes congressional actions, I really do not know what is.

I have a question for Mr. Smith. Because the Court had no developed record on the expansion of the issue in *Citizens United*, Justice Kennedy authored an infamous quote in the majority opinion, and he said, quote, "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," end quote.

Mr. Smith, can you explain what Justice Kennedy relied on in the factual record, which was sparse, to make this sweeping pronouncement? Are you aware of any foundation for the statement by the Court in *Citizens United*?

Mr. SMITH. Senator, thank you. There was no factual record in the *Citizens United* case because the case had not been argued as a facial challenge in the trial court. Essentially what Justice Kennedy did was two different things. First, he moved the goalposts by announcing what corruption means as only quid pro quo corruption. Then he basically used references back to cases involving other issues like the *McConnell* case or to the very tentative decision that the Court uttered in *Buckley* way back in the 1970s.

What happens when they say that, it becomes a finding of fact that is unquestioned in all other courts, and so the Supreme Court needs to be very careful when they announce a factual conclusion

that will end up deciding dozens and dozens of other cases and lead to things like single-candidate super PACs.

Senator HIRONO. Of course, and for Justice Kennedy to suddenly decide that the only kind of corruption is *quid pro quo*, where does he even get that? Where does he even come off saying that? If you know anything about real life, you know that nobody is going to—unless you are really stupid—say to a political person, “I am going to give you this money in exchange for” blank.

Mr. SMITH. This is the move the Court has made in the last—
Senator HIRONO. Yes, and that is why the people we put on the Supreme Court is really, really important.

Okay. Here is a question for Professor Shaw. We had a Judiciary Committee hearing recently about all of these hundreds and hundreds of bills being considered and sometimes enacted by dozens of State legislatures that basically have the effect of limiting voting rights. Basically because we did not have an Attorney General—well, we do not have the relevant provisions of the Voting Rights Act that requires preclearance, there are going to have to be all these lawsuits. Ms. Ifill, who is the current president and director-counsel of the NAACP Legal Defense and Educational Fund, said that lawsuits are an imperfect and difficult means to enforce voting rights.

Professor Shaw, would you agree that this is not the way that we should be enforcing voting rights—a really fundamental right, by the way, of citizenship?

Professor SHAW. I agree that the—that lawsuits are an important way to enforce the right to vote. Section 5 had a prophylactic effect.

Senator HIRONO. Yes.

Professor SHAW. The operating formula that was in section 4 now has been lost, and so that protection has been lost, I hope temporarily, and the only thing that is left right now with respect to the Voting Rights Act are section 2 cases, which are very difficult to litigate.

Senator HIRONO. Yes, that is right.

Professor SHAW. They are not proactive. They only look backward.

Senator HIRONO. Professor Shaw, you would agree that while litigation is always available, it is a very expensive and long—it takes a long time, you know, and that is really an inefficient way to protect people’s voting rights. We all know what happened after *Shelby County*. I think 13 States immediately passed voter suppression legislation, and now that there are people out there who think that they have a 6-to-3 majority on the Court to sustain all of these voter suppression laws, they are coming at us by the hundreds.

Professor SHAW. Agreed.

Senator HIRONO. I seem to be running out of time. I could go on, but you get my drift. We have a 6-to-3 activist Court that is intent on pushing their ideological agenda on the rest of us.

Thank you, Mr. Chairman.

Chair WHITEHOUSE. Thank you very much, Senator Hirono.

Let me ask a few questions myself. Let me start with Mr. Smith and let me start on *Citizens United*, which, as it turned out, was a First Amendment case. As a general proposition, Congress cannot

inhibit the exercise of people's First Amendment rights, but there is an exception, and that exception is where it would tend to produce corruption in the political arena.

In order to create a First Amendment right to unlimited spending, it was not just convenient or helpful; it was actually logically essential to the decision to find a way around the problem of the role of money in political corruption. What that did was set up two facts found by Justice Kennedy's majority opinion as being really, really important ones. One was that the spending would be independent, i.e., I think the sort of general theory was ExxonMobil would buy TV time and run their ad and at the end of the ad say, "We are ExxonMobil, and we approved this message." They would have had no contact whatsoever with the party or the campaign or the candidate who they were intervening to support.

Let us just start with that. Mr. Smith, has that proved out to be the case?

Mr. SMITH. There is a great deal of illegal coordination that goes on between so-called independent expenditure super PAC and candidate campaigns, and it is often done just because you have a single-candidate super PAC and they sort of know what the candidate is all about. They can do this informally. There does not have to be any egregious coordination. The independence promise has proved to be a fiction in the world that has evolved as a direct result of the Court's pronouncement about independent expenditures not being corrupting.

Chair WHITEHOUSE. That is not a very close call. That is pretty obvious, isn't it?

Mr. SMITH. Yes, sir.

Chair WHITEHOUSE. With respect to transparency, which was the other predicate for the decision, that the public would always see who was spending the money, that we can absolutely guarantee is a false fact at this stage, can we not, with over a billion in anonymous money spent in elections since *Citizens United*?

Mr. SMITH. Yes, Senator. I believe it is pretty clear that the whole promise of disclosure being the panacea did not work out. Indeed, I believe, Senator, Justice Kennedy himself has acknowledged that it did not work out the way it was supposed to because there is a tremendous amount of dark money the system is awash with.

Chair WHITEHOUSE. Is it fair in terms of the analysis of *Citizens United* to say that if you remove the transparency and independence underpinnings, the factual findings upon which Justice Kennedy stood the proposition that there would not be corruption, and, therefore, money could be protected by the First Amendment, when you knock out those two predicates, the whole proposition falls, doesn't it? There is nothing left to sustain it. It could be corruption, therefore, it is not First Amendment, and *Citizens United* effectively vanishes as a decision.

Mr. SMITH. Right, it is all about finding a way to get rid of the State interest, the Government's interest in regulating these expenditures. If you take one piece away and the next piece away and you end up with the fact that there is no possibility of corruption as an assumption, then there is no basis under the First Amendment for continuing to regulate it. That is how we got there.

Chair WHITEHOUSE. Let me ask Professor Larsen to chime in on this as well, and then I will ask Mr. Smith also. What's—what is the remedy here?

Professor LARSEN. I think when the Court issues a decision based on a factual premise and then those facts turn out to be errant, the only remedy is for the Court to take the case back up again and change its mind, and then they have to go through a stare decisis rationale, too. Your question, I think, raises a heightened concern with cementing factual decisions into constitutional legal holdings, because they are very difficult to change. I might add—

Chair WHITEHOUSE. Yes, and, in fact, there is no rule of the Court that would allow anybody from the public or anybody from Congress or anybody to say, by the way, you guys, you stood a decision on this predicate fact; without this predicate fact, the decision effectively vanishes; the predicate fact is now proven indisputably wrong, and I seek withdrawal of the decision, I seek what? You end up in a situation in which a law of the United States declared by the United States Supreme Court that stands on a false factual premise is affecting the behavior of people, and in the case of *Citizens United* affecting the integrity of Government, and there is nobody anywhere in any of the branches of Government who has any power to do anything about it unless the Supreme Court acts presumably sua sponte. Is that correct? As long as they are going to get into this kind of fact-finding, should we put a rule in that allows for factual review of false facts when they are predicate facts that are operative to an important decision?

Professor LARSEN. I think Article III would require a case or controversy for that to get to the Court. I do think your question highlights the risks involved with errant fact-finding, and you can even look outside the Federal system after *Citizens United* to what happened in Montana where you get the factual premise of the legal holding being applied in a State system, and they thought that *Citizens United* was a case about facts, so they had a different factual record, and the Supreme Court summarily reversed it. There is a lot of confusion as to where the factual claim ends and the legal holding begins.

Chair WHITEHOUSE. In the case of *Citizens United*, it is as clear as a pile of bricks that, if you take out the bottom brick that says that there is going to be transparency and there is going to be independence, then the next brick above it, which is that that transparency and independence will protect against corruption, falls; and the brick above that, which is that, therefore, we do not need to worry about corruption and can push aside the State interest in regulating, falls; and the First Amendment protection for spending money then falls. I mean, in some cases these errant facts that you talk about are observations in passing. But in *Citizens United* and in *Shelby*, they were essential to the conclusion that the majority wanted to reach, were they not?

Professor LARSEN. Yes, I would call them premise facts.

Chair WHITEHOUSE. Call them what?

Professor LARSEN. Premise facts.

Chair WHITEHOUSE. Yes, I call them predicate facts, but I think we are in the same place.

I think we need to start figuring out how we deal with premise facts or predicate facts that prove to be wrong, but that still support a legal doctrine out there. I do not know how we deal with that, but the idea that a “zombie doctrine” whose underpinning factual predicate has collapsed can still walk the legal earth and demand conformance to it simply makes no sense whatsoever. From a separation-of-powers point of view, it is hard to see why a Chief Executive or a Congress should pay to the judicial branch of Government any deference at all when those situations have occurred.

Let me turn to Professor Larsen and Mr. Smith for that.

Professor LARSEN. I will yield to Mr. Smith.

Mr. SMITH. It is certainly true that the real problem is that these findings of fact, when they form the basis of a decision, legislative facts, when they are done by the Supreme Court, almost take on the quality of being a legal ruling that binds every other court. How would you fix it? The only way to fix it is to file a lawsuit in trial court somewhere, lose, take it up on appeal, lose again, and then hope that the Supreme Court will look at the record you have made and see the errors of its ways. That is a very, very difficult and fraught path, and with respect to the cases we are talking about here, there does not seem to be much prospect that the Court would be willing to even entertain those kinds of arguments.

Chair WHITEHOUSE. If you are looking at a Court that is ambitious and activist, presumably that Court would like free rein to do as much of this premise fact-finding as it could get. If you had a truly conservative Court that was truly trying to cabin itself to a narrow judicial role consistent with the separation of powers, you would not see this problem happen very often because there is an easy way out, is there not? That is to refer the question of fact that you have concerns about—let us say in *Shelby*, Professor Smith, the question of fact—let us just say that despite 15,000 pages of evidence and a unanimous Senate, the Court still had reservations about whether or not things had really changed in the South and in the old preclearance States sufficiently that no minority voter need fear laws being passed to keep them away from the ballot. Let us suppose that they held that concern, notwithstanding the record in front of them. They would have a way to address that, would they not?

Mr. SMITH. I suppose they—they could send it—refer it to a trial court, remand it for some kind of a trial. My own view is those kinds of predictive facts about how a region of the country is going to behave if freed from the preclearance regime are best made by Congress.

Chair WHITEHOUSE. Yes.

Mr. SMITH. Those findings had already been made and ought to have been deferred to.

Chair WHITEHOUSE. Professor Shaw, if you had been given a warning by the Supreme Court that it was going to declare that all was well with respect to minority voting rights in preclearance States, or at least it had that concern, and the Court had then sent it back to a trial court to do the necessary fact-finding determinations to build the record, to bring in experts, to look at data, to have the parties able to make their case and summarize the evidence and try to put a solid factual predicate under the Court’s

finding, you would have engaged in that very energetically, would you not?

Professor SHAW. Of course, but I think that is exactly what we did and what we had before Congress.

Chair WHITEHOUSE. Yes.

Professor SHAW. Ordinarily there should be deference on the part of the Court on those kinds of judgments that Congress makes. There were all kinds of records of courts that were part of the record before Congress when it extended the Voting Rights Act. We knew—I want to underscore this again. We knew that this would be challenged, and we knew that there were those who were going to try to overturn the extension of the Voting Rights Act. We worked assiduously to make sure that the record had in it what it needed to have in it. I think Congress had everything it needed. I think the Court simply did not defer.

Chair WHITEHOUSE. Yes, and I guess my point was—I will turn to Senator Blumenthal very shortly. I guess my point was that if you were to assume the worst of the *Shelby County* majority and that they really wanted to knock out the preclearance thing, irrespective of facts, and were willing to make false factual findings to get there, had they followed the traditional process of an appellate court with a doubt about the facts sending the facts back to the trial court to complete or clarify the record, what they would have seen was this enormous record over here in the Senate and lawyers who would have brought that record into the trial court and said, “Boom, here is our record.” Then the trial court would have made the obvious finding of fact that there still was a problem. Now, the case would have come back up to the Supreme Court, only this time it would have had a bad judicial record and not just a bad congressional record. They had to ignore all sorts of record and just make up the fact that the day had changed in the South.

Anyway, I will defer to Senator Blumenthal—

Mr. SHAPIRO. Senator, could I clarify something about these thousands of pages of congressional findings?

Chair WHITEHOUSE. I cannot tell who is speaking.

Mr. SHAPIRO. Shapiro.

Chair WHITEHOUSE. Let me get to Senator Blumenthal. It is his turn. I will let you come back at the end if you wish.

Senator BLUMENTHAL. Thank you so much, Senator Whitehouse. I really appreciate your having this hearing and also permitting me to be part of it, even though I am not a Member of the Subcommittee. I think this Subcommittee is one of the most important in the United States Senate, especially to any of us who have the privilege and honor of being part of litigation before the Court. I have argued four cases before the Supreme Court as attorney general of the State of Connecticut, and, of course, I have also been honored to be part of the amicus briefs that Senator Whitehouse has led so ably.

Equally important for me was my experience clerking for Justice Blackmun on the Court, and I can remember numerous occasions we had breakfast every morning at 8 a.m., when I sought to argue facts to the Justice, only to be very politely but unceremoniously silenced because I was trying to persuade him to, in effect, go outside the record. Our fact-gathering methods were very, very lim-

ited. We considered the briefs. We read the record. We researched the underlying sources, and we consulted the books in the library. The reason was, in Justice Blackmun's view, that the facts coming before us from the record were the result of the adversarial process that tested the facts and the evidence and could be disputed below, but then found by the lower courts, the district court.

Today we are an infinite world away from that time. Your research has found, Professor Larsen, that virtually all the Justices on the Supreme Court, no matter what their ideological persuasion, take advantage of the internet and conduct independent research online. You have written, quote, "With this new tool come some new risks, the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data that can now be quickly posted to the world by anyone without cost," end quote.

Just today, in two other Committees, one of them a Subcommittee of the Judiciary Committee, the other a Subcommittee of Commerce, which I Chaired this morning, the Subcommittee on Consumer Protection, the testimony was about misinformation, disinformation, distortion on the internet, in fact, often amplified by the algorithms that some of the tech platforms use.

I am very, very worried about Judges or Justices relying on the internet as a supposed source of truth without anybody telling them that it is distorted or fabricated, in fact, fraudulent, as we showed this morning when it comes to some of the therapeutics, the preventive measures, some of them in effect the result of snake oil salesmen on the internet.

I would like to ask you, Professor Larsen, can you elaborate on some of the risks of judicial fact-finding and, most important, what can be done about it? Is there room for a legislative solution that constrains these outside uses of data or information? Because, after all, we make rules of evidence, or the judicial branch recommends them and we are involved in them, and certainly that is a legislative function. Can we take steps to make sure that judicial fact-finding is limited to lower courts?

Professor LARSEN. Thank you for your question. I hate to say it, but I think you are right to be worried, and I have spent a lot of time worrying about that myself. It is not just that the facts are easy to access. As you say, it is that the facts are easy to manipulate, and the judges are human, and we all have a tendency to fall prey to confirmation bias. We believe what we want to believe, and there is a whole sea of factual information to comfort us into thinking we are right.

The answer to your question, I think, is we have to inject some more adversarial testing into the process, and whether you want to do that below in the trial court and then defer to any sort of fact-finding that came through adversarial process, that is one avenue. Whether you want to encourage more disclosure rules at the U.S. Supreme Court so that when amicus briefs are making factual claims—maybe not when they are making policy claims, but when they are making an assertion of fact and the Justices will then rely on the brief itself as the authority for the factual claim, I think our adversarial system demands that that source, if it is a biased source, that that be disclosed.

I do think there are things you can do as a legislature to improve fact-finding or at least to update the fact-finding to accommodate a new reality.

Senator BLUMENTHAL. If you present something to a court, if you are trying a case, as an officer of the court if you, in effect, present material that you know to be untrue, it is a violation of the oath and the duty to the court. That is not so when the internet provides platforms for deliberate lies and untruths. No one is held accountable. Under section 230, the tech platforms have total immunity. Even when we know that they are lying in ways that do immense harm, they still cannot be held accountable. I agree with you that we do need to think of other ways to impose accountability, if possible, through an adversarial fact-finding process. I think your point about disclosure is very well taken, that maybe more disclosure is part of the answer.

I thank you, and I also thank the other witnesses, and thanks very much, Mr. Chairman.

Chair WHITEHOUSE. Thank you, Senator Blumenthal.

Mr. Shapiro, you wanted to say something?

Mr. SHAPIRO. Thank you, Mr. Chairman. There has just been a lot of talk about how the Court improperly did not defer to Congress, substituted its own facts for the hundreds of thousands of pages of record findings in *Shelby County*. The point is I think this goes to kind of how two sides are talking past each other, and that Judges are not supposed to defer to Congress on whether Congress has gone beyond its constitutional power. I do not think the Justices were disputing the findings of racial discrimination in that record. They were simply saying that as the Court unanimously ruled in 2009, that record did not sustain the burdens that were imposed based on the current needs. I could say more, but that is—thank you for indulging me.

Chair WHITEHOUSE. Yes, I get your point, but in separated powers, your fellow witness Solicitor General Fisher said that there are times when you actually have to rely on the elected branch, the legislative branch, to do certain things, even if you may not think it is right. It is just where the power lies in our separated powers, in the same way that I happen to know that the *Citizens United* fact-findings are wrong, but I do not have the ability to do much about it other than point it out.

The Court took to itself the ability to ignore Congress, and it did so in an area in which it was under two disabilities: One, the Constitution specifically directs the issue of voting rights, you know, post-Civil War, to Congress, so there was a very clear allocation of responsibilities, more than just the general separation of powers. Two, we have all run for office. We have a pretty strong sense of how politics works, of how corruption can creep in. These Judges who have never run for anything and have not a clue—indeed, it is the first Court—when Justice O'Connor retired, it is the first Court in the history of the country in which nobody had a clue about actually running for office and about, as one author said, how a United States Senator “is the focal point for evil and good attentions from many directions,” and how you work your way through that, and how you build a system that protects against

that, and how you particularly protect the right of people to vote, that core predicate.

I hear what you have said, Mr. Shapiro, but I happen to think, first, that notwithstanding your point, the Court should have deferred to Congress on those fact-findings because it was pretty clear devolved to Congress to make them; and, second, if they did not want those fact-findings, if they thought there was a problem with it, there was something about the congressional process, the legislative process, that somehow we had done a poor job of finding those facts, that somehow it was slanted enough and 98 Senators were completely fooled by it, that they had a ready solution, which was to trust their own judicial branch of Government and say, look, we are not really convinced by this record that Congress developed, we want a judicial record where there is a real adversarial process, where witnesses get called in. Then they would have been a Court that would have looked through that record, and I very much suspect that the exact same conclusion would have come up. Whether I am right or not—I am confident that I am right that that is the way that this should have gone, because ab initio fact-finding on premise facts, predicate facts, that are the gateway to the decision that either—the decision they want either opens or closes, depending on that fact.

I know you and I see the world very differently, Mr. Shapiro, but I have got to hope that we believe that if you took out the substantive question here, you and I would come to agree that courts are not the place where spontaneous fact-finding should be occurring, particularly not appellate courts and particularly not the Supreme Court. There are a gazillion ways for records to be brought to the Supreme Court that can lay out these facts. I think of all the possible ways in which facts can be developed by the Supreme Court, to have a small group of Justices with no expertise or experience, guided in some cases by amici with huge conflicts of interest, often undisclosed, to be just spontaneously making fact-findings about the way America is, the way these States are, the way these legislatures are, the way voting rights will be treated, how transparency and independence will carry the day through the dangers of corruption, all of these things, it just does not belong there, setting aside everything else. I would hope that we could at least agree on that point.

The record will remain open for an additional week for anybody who has questions for the record or would like to supplement their testimony. This has been a lively and interesting debate, and I am grateful to all who participated.

With that, the hearing is concluded. Thank you all.

[Whereupon, at 4:38 p.m., the hearing was adjourned.]

**Testimony of Thomas M. Fisher,* Indiana Solicitor General,
Before the Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight,
Agency Action, and Federal Rights
April 27, 2021**

Chairman Whitehouse, Ranking Member Kennedy, and distinguished members of the Subcommittee:

Thank you for inviting me to testify at this hearing on “Supreme Court Fact-Finding and the Distortion of American Democracy.”

The premise of today’s hearing, as I understand it, is the suspicion that the Supreme Court regularly flouts both judicial and democratic norms by basing its decisions on factual evidence brought to its attention by obscure sources outside the adversarial process. The concern seems to be that organizations funded by confidential donors advancing their own private interests seek to influence the Court by filing amici curiae briefs packed with dubious factual assertions that have never been subjected to adversarial testing. As many lawyers and scholars have recounted, and as witnesses today will likely testify, it is indeed the case that various entities, individuals, scholars and organizations—some (but not all) funded by confidential donors—seek to influence the Court by filing amici curiae briefs packed with (occasionally dubious) factual assertions that have never been subjected to adversarial testing.

My view of the matter, however, is that concerns about *that* phenomenon are overblown. First, as my friend Mr. Shapiro will testify, it is not clear whether the Supreme Court decisions thought to typify this issue—*Shelby County v. Holder* (2013) and *Citizens United v. FEC* (2010)—depended on amici-supplied extra-record evidence. Second, the practice of amici curiae of various types across the ideological spectrum bringing relevant, extra-record evidence to the Supreme Court’s attention is *not* a new phenomenon. Indeed, it has a distinguished pedigree going back at least to the original “Brandeis brief”—the amicus brief of then-scholar and eventual Supreme Court Justice Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908). And, broadly speaking, the legitimate parameters of Brandeis briefs are well understood by the legal profession: It is appropriate for such briefs to bring to the Court’s attention matters of “legislative fact”—*i.e.*, facts about the state of the world—but *not* matters of “adjudicative fact,” *i.e.*, evidence or claims about events or parties relevant to a particular case. Supreme Court justices and lower court judges alike can distinguish between the two and routinely dismiss attempts to advance extra-record adjudicative facts.

* The witness wishes to thank Indiana Deputy Solicitor General Kian Hudson and law clerks Michael Froedge and Andrew Ireland for assistance with researching and drafting this testimony. Any errors are those of the witness alone.

But that is not to say that no tension exists between the idea of Supreme Court legislative factfinding and the idea of democratically accountable decision-making. In short, when the state of the world is reasonably disputed, we generally look to legislatures, not courts, to make the critical decisions, as limited by constitutional safeguards protecting individual liberty. Precisely because legislators are accountable to voters, we lodge policy judgments in their hands.

The real problem underlying today’s hearing, then, is not the practice of amici supplying the Court with extra-record material concerning legislative facts. It is instead the practice of the Supreme Court, arising largely in the latter half of the 20th century (but continuing today), of deciding constitutional cases based on vague, multi-part balancing tests or standards instead of deciding them based on crisp rules derived from the original public meaning of constitutional text. That method of deciding cases exists in many areas, including free-speech doctrine and Eighth Amendment doctrine, among others. Balancing tests, in short, amount to policy judgments, not legal reasoning, and they invite the very reliance on extra-record state-of-the-world “factfinding” that has prompted this hearing.

Fortunately, the Court has shown signs in recent decades of retreating from amorphous, policy-laden constitutional standards and advancing toward a constitutional law characterized by rules grounded in constitutional text and history. That, and not any extraneous restraints on amicus practice, is the solution to any problems attendant to Supreme Court factfinding.

I

In American jurisprudence, factual questions are generally resolved at the trial level, either by the jury or the judge, via an adversarial process—perhaps the most important part of which is the cross-examination of witness testimony.¹ Appellate courts, accordingly, generally bar the introduction of new factual evidence.² Well-established exceptions to that general principle exist, including for material susceptible

¹ See, e.g., Fed. R. Civ. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020) (Generally, questions of law are reviewed de novo and questions of fact, for clear error); *California v. Green*, 399 U.S. 149, 158 (1970) (noting Professor Wigmore’s famous conclusion that cross-examination is “the ‘greatest legal engine ever invented for the discovery of truth’” (quoting 5 John Henry Wigmore, *Evidence* § 1367 (3d ed. 1940))).

² See, e.g., *Phonometrics, Inc. v. Westin Hotel Co.*, 319 F.3d 1328, 1333 (Fed. Cir. 2003) (“We, as a court of review, generally do not consider evidence that has not been considered by the district court.”); *Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999) (“An appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling.”).

of judicial notice.³ And for many decades, American courts have analyzed whether to consider factual evidence that has been spared the rigors of trial-level testing by dividing the universe of facts into two categories: (1) “adjudicative facts,” new evidence of which courts generally will not consider on appeal, and (2) “legislative facts,” or “non-adjudicative facts,” new evidence of which appellate courts frequently *will* consider.⁴

So-called “adjudicative facts” are the facts that underlie a given controversy. They are the facts in the street, the behavior and mental states of the parties, or, as put by my fellow witness Allison Larsen, the “whodunit facts.”⁵ These case-specific facts address “who did what, where, when, how, and with what motive or intent.”⁶

“Legislative facts,” meanwhile, are more general facts that have some significance or bearing to society more broadly.⁷ Or, in more limited terms, they are the

³ See *N.Y. Indians v. United States*, 170 U.S. 1, 32 (1898) (“While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.”).

⁴ This division, long-established in practice, was first coined in 1942. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402–03 (1942). It has been widely adopted by the Supreme Court and other courts of appeal. See, e.g., *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting) (“As Mr. Justice Holmes recognized, the determination of legislative facts does not necessarily implicate the same considerations as does the determination of adjudicative facts.” (citing *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915))); *Unger v. Young*, 571 U.S. 1015, 1018 n.1 (2013) (Alito, J., dissenting) (“The analysis of the court below cannot be defended on the ground that *Pinholster* concerns only adjudicative facts and that the data in the social science studies constituted legislative facts.”); *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (“Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case.”); *Broz v. Heckler*, 721 F.2d 1297, 1299 (11th Cir. 1983) (holding the effect of a claimant’s age on his ability to work was an adjudicative fact and “must be made on a case-by-case basis”); *State ex rel. TB v. CPC Fairfax Hosp.*, 129 Wash 2d 439 (1996) (permitting amicus to offer “scholarly articles and excerpts” in connection with minor’s constitutional challenge to her involuntary confinement at a mental hospital).

⁵ Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1265 (2012).

⁶ I Weinstein’s Federal Evidence § 201.02 (2021); Henry Paul Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985) (“The important point about law is that it yields a proposition that is *general* in character. Fact identification, by contrast, is a case-specific inquiry into what *happened here*.”).

⁷ See, e.g., Fed. R. Evid. 201 Advisory Committee’s Note (“Legislative facts, on the other hand, 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.”); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2770 (2011) (Breyer, J., dissenting) (referring to “elected legislature’s” factual conclusions regarding the dangers of video games as “legislative facts”).

kinds of facts that legislatures “find”—or *could* find—as part of the legislative process. They do not turn on the conduct of the individual parties and do not arise out of the individual case or controversy.

Traditionally, appellate courts have considered legislative facts for many purposes regardless whether they have been subjected to trial-court adversarial testing—even if dispositive.⁸ In constitutional cases, however, the Supreme Court historically *assumed* plausible factual premises underlying challenged laws regardless whether such premises were disputable or represented the actual motivations of legislators.⁹ That is, in such cases the Court declined to resolve disputes over legislative facts and instead left such questions to the political branches—an approach the Court continues to use today in rational-basis cases.¹⁰ Only in the last century has express reliance on legislative facts—and a willingness to resolve disputes over contested legislative facts—become a hallmark of the Court’s constitutional-law cases.¹¹

Just as the Supreme Court’s constitutional doctrines have come to embrace greater consideration of legislative facts, so have American appellate courts

⁸ See *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891) (“If that presumption could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case . . .”).

⁹ See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (stating that “if any state of facts reasonably can be conceived that would sustain [a challenged statute], the existence of that state of facts at the time the law was enacted must be assumed.”).

¹⁰ See, e.g., *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (explaining that under the Court’s rational-basis precedents a law is “constitutionally valid if ‘there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.’” (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

¹¹ Davis, *supra* note 2, at 407 (discussing how “judicial decisions making direct and extensive use of legislative facts” remained exceptional in 1942 but had increased vastly since 1937); Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637, 642–43, 667 (1966); Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 Or. L. Rev. 111, 120–21 (1997) (observing that most legal scholars recognize the influence of legislative facts on constitutional decision making); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 Vand. L. Rev. 111, 115 (1988) (recounting but critiquing this phenomenon); see also Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75 (1960) (characterizing the proposition that judges make constitutional law “on the basis of facts proven and assumed” as “hardly earth-shaking.”).

permitted parties and amici greater leeway to present verifiable extra-record evidence, especially social scientific evidence.¹²

In the early twentieth century courts became “increasingly receptive to the introduction of empirical research.”¹³ During this period future Supreme Court Justice Louis Brandeis became one of the first practitioners to employ social research to contest constitutional facts before the Court.¹⁴ In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, Brandeis presented “existing social science research on the detrimental impact of long work hours on the health of women,”¹⁵ to defend the constitutionality of an Oregon statute limiting the number of hours women could work in a day. So-called “Brandeis briefs” soon became famous and marked a paradigmatic shift toward the widespread use of “policy-oriented extra-legal arguments in briefs”—that is, towards the frequent invocation of extra-record legislative facts.¹⁶

The distinction between adjudicative and legislative facts has thus become a foundational part of judicial decision-making. Rule 201 of the Federal Rules of Evidence, for example, imposes strict rules on judicial notice of *adjudicative* facts: Such facts must either be “generally known” or “readily determined from sources whose accuracy cannot reasonably be questioned.”¹⁷ Accordingly, courts will reject attempts by parties or amici to introduce case-specific evidence of adjudicative facts (*e.g.*, what the parties did, when they did it, how they did it) for the first time on appeal.¹⁸

At the same time, Rule 201 expressly provides that its strict rules do *not* apply to judicial notice of “*legislative* facts” (*e.g.*, empirical studies, statistics, social

¹² See Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197, 199 and n.12 (discussing the origin of the “Brandeis brief,” a seminal work by future Supreme Court Justice Louis Brandeis that relied on scientific information); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 93 n.5, 104–07 (1993) (elaborating on the origin of the Brandeis brief).

¹³ Rustad & Koenig, *supra* note 12, at 104 (1993).

¹⁴ *Id.* at 105.

¹⁵ Margolis, *supra* note 12, at 199 and n.12.

¹⁶ Rustad & Koenig, *supra* note 13, at 93 n.5.

¹⁷ Fed. R. Evid. 201(b).

¹⁸ See, *e.g.*, *Oviedo v. Washington Metropolitan Area Transit Authority*, 948 F.3d 386, 398 (D.C. Cir. 2020) (“*Amicus’s* argument for shifting explanations relies on evidence that was not put before the District Court at summary judgment.”); *Snyder v. Phelps*, 580 F.3d 206, 216 (4th Cir. 2009) (“We respectfully reject our good friend’s reliance on the amicus contention, because the evidentiary issue has plainly been waived by the only party entitled to pursue it.”); *Smith v. United States*, 343 F.2d 539, 541 (5th Cir. 1965) (“Nor can the Court consider the new factual material included in the brief of the amicus.”).

scientific theories, and historical information).¹⁹ Appellate courts are accordingly free to consider legislative facts brought to their attention by parties and amici. Indeed, the Supreme Court Rules declare that “[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”²⁰

Just a few weeks ago, for example, the Supreme Court, when interpreting the Telephone Consumer Protection Act’s ban on autodialers, had to address whether it makes sense to say that a piece of equipment “stores” numbers using a random number “generator.” And while Justice Sotomayor’s majority opinion for the Court acknowledged that formulation does sound odd “as a matter of ordinary parlance,” her opinion cited an amicus brief supporting petitioner Facebook to supply legislative facts suggesting the formulation “is less odd as a technical matter.”²¹

In sum, American *appellate* courts have long been willing to consider new legislative facts—including facts adduced by amici. Parties and amici from representing many distinct perspectives take this opportunity to bring what they consider to be important information to courts’ attention. In keeping with that practice, the Supreme Court this term is considering many cases featuring dozens of amicus briefs from interests across the ideological spectrum.²²

II

The core problem with constitutional adjudication premised on legislative facts is not that *amici* furnish their views of legislative facts. Any problems that attend the lack of adversarial testing are equally present when *parties* cite new legislative facts on appeal, which happens frequently. Indeed, any such problems are undoubtedly worse when *courts* take cognizance of legislative facts without any input from parties or amici at all, which courts are of course free to do.²³

¹⁹ Fed. R. Evid. 201(a).

²⁰ Supreme Court Rule 37.

²¹ *Facebook, Inc. v. Duguid*, No. 19-511 (U.S.), slip op. at 10 (citing Amicus Br. of Professional Association for Customer Engagement, *et al.* at 15–21). In that same case, Indiana joined with North Carolina to lead a multi-state amicus curiae brief supporting respondent Duguid. See *Facebook, Inc. v. Duguid*, No. 19-511 (U.S.), Amicus Br. of Indiana, *et al.*

²² See, e.g., *Brnovich v. Democratic National Committee*, No. 19-1257 (more than 50 amicus briefs filed, with organizations ranging from the Pacific Legal Foundation and Cato Institute to Fair Action Fight, Inc. and the Brennan Center for Justice at NYU Law School); *Mahanoy Area School District v. B.L.*, No. 20-255 (36 amicus briefs filed from organizations including Parents Defending Education, The Becket Fund for Religious Liberty, American Center for Law and Justice, and the Cyberbullying Research Center).

²³ See Fed. R. Evid. 201 Advisory Committee’s Note.

Because judges will inevitably consider legislative facts, interested parties should have an opportunity to bring such facts to the attention of the judiciary—including appellate courts—in an open and honest manner. After all, issues to which legislative facts may be relevant often will not rise to the surface until after a case is already on appeal, particularly in criminal cases and tort cases. And there is no reason to limit the introduction of new legislative facts to the parties, since even sophisticated parties will have limited resources and perspectives. If the Supreme Court is going to evaluate the constitutionality of statutes based on legislative facts and policy judgments, it is reasonable to permit interested amici to provide input. To take another recent case, *Jones v. Mississippi*, where the Court ultimately upheld a life sentence for a juvenile offender, amicus briefs cited neuroscience findings and social scientific research to support the argument that courts must, a matter of constitutional law, make special findings before imposing life sentences on juveniles.²⁴

Instead, any problem with Supreme Court consideration of legislative facts arises from constitutional law doctrines that depend on judicial *evaluation* of such facts in the first place. Hence, the more fundamental problem at the heart of today’s hearing today is this: *Are courts best equipped to answer complex policy questions?*

Courts are of course well-suited to resolve disputes over adjudicative facts. Such factual questions (Was the light green? Did the defendant have malicious intent?) affect only the parties to a single case and are not apt to be manipulated by courts to achieve policy ends. And even when such questions are disputed by reasonable people, they are the sorts of questions our adversarial trial process was designed to resolve. That is why appellate courts defer to lower-court historical factfinding and refuse to go outside the record to consider evidence bearing on matters of adjudicative facts.

In contrast, courts are not well suited to resolve disputes over *legislative* facts. Legislative facts implicate complex questions that are subject to reasonable disagreement and necessarily affect a broad array of citizens. For these reasons, these factual determinations should be squarely lodged with the people’s branch, which is best suited to debate, discuss, and decide how to address these social and political debates. Austrian economist F.A. Hayek put this point well in his famous “The Pretense of Knowledge” 1974 Nobel Prize Lecture: Judges who “act on the belief that we possess the knowledge and the power which enable us to shape the processes of society entirely to our liking, knowledge which in fact we do *not* possess” are likely to “do much harm.”²⁵ Indeed, it is for this reason that courts historically have adopted a

²⁴ See *Jones v. Mississippi*, No. 18-1259 (U.S.), Amicus Br. of Current and Former Prosecutors, *et al.* at 6–7; *Jones v. Mississippi*, No. 18-1259 (U.S.), Amicus Br. of Juvenile Law Center, *et al.* at 21–25. In that same case, Indiana led a multi-state amicus curiae brief supporting respondent Mississippi. See *Jones v. Mississippi*, No. 18-1259 (U.S.), Amicus Br. of Indiana, *et al.*

²⁵ Friedrich A. Hayek, *The Pretense of Knowledge*, Nobel Memorial Lecture (Dec. 11, 1974), in 79 Am. Econ. Rev. 3, 7 (1989).

presumption of constitutionality, giving broad deference to the version of legislative facts provided by governments defending statutes—and why appellate courts do not defer to district court “findings” of legislative fact the way that they would for findings of adjudicative facts.

As Professor Charles Reich explained in an important 1963 article in the *Harvard Law Review*, “Courts have no sources of information other than the records before them, and judges have no special knowledge to assist them in evaluating information of a *social* and *political* nature if it were able to obtain it.”²⁶ Because the task of evaluating information is situated “beyond the capacity of mortal men,”²⁷ judges should avoid attempts “to resolve these conflicts by the exercise of judgment,”²⁸ and should instead adopt a frame of reference—“the *words* of the Constitution itself.”²⁹

Yet courts often employ a variety of “balancing” tests to assess the constitutionality of statutes. Such multi-factor tests necessarily invite—and ultimately *require*—a broad account of competing policy judgments about the prospective impact of a legal rule. They thereby effectively grant courts freewheeling discretion to circumvent the fixed, original public meaning of the text of the Constitution.

In the First Amendment context, for example, the Court has held that even content-neutral time, place, and manner regulations must both “serve a *significant* governmental interest” and “leave open *ample* alternatives for communication.”³⁰ And in deciding whether a governmental interest is “significant” or whether remaining speech opportunities are sufficiently “ample,” the Court has resolved disputed questions of legislative fact and made its own policy judgments.³¹ Similarly, in the

²⁶ Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 *Harv. L. Rev.* 673, 740 (1963) (emphasis added).

²⁷ Alfange, *supra* note 11, at 641.

²⁸ Reich, *supra* note 26, at 740.

²⁹ Reich, *supra* note 26, at 744 (emphasis added).

³⁰ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (emphases added); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

³¹ *See, e.g., United States v. Grace*, 461 U.S. 171, 182 (1983) (“We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner or device on the public sidewalks substantially serves these purposes.”); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977) (invalidating a municipal ordinance that prohibited “For Sale” or “Sold” signs in order to stem the flight of white homeowners from a racially integrated community, explaining its alternative view that while “in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. . . . The alternatives, then, are far from satisfactory.”); *Linmark Assocs., Inc. v. Willingboro Twp.*, No. 76-357 (U.S.), Amicus Br. of Housing Advocates, Inc. (arguing that limitations on “For Sale” signs are essential to maintaining integrated neighborhoods).

Eighth Amendment context the Court has suggested that Excessive Fines Clause challenges should be evaluated by asking whether the amount of a fine “is grossly disproportional to the gravity of the defendant’s offense.”³² And as lower court decisions applying this standard demonstrate, judicial consideration of offense “gravity” means judges, not democratically accountable legislators, invoking social science (and their own intuitions) to decide whether a crime is actually serious.³³

Our Constitution, however, places the authority to decide policy questions in the political branches. Courts, meanwhile, simply have the power and responsibility to adjudicate real cases and controversies, and, incidental to that role, the power of constitutional *interpretation*. As Justice Antonin Scalia and Bryan Garner both underscore in the canonical *Reading Law: The Interpretation of Legal Texts*, “the words of a governing text are of paramount concern, and what they convey, in their context, is what the text *means*.”³⁴ As Justice Cardozo similarly wrote in *United States v. Great Northern Ry.*, “We have not traveled, in our search for the meaning of the law-makers, beyond the borders of the statute.”³⁵

Constitutional Interpretation Should be Governed by Legal Rules

For these reasons, courts should not be in the business of considering legislative facts—policy questions, in other words—as qualitative inputs in their overall constitutional calculus. To execute more faithfully their institutional role as independent arbiters of constitutional meaning in our system of government, courts should instead, as necessary to decide individual cases, apply traditional canons of legal interpretation to shape and define the doctrinal contours of constitutional law. In so doing, courts can ensure consistency, increase predictability, deepen public faith in the rule of law, and lessen the significance of amicus briefs—from any source—that present untested assertions about the state of the world.

Originalism offers the best way for courts to fulfill their responsibility to interpret the Constitution while leaving the policymaking to the political branches. Under this method of interpretation, judges place a premium on fidelity to the Constitution’s *text* and *structure*. Instead of relying on a range of legislative facts and corresponding policy judgments to supply the appropriate meaning and scope of a specific

³² *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

³³ See, e.g., *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 189 (Pa. 2017) (noting that “[a]ssessing the gravity of the offense has engendered wide discussion and approaches regarding the appropriate factors for making this determination.”); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1309 (11th Cir. 1999) (“Translating the gravity of a crime into monetary terms . . . is not a simple task.”).

³⁴ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (emphasis added).

³⁵ *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932).

constitutional provision, under this method of interpretation, judges ascertain a “public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”³⁶ As Justice Scalia aptly explained in *A Matter of Interpretation: Federal Courts and the Law*, “[w]e look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”³⁷ At its most basic, the “text of the Constitution,” including its “structural design,” remains the primary source of constitutional rules.³⁸ Of course, to answer questions not directly resolved by the Constitution’s text, originalists will often look to historical evidence³⁹ or corpus linguistics,⁴⁰ but the objective remains the same—to discern the original public meaning of constitutional provisions.

In opposition to originalism, some argue for a *dynamic* interpretation of the Constitution, “adapting statutes to new circumstances and responding to new political preferences . . . even when the interpretation goes against as well as beyond original legislative expectations.”⁴¹ Under such a discretionary interpretative framework, judges “update” the meaning of constitutional and statutory provisions to account for new, ostensibly unanticipated social circumstances—circumstances reflected by, of course, *legislative* facts. When courts undertake such analysis, parties and amici will inevitably respond by offering alternative versions of the relevant legislative facts, citing their own competing experts and studies.

Originalism, however, “is the *only* approach to text that is compatible with democracy.”⁴² “When government-adopted texts are given a new meaning, the law is changed,” and “any changes in the written law is the function of the first two branches of government—elected legislators and . . . elected executive officials . . .”⁴³ The practical consequence of such a “dynamic” interpretation, remains, as Chief Justice William H. Rehnquist wrote nearly five decades ago, a “formula for an end run around popular government.”⁴⁴ And as today’s hearing illustrates, when courts depart from

³⁶ Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 92 (2004).

³⁷ Scalia & Garner, *supra* note 34, at 17.

³⁸ Keith Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L. Rev.* 375, 377 (2013).

³⁹ Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 35 (1999).

⁴⁰ See Thomas R. Lee & James Phillips, *Data-Driven Originalism*, 167 *U. Penn. L. Rev.* 261 (2019).

⁴¹ William N. Eskridge Jr., *Dynamic Statutory Interpretation* 108 (1994).

⁴² Scalia & Garner, *supra* note 34, at 82.

⁴³ Scalia & Garner, *supra* note 34, at 82–83.

⁴⁴ William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 706 (1976).

the Constitution’s original meaning they inevitably attempt to fill the gap with judicial policy judgments informed by untested, unexamined legislative facts.

Instead, when evaluating specific constitutional cases and controversies, judges should employ clear legal *rules* to pinpoint the original public meaning of a constitutional provision. By giving judges the tools to do so, originalism removes the prospect that legislative facts may determine the constitutionality of laws adopted by the democratically accountable branches.

Categorical Rules Promote Consistency and Rule of Law

We need not resign ourselves to judicial weighing and reweighing of legislative facts. In many areas of constitutional law the Supreme Court has already avoided the problems of judicial policymaking by adopting clear, consistent rules—and has indeed shown a willingness to retreat from policy-oriented doctrines. Take the Court’s Confrontation Clause doctrine, for example. Under the rule established in *Ohio v. Roberts*, the Court held that an unavailable witness’s out-of-court written statement could be admitted into evidence so long as the written statement provided “adequate indicia of reliability.”⁴⁵ That standard in effect created a balancing test to measure whether a statement was “reliable” and therefore constitutionally admissible. And several cases after *Roberts* furnish examples where amici advanced policy arguments about the reliability of out-of-court statements.⁴⁶

The Court came to recognize, however, that this test provided an unpredictable doctrinal framework that “failed to provide meaningful protections from even core confrontation violations.”⁴⁷ Accordingly, in *Crawford v. Washington*, the Court, in an opinion by Justice Scalia, overruled *Roberts* and held that the Confrontation Clause’s original meaning prohibits such “amorphous” judicial determinations of “reliability,” which ultimately reflect “[a] subjective concept.”⁴⁸ Instead, the Court furnished a categorical rule: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: *confrontation*.”⁴⁹ This Clause, as Justice Scalia’s majority opinion

⁴⁵ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quotation marks omitted).

⁴⁶ See, e.g., *Coy v. Iowa*, No. 86-6757, Amicus Br. of Attorney General of Kentucky and Thirty-Five States (relying on a range of legislative facts to establish States’ interest in minimizing psychological trauma to child abuse victims); *Idaho v. Wright*, No. 89-260, Amicus Br. of American Professional Society on the Abuse of Children, *et al.* (advancing policy arguments that children disclose sexual abuse in a variety of ways not conducive to audio or video recording); *Maryland v. Craig*, No. 89-478, Amicus Br. of People Against Child Abuse, *et al.* (citing evidence of child abuse victims’ unique vulnerability and arguing that a strict face-to-face confrontation requirement would therefore damage child witnesses and hamper the prosecution of child abuse).

⁴⁷ *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

⁴⁸ *Id.*

⁴⁹ *Id.* at 68–69 (emphasis added).

recognized, “reflects a judgment, not only about the desirability of reliable evidence, but *how* reliability can best be determined.”⁵⁰

Crawford illustrates that courts need not answer constitutional questions by reference to their own policy judgments. And the Court’s recent decision in *Jones v. Mississippi* is another example where the Court rejected an amorphous standard—“permanent incorrigibility”—for a clear rule: The Court has now held that “In a case involving an individual who was under 18 when he or she committed a homicide, a State’s discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.”⁵¹ That categorical Eighth Amendment rule stands in contrast with the amorphous “gross disproportionality” standard applicable to fines, not to mention the “evolving standards of decency” standard that characterizes so much of Eighth Amendment doctrine. Perhaps *Jones*, like *Crawford*, heralds the Supreme Court’s return to the Constitution’s objective, fixed, rule-based meaning—and implicitly the Court’s rejection of the sorts of broad standards that invite judicial determinations of legislative facts.

CONCLUSION

If we are to be governed by a constitutional law of broad standards and judicial balancing tests—inquiries that by their nature invite judicial policymaking—then Supreme Court factfinding is inevitable, and the current system of liberal Brandeis briefing is perfectly reasonable. Doing away with amicus briefs that bring extra-record legislative facts to the Court’s attention would only cloud a practice that, at present, is relatively open and transparent. The real problem is not how Supreme Court practice copes with decision-making under current doctrines—it is the doctrines themselves. Only by eschewing the vague standards that characterize so many doctrines of constitutional law, and instead embracing rules-based decisions grounded in constitutional text and original meaning, can the Court leave the legislative fact-finding where it belongs—in the Nation’s legislatures.

⁵⁰ *Id.* at 61.

⁵¹ *Jones v. Mississippi*, No. 18-1259 (U.S.), slip op. 5.

Opening Statement of Professor Allison Orr Larsen
Senate Judiciary Committee
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

April 27, 2021
3:00 PM

Chairman Whitehouse, Ranking Member Kennedy, and distinguished members of the Subcommittee:

My Background

Thank you for inviting me to testify today. I am honored to discuss my research in any way that would be helpful to you. I am a professor of law at William & Mary Law School where I teach Constitutional Law, Administrative Law, and related courses. Before joining the faculty at William & Mary in 2010, I clerked for Judge J. Harvie Wilkinson on the U.S. Court of Appeals for the Fourth Circuit, and for Justice David Souter on the U.S. Supreme Court. I also spent several years practicing appellate and Supreme Court litigation at O'Melveny & Meyers.

My scholarship focuses on the institutional and information dynamics of judicial decision-making. I have a particular interest in the role of fact-finding at the Supreme Court and the way the Justices inform themselves about those facts. My research on that topic over the last decade has received quite a bit of national attention (from the press and from the academy) and it is my privilege to share my observations with you today. The starting assumption of my work is that technological advances have changed much about the way courts desire and digest information. My concern is that the rules governing fact-finding have not caught up to the change and the absence of procedural safeguards risks tainting judicial decision-making with errors that are costly and difficult to change.

Confronting Supreme Court Fact-Finding¹

In law school everyone learns that facts are developed in the trial courts, and that appellate judges review what is known colloquially as a “cold record” evaluating legal questions but with deference given to the lower court and legislative records on questions of fact. The reality is more complicated than that. Many of the Supreme Court’s most significant decisions turn on questions of fact that are not definitely determined at trial or governed by typical rules of deference. These facts are not of the “whodunit” variety concerning what happened between the parties. They are instead more generalized facts about the world: Can you effectively discharge a locked gun in self-defense? Is a child’s brain development affected by playing violent video games? Do independent campaign expenditures lead to corruption? Has minority voter turn-out changed significantly so as to render a legislative intervention outdated?

¹ This portion of my testimony is drawn from my 2012 [article](#), *Confronting Supreme Court Finding*, 98 Va. L. Rev. 1255 (2012) and my 2018 [work](#), *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. Rev. 175 (2018). Citations are largely omitted here but can be found within those articles.

Questions like these are not strictly legal – they do not involve the interpretation of a text nor do they involve a choice between competing rules that prescribe conduct. But they are also not “facts of the case” in the way we generally use that phrase -- the who / what / where / why questions that should ultimately go to a jury or fact-finder. Instead, these questions implicate what have come to be known as “legislative facts.”² A legislative fact gets its name not necessarily because it is found by a legislature (although it can be), but because it relates to the “legislative function” or policy-making function of a court. The central feature of a legislative fact is that it transcends the particular dispute and provides descriptive information about the world which judges use as foundational building blocks to form and apply legal rules.

Legislative facts are not governed by the existing rules of Federal Evidence. In 1972, legislative facts were specifically exempted from Federal Rule of Evidence 201 on “judicial notice,” and the advisory notes accompanying the rule actually encourage their “unfettered use.”³ The result is a complete hodgepodge of procedure concerning fact-finding of this sort. Legislative facts can be –but do not have to be – the subject of expert testimony in the trial court. Citations to support assertions of legislative fact can – but need not – come from the record below. And district court decisions on legislative facts may – but are not entitled to – be given deference from reviewing courts.

Of course in 1972 when legislative facts were exempted from the judicial notice rule the world of information-sharing looked dramatically different from the way it does today. The traditional limitations of fact-finding at the appellate level are well known: the courts have limited staff, limited time, limited resources and the parties briefing them have many issues to cover and limited space in which to do so. Appellate courts are simply not built for fact-finding. Thanks to the dawn of the internet age, however, the Justices (and their clerks) now have new tools and are flooded with information literally at their fingertips. Social science studies, raw statistics, and other data are all just a Google search away and being pressed by motivated amicus briefs and through targeted bloggers seeking their attention. Today, if the Justices want more empirical support for a factual dimension of their argument, they can find it easily and they are increasingly being asked to do so.

As a result, Supreme Court decisions today are very fact-heavy. Pick up any issue of the U.S. Reports and one will quickly encounter “fact-y” claims and non-legal authorities: Justice Kennedy citing statistics on car crashes, Justice Breyer explaining rates of medical complications following abortions, Chief Justice Roberts on the economics of the health insurance industry, to name a few. Available empirical evidence is clear that—compared to thirty years ago—Supreme Court opinions are longer, padded with significantly more citations, and rich with “nonlegal” authorities (like citations to newspaper articles, online data sets, websites and even blog posts).

² This terminology and distinction, as I explain in my articles, originated with Kenneth Culp Davis in 1942 although it has been refined and re-articulated since then. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 Harv. L. Rev. 364, 365–66 (1942).

³ An explicit reference to legislative facts (excluding them from coverage) can now be found in the text of the current Federal Rule of Evidence 201; it was added to the text as part of the 2011 amendment, but according to the committee notes, the change was intended to make the rule more easily understood, not to substantively change the rule. The advisory notes explaining that legislative facts are to be excluded from the rule on judicial notice date back to 1972.

The Justices are not just surrounded by these facts, they seem hungry for them. For judges—and indeed for everyone alive today—no factual question seems out of reach. We can all access infinite information on our phones now, so it is no wonder that there is a bolstered faith in our ability to understand the world around us. The information age, in other words, has produced an increased confidence in digesting factual information and this new dynamic has had a significant effect on judicial decisions, particularly at the U.S. Supreme Court. Put simply, Supreme Court fact-finding is no longer a fringe issue; it is core to the Court’s every-day business and there is every indication that it is here to stay.

An Amicus Growth Spurt and its Implications⁴

One increasingly common way that Supreme Court Justices inform themselves about the factual dimensions of their decisions is through the use of *amicus curiae* (Latin for “friend of the court”). Amicus briefs are on the rise. Ninety-eight percent of Supreme Court cases now have amicus filings; over 800 briefs are filed each term and the marquee cases attract briefs in the triple digits. This is an 800% increase from the 1950s and a 95% increase from 1995. To put things in perspective historically, amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s. By contrast, in the 2015 *Obergefell* case the number of amicus briefs reached 147 amicus briefs (a record-breaker) and the health care case two years earlier (*NFIB v. Sebelius*) had 136 amicus briefs on the docket. For the sake of comparison, consider that *Roe v. Wade* had 23 amicus briefs. In *Brown v. Board of Education*, there were only six. In *Lochner v. New York* that number was zero.

Amicus briefs are filed for any number of reasons: to make or reiterate a legal argument, to flag implications of a law for an industry, to weigh in and show consensus on a policy debate, or to ask the Court to steer clear of an issue altogether. Perhaps the most influential type of amicus brief, however, is one that adds new facts to the record. This is the role of the amicus applauded by the Justices and their clerks. Justice Breyer has said that these briefs “play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.”⁵ Likewise Justice Alito (while sitting as a federal appeals court judge) observed that “[e]ven when a party is very well represented, an amicus may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice.”⁶ And former Supreme Court law clerks have remarked that it is the “non-legal” information provided by amici that is the most useful.

Perhaps it is not surprising, therefore, that the Justices cite these briefs to support their factual claims with increasingly regularly. In my 2014 study on the subject I found that that one in every five citations to amicus briefs by the Justices were used to support a factual assertion. Of those citations, several surprising patterns emerge. Less than a third of the factual claims credited

⁴ My testimony in this section comes from my articles *The Trouble with Amicus Facts*, 100 Va L. Rev. 1757 (2014), and *The Amicus Machine*, 102 Va. L. Rev 1901 (2016) (with Neal Devins). Internal citations are largely omitted here but can be found in the original articles.

⁵ Justice Breyer Calls for Experts to Aid Courts in Complex Cases, N.Y. Times, Feb. 17, 1998, at A17.

⁶ *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002).

by the Court were contested by the party briefs. And more than two-thirds of the time, the Justice citing the amicus brief for a fact cites only the amicus brief as authority—not any accompanying study or journal citation from within the brief. The implication from this omission is telling: the Justices are using these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.⁷

The Justices are hungry for factual information and an amicus machine has emerged to feed that hunger. The trouble is that this information coming to the Court is not uniformly reliable, not stress-tested through the adversarial system, and not provided by neutral parties. Historically, a “friend of the Court” was a lawyer who happened to actually be in the courtroom during oral argument. There was no preparation and no agenda in his participation. The amicus today, however, has evolved significantly since its original incarnation. Now the norm is targeted amicus briefs authored by motivated interest groups, often coordinated by the parties, and submitted by well-organized and well-funded players. This change matters because the studies, statistics, and articles marshaled by these groups to support factual assertions are selected by those with a “dog in the fight.” The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. Rather they are chosen as part of a coordinated plan to win the day. And with the vast amount of information and studies available online now, it is not hard to assemble evidence – whether of dubious or strong reliability – to support a pre-existing point of view.

It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them. The American College of Pediatricians, for example, is a socially conservative group founded to protest the adoption of children by gay couples, in opposition to the contrary position taken by the similarly-named American Academy of Pediatrics. With so much data out there and so many “experts” competing for the Court’s attention, it becomes increasingly difficult for the Justices and their clerks to sort the reliable amici information from the unreliable.

The Risks of Unregulated Appellate Fact-Finding⁸

Nowhere outside the Supreme Court do we see this widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability. The fact that the U.S. Supreme Court is unique in educating itself about the world in this way should give us pause. Unlike other legal decision makers (i.e., administrative agencies and trial courts), the U.S. Supreme Court is not set up to sort through what is now a sea

⁷I updated this research for a 2019 retreat with the Annenberg Foundation (looking at decisions from 2014-2018) and although that research was never published I found even more dramatic results: 50% of the citations to amicus briefs were for questions of fact and of the 277 citations to amicus briefs for claims of fact during that more recent time period, 93% of them were uncontested by the parties to the litigation.

⁸This portion of my testimony comes from the following three articles: *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. Rev. 175 (2018); *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014); and *Judging Under Fire and the Retreat to Facts*, 61 W&M Law Rev. 1083 (2020). Internal citations and quotations are omitted here but can be found in the original articles.

of factual claims coming from a variety of actors who all claim to be experts. Mistakes are almost inevitable.

As part of my research I did a deep-dive into some of the amicus briefs the Justices use to support their arguments. I found several examples where the reliability of the information presented is shaky at best. Sometimes, for example, the amicus will cite a study that it funded itself. Sometimes the numbers supplied by an amicus to support an assertion of fact are not even publicly available but instead remain “on file with” the amicus. And it is not uncommon for an amicus to present factual evidence that, in reality, rests on methods which have been seriously questioned by others working in the field.

Gonzales v. Carhart—the Court’s 2007 decision on a federal “partial birth abortion” ban—provides a controversial example.⁹ Writing for the majority and acknowledging that he could “find no reliable data to measure the phenomenon,” Justice Kennedy wrote that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.” The authority he cites for this proposition is an amicus brief filed by Sandra Cano, the “Mary Doe” in *Doe v. Bolton*, and 180 women who alleged injuries from abortions. The relevant pages of the Cano brief, in turn, rely on the work of Dr. David Reardon to demonstrate what he claims are serious adverse psychological consequences that accompany a decision to have an abortion. Dr. Reardon is a trained electrical engineer who holds a Ph.D. in bioethics from an unaccredited and now non-existent school in Hawaii. He runs the “Elliot Institute,” which is an organization known for its anti-abortion advocacy. Dr. Reardon’s research has been the subject of much controversy. His work on the psychological harm caused by abortion has been consistently refuted by psychologists and psychiatrists, including groups such as the American Psychological Association and the American Medical Association. To be sure, this is a debate in psychology that is particularly charged politically but it was not one of the reasons Congress gave (in extensive factual findings) for banning the procedure. Regardless of how one feels politically on the subject, there are two relevant points for now: (1) Dr. Reardon’s research is a minority view in the field of psychology, and (2) one would not be able to figure that out by looking at the name on the brief or the statement of interest on its first page.

To date, the standard response to questions about “junk science” ending up in Supreme Court opinions is to resort to the adversary process. While that may have been enough in a pre-Internet universe, it is insufficient today. My research shows that the check from the adversary system at the Court is very feeble to the point of being almost non-existent. In both my 2014 published study and my 2018 update I went through each of the factual claims supported by an amicus and cross-referenced the party briefs to see if they were contested by the parties. Such a check existed in less than a third of the citations for the 2014 study and less than 10% of the citations for the more modern time period. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims.

⁹ For relevant citations in *Carhart* and to the amicus brief discussed see *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1797-98.

There is more to fret about, however, than just “creative” or unreliable factual submissions to the Court. Facts are not just easier to access in the digital age, they are also easier to legitimize. Factual claims that may have once been labeled as outrageous assertions from fringe players are now easily distributed in a way that makes them seem more mainstream. Add to that the human tendency (shared of course by judges) of confirmation bias and one quickly sees the danger. Whether one believes climate change is man-made or voter ID laws suppress minority votes, for example, may well depend on one’s political affiliation. In today’s political dialogue, as comedian Stephen Colbert explained sarcastically, ideas that “feel right . . . should be true.” In the judicial context, the temptation to reach for an amicus brief or extra-record fact that confirms a pre-existing world view has never been higher. The risks are particularly acute once one acknowledges the parties have little control or ability to rebut the shaky factual claims. The American legal system has relied on an adversarial method to test factual claims for a long time; it is dangerous to assume that safety net is no longer necessary at the Supreme Court now that facts are so freely accessible.

There is another, more subtle consequence of the digital revolution and the increased judicial confidence in digesting factual information at the appellate level. These facts are not only being used by the Justices to rationalize their decisions; there is reason to suspect that the turn towards facts is shaping the outcomes themselves. There is something very comforting about a retreat to facts. Rather than directly announcing philosophical or normative commitments, a Justice can announce the facts in a “neutral” way and use those facts as a shield to hide from accusations of judicial activism.

Take *Shelby County v. Holder* as an example. *Shelby County* was the 2013 decision by the Court invalidating a key part of the Voting Rights Act. It was largely briefed as a case about congressional power (power to force certain states to get approval before changing voting laws), but the Court held instead that the law’s coverage formula—which determined if a state or local government must obtain this permission—was outdated and unconstitutional. The Court explained that this part of the law (which was written in 1965, revised in 1982, and reauthorized without change by Congress in 2006) was “based on decades old data,” “eradicated practices,” and needed to be “updated.” In reaching this result, *Shelby County* emphasized facts about minority voter turnout and changes in those patterns since the passage of the Voting Rights Act. The opinion dissects the congressional record on this score and includes charts and graphs to make the factual point that times and racial voting patterns had changed.

Other scholars have criticized the facts marshalled by the *Shelby County* majority, but there is also a more fundamental lesson to learn from the opinion. In *Shelby County* the Justices were tempted by the allure of a presumably factual decision on the Voting Rights Act rather than a bold legal call about the scope of congressional power. Ultimately, the decision reached in *Shelby County* could be explained in charts and graphs about voter turnout. It could be laid out objectively and in a way that sounds scientific and data-driven. There was no need to answer doctrinal puzzles about standards of review or enter normative debates about the scope of congressional power or even to constitutionally interpret what the words “appropriate legislation” mean in the Fifteenth Amendment. Instead, by focusing on factual changes and the outdated nature of the coverage formula, the Court sought to insulate itself from criticisms that it was unfairly biased against the Voting Rights Act or minority voters. This “just the facts, ma’am” strategy is attractive because it appears judicially modest even if the modesty is only an illusion.

Citizens United provides another example of this dynamic at work. The Court in that case found “scant evidence that independent expenditures” lead to political corruption, and it cites an enormous variety of nonlegal texts to support its contentions about the purposes of campaign finance regulation, the scope of campaign finance corruption, and corporate power and rights. The end result is an opinion that focuses on what legal scholar Michael McConnell has called “dubious quasi-empirical inquiries relating to the prevention of corruption ... or leveling the playing field.” One could reasonably debate whether the rationale in *Citizens United* is a factual one or a legal one (or something in between), but it is hard to deny that the language used by Justice Kennedy is couched in factual terminology. Beneath the banner of the First Amendment, *Citizens United* issued a fact-heavy rationale that sounds empirical and data-driven.

Indeed the factual dimension of *Citizens United* sparked an interesting epilogue. Not even a full year after the decision, litigants in Montana challenged an almost identical campaign finance restriction in their state on the basis of a new and different factual record. Although the litigants eventually lost at the U.S. Supreme Court in a summary reversal, they met success below because the Montana Supreme Court explained that “*Citizens United* was a case decided upon its facts” or lack of facts. To the Montana litigants and Montana judges, *Citizens United* was such a fact-y decision that a different factual record could lead to a different result. In a quick summary reversal, the U.S. Supreme Court set the record straight— explaining “[t]here [could] be no serious doubt” that *Citizens United* applied to the Montana law.

The stakes of fact-finding at the Supreme Court are thus extraordinarily high. Not only do the Justices use factual claims (backed up by amici) to pad their rationales; they also change their rationales to take shelter in the facts – a move that carries significant implications for courts and future litigants around the country.

Potential Reforms¹⁰

What can be done to improve Supreme Court decisions reached in a reality of unregulated fact-finding and a growing sea of manufactured factual claims?

One possible reform pursued by members of this Committee involves increased disclosure rules on amici so that the Justices are fully aware of the source of the information they are digesting. Since the Justices are tempted to reach for outside experts to inform themselves about the factual dimensions of the decisions they reach, it only behooves them to know where the information is coming from. As any new researcher is taught and any cross-examiner knows well, a source’s motivation is intrinsically tied to its credibility. (Are you being paid for your testimony? Is this product review being compensated by the seller?). If the Justices are blind to the actual funders of the amici then they have no way to evaluate critically the factual submissions coming from them. Current Supreme Court rules on amicus briefs require a statement of interest of the amicus and disclosure only as to whether the party contributed financially or otherwise to the

¹⁰ In addition to the previously linked articles, this section draws from my article, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016) (with Neal E. Devins). Internal citations are omitted here but can be found in the article.

brief.¹¹ The rules do not bar anonymously-funded amicus briefs and they do little to shed light on briefs filed by neutral-sounding organizations that are in reality funded by those with an interest in the case (even if not the party).

Indeed, increased disclosure rules will not only help the Justices but may control the amici themselves. In my research I have observed that many amicus briefs are orchestrated by members of the elite Supreme Court bar, and with good reason. The identity of the lawyer on the amicus brief matters inside the Court. In one (anonymous) survey of Supreme Court law clerks, 88% of the clerks admitted that they paid careful attention to amicus briefs written by renowned attorneys. The clerks identified about two dozen lawyers, who, by virtue of their reputation, “would be read carefully.” In the words of one clerk, “A famous name creates a certain level of expectation; it is a natural human quality to look at the source.”

While one could debate the virtues and the vices of this dynamic, there is a benefit to it that is particularly relevant to the problem of unreliable factual submissions. Members of the elite Supreme Court Bar—often led by former attorneys in the Office of the Solicitor General—have a vested interest in avoiding dubious authorities. In fact not a single example of troubling amicus facts highlighted in my article was filed by a member of the Supreme Court elite. Rather, these repeat players have formed a reputation market—an extralegal mechanism to constrain behavior. To protect their credibility with the Justices and with each other, these members of the elite Supreme Court Bar will not engage lightly with suspect authorities and overly creative claims to the Court. Indeed, they likely will not want to associate with those players who would. They have formed an economy of trust that they do not wish to be broken.

Stronger disclosure rules in terms of the client (the amicus organization sponsoring the brief) can take advantage of the reputation market dynamic that exists within the Supreme Court bar. Because these recognized lawyers fiercely protect their reputations with the Justices, it seems likely they will not want to taint that reputation by making factual claims on behalf of anonymously funded organizations with a (hidden) dog in the fight. Likewise, amicus briefs that are not filed by these players (and are thus not subject to the check from the reputation market) will perhaps be approached by the Justices and the law clerks with a more skeptical eye. A key to making this work, however, is transparency – to the bar, to the Justices, and to the public.

Disclosure rules will certainly help with fact-checking, but ultimately it will be up to the Justices to show restraint before relying on unreliable facts provided by motivated groups. To facilitate this restraint, I do not argue for the (unrealistic) proposal that the Justices avoid legislative facts in their decisions altogether. Instead I have suggested a little well-placed skepticism: retooling the current standards of review to focus on the process used to generate the factual claim at the heart of a legal dispute.¹²

¹¹ The core requirements for these briefs are set forth in Supreme Court Rules 33.1, 34 and 37. With respect to disclosure, Supreme Court Rule 37 generally requires amicus submissions to “indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief.”

¹² For elaboration on this idea see Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. Rev. 175 (2018).

The general rule is that the level of judicial skepticism due for factual contentions in a legislative record should follow the corresponding level of deference in a constitutional case. Put differently, only on heightened scrutiny will a court open the trunk and kick the tires of a law in order to make sure the state is actually pursuing sufficiently weighty goals in a permissible way. The problem, however, is that these rules allow for much wiggle room (What is a factual conclusion versus a legal one? How much factual uncertainty is too much?) and hence they are not followed with any precision. Sometimes—as in *Gonzales v. Carhart*, the partial-birth abortion decision—the Supreme Court chooses deference even in light of medical uncertainty and even on heightened review. Other times—as in *Shelby County v. Holder*, the case striking down a critical part of the Voting Rights Act—the Court evaluates findings of fact skeptically and (while purporting to apply rationality review) “essentially dispose[s] of the remainder of the 15,000 page congressional record supporting the Act in one sentence.”

In my work I have resisted calls for blind deference to a legislative or trial record. Instead, I call for a more granular and nuanced view. Deference to factual claims should rise or fall depending on the nature of the process that led to the assertion in the first place. Instead of just focusing on whether the legislature’s purpose was rational or important or compelling, the Court should look at the factual record and attempt to assess the process that led to it. Questions to be asked include: Is the factual assertion backed by peer-reviewed studies? Is more than one study cited? If the fact is the product of a legislative hearing, was it bipartisan or more likely political theater? Would the experts cited hold up on cross-examination? Do they have degrees in the relevant fields? If a minority view in the field, do the authorities acknowledge and explain the inconsistency and is the methodology used accepted by the industry? The more complete the process behind the factual statement, the greater deference is due. By contrast, if the scientific evidence has been cherry-picked or over-simplified or even fabricated or baldly asserted, then the factual record deserves very little deference at all. The upshot of this proposal is to reward with deference factual claims reached after some sort of adversarial testing and to treat with suspicion untested claims submitted at the eleventh-hour by motivated (and often anonymous) groups.

Conclusion

Over the past 30 years the world has undergone a revolutionary change in how information is transmitted and received. Factual information is now cheaply manufactured and easily posted to the world with a click of a mouse. There is now an emphasis in Supreme Court decision making on generalized factual claims and a turn toward empirical factual support for legal arguments. There is also a brave new world of factual data that can be marshaled easily and quickly by any interested party that can call itself an expert. The Court seems hungry for factual information; it consumes it at a greater rate than the parties and the record can provide. But by turning to motivated interest groups to fill the need—and indeed relying on the amicus briefs themselves as evidence on factual claims—the Court risks tainting its decisions with unreliable evidence. It is time to refashion this old tool for the new purpose for which it is currently being used, and to equip the Court to confront the factual free-for-all in which it finds itself.

**Written Testimony to the U.S. Senate Judiciary Committee
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights**

Hearing on “Supreme Court Fact-Finding and the Distortion of American Democracy”

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Chairman Whitehouse, Ranking Member Kennedy, and distinguished members of the Subcommittee, thank you for this opportunity to share my thoughts on the Supreme Court’s judicial process, especially as it relates to fact-finding. I actually think that the hearing title is a bit loaded: first, because the Supreme Court doesn’t generally engage in fact-finding in the way trial courts do, but rather applies the law to novel facts, as any appellate court is supposed to; and second, because however much one thinks American democracy is “distorted,” the Supreme Court, a reactive institution, is hardly at fault. Indeed, the court is the most respected government institution other than police and the military,¹ so hand-wringing over its role in governance—or broader questioning of its legitimacy—principally arises when the justices rule in ways that disagree with progressive orthodoxy or, more broadly, when progressives are frustrated that there’s a major institution they don’t control. The chairman himself filed a brief in last year’s Second Amendment case admonishing the Court to “heal itself before the public demands it be restructured in order to reduce the influence of politics.”²

On the point about fact-finding, it’s uncontroversial when the Supreme Court takes facts into account to assess reliance interests and other factors that go into proper jurisprudence, depending on the appropriate standard of review and procedural posture. But then there’s the distinction between “adjudicative” facts—those that “relate specifically to the activities or characteristics of the litigants, and are facts that would typically go to the jury in a jury trial”—and “legislative” facts, information about the world that helps the court decide questions of law and policy.³ Appellate courts generally aren’t supposed to perform independent investigations to develop adjudicative facts. Just last week, the Court considered when a circuit court may review matters outside the trial record to determine whether a district court’s error affected a defendant’s substantial rights or impacted the fairness, integrity, or public reputation of the trial.⁴

¹ “Confidence in Institutions,” Gallup, <https://bit.ly/2PbeNeP> (presenting longitudinal surveys of public confidence in major American institutions) (last visited Apr. 22, 2021).

² Brief of Senators Sheldon Whitehouse, Mazie Hirono, et al. as Amici Curiae in Support of Respondents, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), <https://bit.ly/38otf9Y>.

³ Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 Harv. L. Rev. 364, 365–66 (1942).

⁴ See Transcript of Oral Argument, *Greer v. United States* (April 20, 2021) (No. 19-8709), <https://bit.ly/3xe1Ge9>.

Legislative facts are different, however, because they're used to explore the practical consequences of potential rulings, to develop doctrine that goes beyond the case at hand, and just rhetorically to buttress arguments. Justice Breyer is particularly well known for his independent internet searches, but all the justices employ legislative facts, so there's no ideological or jurisprudential bias with respect to taking judicial notice of or finding authoritative support for descriptions of real-world phenomena that make legal rulings more persuasive.⁵ My fellow witness Indiana Solicitor General Thomas Fisher will discuss these issues in greater detail.

But something tells me that this hearing wasn't called to survey appellate review of summary judgment determinations—which are supposed to be based on whether there are any material issues of fact in dispute—or the difference between clear-error and abuse-of-discretion review. I don't think we're here to discuss the role that case-specific facts play in evaluating whether a given lawsuit should properly be construed as challenging a statute as-applied versus facially. Nor is this an academic seminar on the proper scope of judicial notice, or how the integrity and probity of facts developed through the adversarial process (including *amicus curiae* briefs⁶) may be different from those produced by “in-house” research by the justices and their clerks. Because if that's what interests this committee, I suggest that we all yield all of our time to Prof. Allison Larsen, whose empirical work in this area, with which I've been familiarizing myself since being called to testify at this hearing, is truly ground-breaking.

Instead, this seems to be a collateral attack on certain rulings that Prof. Larsen has called “facty”—meaning legal determinations “infused with factual observations.”⁷ Specifically, *Shelby County v. Holder* (2013) and *Citizens United v. Federal Election Commission* (2010). As I'll discuss below, neither independent Supreme Court fact-finding, nor even legislative facts presented in *amicus* briefs, played much of a role in those controversial cases. I certainly wouldn't put them in the same category for these purposes as *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), or *Grutter v. Bollinger* (2003).

But before turning to those cases, I want to briefly comment on the role of *amicus* briefs, because I know that's one of the chairman's special interests. Prof. Larsen has done significant empirical work in this area as well,⁸ but my own Cato Institute is one of the biggest filers of Supreme Court *amicus* briefs, so I have plenty of “lived experience.” My briefs aren't a good example of feeding the justices legislative facts or otherwise assisting with fact-finding, because we almost always make purely legal arguments. We typically make doctrinal points or expand on the parties' legal arguments rather than filing “Brandeis briefs,” because, as a think tank focused on public policy, Cato has no real expertise in sociology or technology or biology. We do sometimes employ institutional or outside academic experts on economics or legal history or financial regulation, most often to counter opposing arguments in these areas.

⁵ See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1260–63 (2012), <https://bit.ly/2RO1bGN>.

⁶ *Id.* at 1257 n.12 (making the assumption that “a party's amici count as part of the adversarial process”); *id.* at 1270–71 (distinguishing legislative facts found “in-house” by a justice from those coming “from any of the party briefs or from the briefs submitted by amici curiae”); *id.* at 1291 (noting that bias is easier to spot among “dueling experts in the courtroom” or “dueling citations at the briefing process—even when facts come from amici—since these sources are all subject to counterarguments in reply briefs or at oral argument”).

⁷ Allison Orr Larsen, *Judging “Under Fire” and the Retreat to Facts*, 61 Wm. & Mary L. Rev. 1083, 1089 (2020), <https://bit.ly/3xdBArG>.

⁸ See, e.g., Allison Orr Larsen, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016), <https://bit.ly/3Hjlk7G>.

I. My Experience with “The *Amicus* Machine”

In all our briefs, Cato maintains an unwavering commitment to articulating for the Court how the principles of liberty through limited government and a commitment to the original public meaning of the Constitution should guide their decisions. That’s our only interest, and we don’t hide it. Petitioners to the Supreme Court from all over the country actively seek Cato’s support—so many that we turn away a good deal due to lack of resources.

As we all recognize, *amicus* filings have exploded in recent years. For example, the constitutional challenge to the Affordable Care Act, *NFIB v. Sebelius* (2012), drew 136 *amicus* briefs. This record was short-lived, as three years later, the consolidated same-sex marriage cases, *Obergefell v. Hodges* (2015) entertained 149 *amicus* briefs.

Each year, thousands of petitions for a writ of certiorari are filed and only about 75 are granted. Among those thousands of petitions, relatively few receive support from *amici*. Many academic studies have indicated that briefs at the cert. stage have a greater impact on the Court—greater, that is, than just being another voice among the potentially dozens of briefs weighing in on the merits. Accordingly, for about the last decade, Cato has consistently filed more briefs in support of certiorari than on the merits. We have also expanded our presence in the circuit courts of appeals, as well as in state supreme courts. In those courts, which receive far fewer *amicus* briefs than the U.S. Supreme Court, we concentrate our legal firepower on upcoming issues.

Amicus briefs serve a variety of purposes. Some inform the justices about economic, historical, scientific, or sociological data. Those briefs can be useful in more esoteric cases that are difficult for even the best legal minds to understand; the justices aren’t experts on everything. For a case dealing with an adjustment in banking regulations, for example, it can be helpful for those who are more familiar with banking practices to tell the Court how those changes will work in practice. Other briefs can focus on a particular legal argument that isn’t fully explored in the merits briefs, or explain the scope of the problem that the Court is asked to address. For briefs supporting cert. petitions, it can be helpful to explain why a given legal issue requires the Court’s attention and why taking a particular case is the best way to resolve that issue.

Some *amicus* briefs—actually a significant number of them (particularly in the highest-profile cases)—are just “me too” briefs. These filings merely restate the arguments for the main parties in different language. These are not helpful to the Court and are usually ignored.

At Cato, we actively avoid “me too” briefs. We work with the counsel for the parties we support—and their “*amicus* wranglers”—as well as other *amici*, to discuss what arguments need to be covered. To maximize efficiency and avoid redundancy, often we’ll join other organizations’ briefs rather than filing our own, or invite other groups to join ours. A properly coordinated array of *amicus* briefs will hit all sides of the argument, with little overlap, and provide information about the scope of the problem and the effects of possible rulings.

Despite Chairman Whitehouse’s quixotic crusade against *amicus* brief funding,⁹ there’s nothing fishy about donations to think tanks and other nonprofit organizations involved in strategic litigation. People fund organizations that support their values and policy perspectives. It’s done on the left and the right, and affects cases of constitutional, civil, and criminal law. Cato itself is funded mostly by individuals (75% in 2019) and foundations (20% in 2019).¹⁰

⁹ See, e.g., “Sen. Sheldon Whitehouse Outlines Dark Money Schemes, Hidden Powers behind SCOTUS Nominee,” *USA Today*, Oct. 13, 2020, <https://bit.ly/38s2E5y>.

¹⁰ See Cato Institute 2019 Annual Report at 41, <https://bit.ly/3t56wrm>.

We also get a tiny bit of corporate funding (3% in 2019), which I would hazard is much less than the chairman gets from corporate PACs for his reelection campaigns.¹¹ In short, the attack on *amicus* briefs and their funders is misguided. It also misplaces the causation arrow as between funding and issue advocacy. Advocacy groups exist to advance all sorts of causes—and donors, both individual and corporate, fund those causes they support.

Because of effective lawyering and strategic *amicus* coordination, as well as a Constitution that, interpreted properly, is quite libertarian, the Supreme Court has been one of the few friends in government, relatively speaking, for advocates of individual liberty. For example, in the 2012–2013 term, the Court sided with Cato 15 times out of 18 filings, seven of them unanimously. Cato also went three-for-three that term on the Court’s blockbuster, end-of-term cases: affirmative action (*Fisher v. UT-Austin I*), same-sex marriage (*Obergefell v. Hodges*), and the Voting Rights Act (*Shelby County v. Holder*). In fact, we were the only organization to support the constitutionally correct outcome in *each* of those cases. Moreover, Cato was the only organization in the entire country to have filed briefs in support of both Jim Obergefell and, five years later, Jack Phillips, the owner of the bakery in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018). The libertarian view is truly a third way not represented by either progressives or conservatives.

II. *Shelby County v. Holder*: The Court Grapples with the Meaning of “Appropriate Legislation” Under the Fifteenth Amendment¹²

The Constitution doesn’t grant Congress the power to do whatever it wants regarding voting rights or election regulation, or even the prevention of racial disenfranchisement. Instead, Section 2 of the Fifteenth Amendment says that “Congress shall have power to enforce this article by appropriate legislation.” What “appropriate legislation” means may be disputed by legal scholars, but four years before *Shelby County*, the Supreme Court determined that the Voting Rights Act “imposes current burdens and must be justified by current needs.”¹³ But regardless of how one articulates the standard, the point is that legislation passed to protect voting rights under the Fifteenth Amendment may be fully constitutional when enacted but cease to be later, at the point when the underlying conditions no longer make it “appropriate.” Jurists and scholars can argue in good faith over when that point is reached, but regardless it’s not fact-finding: it’s an application of the law to the facts of the case. In other words, it’s judging.

And so it shouldn’t be surprising that *Shelby County* eased out what was supposed to be a temporary provision enacted in 1965 to provide federal oversight of state elections based on that era’s racial disparities. While politicians and pundits irresponsibly liken the ruling to sanctioning fire hoses, dogs, night riders, and all-white primaries, it actually shows the strength of voting protections. The Court simply found that the Section 4(b) “coverage formula” for jurisdictions

¹¹ “Sen. Sheldon Whitehouse—Campaign Finance Summary,” OpenSecrets.org, <https://bit.ly/3btZu9v> (showing that PAC contributions—not all of which are corporate—constitute 21.41% of funds raised between 2015 and 2020).

¹² This section is based on Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King’s Dream*, 8 NYU J. L. & Liberty 182 (Fall 2013), <https://bit.ly/3sy8CtE>.

¹³ *Northwest Austin Mun. Util. Dist. No. 1 v. Holder (NAMUDNO)*, 557 U.S. 193, 203 (2009). Justice Thomas dissented in part, because he would’ve gone further than Chief Justice Roberts’s opinion for the Court, but that doesn’t affect his agreement with this general statement about how to justify voting-rights legislation under the Fifteenth Amendment. Indeed, Justice Thomas would’ve invalidated Section 5 then and there for failing that test. *Id.* at 212 (Thomas, J., concurring in the judgment in part and dissenting in part).

subject to Section 5 preclearance was unconstitutional because it was based on 40-year-old data, such that covered jurisdictions no longer corresponded to incidence of racial discrimination in voting. Had Congress updated Section 4(b) when it renewed Section 5 in 2006, the Court would've had a harder time finding the coverage formula outdated. But it didn't, so its legal conclusion is hard to argue with, regardless of inflammatory disingenuousness to the contrary.

After all, when the coverage formula was enacted, Mississippi was “a state sweltering with the heat of oppression,”¹⁴ but by the time *Shelby County* came down it had the best ratio of black-voter turnout to white-voter turnout.¹⁵ And the Magnolia State was and remains one of a number of states where voter-registration rates are higher for blacks than for whites. Indeed, covered states led (and continue to lead) the nation in government officials who are racial minorities, including those elected statewide.¹⁶

In other words, just as the Court was correct in 1966 to approve, as a matter of law, the constitutional deviation that preclearance represents as an “uncommon” remedy to the “exceptional conditions” in the Jim Crow South,¹⁷ it was correct in 2013 to restore, on the basis of legal findings, the constitutional order. While Justice Ruth Bader Ginsburg in dissent compared ending preclearance to “throwing away your umbrella in a rainstorm because you are not getting wet,”¹⁸ it's actually more like stopping chemotherapy when the cancer (of Jim Crow) is eradicated. As Justice Clarence Thomas wrote in another voting rights case four years earlier, disabling preclearance “represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA.”¹⁹ Instead, progressive elites focus on a decision that, far from removing protections for racial minorities' voting rights—the key Voting Rights Act provision (Section 2), which facilitates suits against discriminatory state actions, remains very much in effect—declared an end to the state of emergency that existed when those rights actually were systematically threatened.

To put a finer point on it, the way that Chief Justice John Roberts began his opinion in *Shelby County* shows what was really at stake in the case, and that this ruling was firmly grounded in law, rather than “Supreme Court fact-finding.” Although this preamble doesn't explicitly state what the Court's ultimate ruling is, it provides the key to the case and gives you all you really need to know about the modern Voting Rights Act—save one bit that I'll explain shortly after. To make this easier, I've divided Roberts's introduction into the logical points that he sequentially makes and then paraphrased them.

¹⁴ Martin Luther King, Jr., “I Have a Dream,” Speech at the March on Washington, Aug. 28, 1963, <https://n.pr/3sDly6Q>.

¹⁵ See Ilya Shapiro, “Voting Rights in Massachusetts and Mississippi,” *Cato at Liberty* (Mar. 6, 2013, 1:55 PM), <https://bit.ly/3dDEFWwf>.

¹⁶ For example, Thurbert Baker served as attorney general of Georgia from 1997 to 2011, having initially been appointed by Gov. Zell Miller and then winning three elections; Wallace Jefferson became the first black justice (2001) and chief justice (2004) of the Texas Supreme Court through appointments by Gov. Rick Perry, and was elected to a full term as chief justice in 2008. In the U.S. Senate, meanwhile, Ted Cruz and Marco Rubio were elected to represent Texas and Florida, respectively, with Tim Scott also going on to win two state-wide elections in South Carolina after having initially been appointed to his seat.

¹⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

¹⁸ *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

¹⁹ *NAMUDNO*, 557 U.S. at 229 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

Point 1:

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.²⁰

Translation: The Voting Rights Act provisions at issue here are really, really unusual, outside the normal constitutional framework, and require some sort of extraordinary factual basis to support their constitutionality.

Point 2:

This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.” *Id.*, at 334.²¹

Translation: The really bad things going on in the Jim Crow South justified the Sections 4-5 constitutional deviation.

Point 3:

Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. *See* Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031.²²

Translation: These were supposed to be temporary measures, so it’s notable that they’re still in effect nearly 50 years later and are due to continue for nearly 30 more years; Jim Crow must still be roaming the land.

Point 4:

There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide.” *Northwest Austin Municipal*

²⁰ *Shelby County*, 570 U.S. at 535.

²¹ *Id.*

²² *Id.*

Util. Dist. No. One v. Holder, 557 U. S. 193, 203-204(2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).²³

Translation: Actually no, and indeed there doesn't seem to be *any* evidence that racial minorities, or at least blacks, are systematically disadvantaged versus whites in terms of the right to vote—certainly not in Section 5-covered jurisdictions.

Point 5:

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U. S., at 203.²⁴

Translation: Racial discrimination in voting hasn't been fully eradicated, of course, but does it really still exist in the same widespread, systemic way such that all those extra-constitutional measures—and the burdens they put on our federal structure—are still justified? After all, we've said repeatedly that remedies need to match wrongs.

Shelby County thus becomes rather easy to understand: the Court had to restore the constitutional order—the *status quo* that existed before the temporary Sections 4 and 5—because, at the very least, there's no correlation between the coverage formula and racial discrimination in voting.²⁵

In other words, the following *factual* questions were completely irrelevant to the case: Does racial discrimination still exist? Does racial discrimination in voting still exist? Is racial discrimination in voting more common in Section 5-covered jurisdictions than elsewhere?

Even if the answer to all those questions was yes—which it was to the first two but not the third—that wouldn't have been enough to uphold the preclearance regime. Instead, the only question that mattered is whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still existed such that an "uncommon exercise of congressional power" is still constitutionally justified—to again quote the 1966 ruling that approved Section 5 as an emergency measure.²⁶

²³ *Id.*

²⁴ *Id.* at 536.

²⁵ Justice Ginsburg's dissent goes much more to the question of who gets to decide whether the facts on the ground justify continued application of Section 5, Congress or the courts. *Shelby County*, 570 U.S. at 559. (Ginsburg, J., dissenting). As a proponent of judicial review and engagement, I see the role of judges as saying what the law is rather than avoiding such rulings—but that debate is beyond the scope of this essay. See generally Clark Neily, *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government* (2013).

²⁶ *Katzenbach*, 383 U.S. at 334.

The answer to that question must be no—and it doesn’t take any “fact-finding” to get there. At the very least, political conditions had changed such that the 40-year-old voting data on which Section 4(b) relied was subjecting a seemingly random collection of states and localities to onerous burdens and unusual federal oversight. As Chief Justice Roberts wrote for the Court the last time it looked at this law, the “historic accomplishments of the Voting Rights Act are undeniable,” but the modern uses of Section 5 “raise[] serious constitutional concerns.”²⁷

Yet Congress renewed Section 5 without updating the Section 4(b) formula, and it ignored the Court’s warning that “the Act imposes current burdens and must be justified by current needs.”²⁸ Accordingly, it should’ve come as no surprise that the chief justice noted that “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”²⁹

For example, on the measures originally used to determine Section 5 coverage—racial disparities in voting and voter registration—Massachusetts is the worst offender, while Mississippi is our national model.³⁰ As Chief Justice Roberts explained in *Shelby County*, even if one views the thousands of pages of congressional record related to the 2006 reauthorization in their best light, “no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”³¹

Moreover—and this was the extra bit I alluded to earlier—it’s Section 2, the nationwide ban on racial discrimination in voting, that is the core of the Voting Rights Act, and it remains untouched.³² Section 2 provides for both federal prosecution and private lawsuits, and allows prevailing parties to be reimbursed attorney and expert fees. As I described in the run-up to oral argument in *Shelby County*, there was no indication that Section 2 is inadequate.³³

Sections 4 and 5, meanwhile, were supposed to supplement Section 2—and they succeeded brilliantly, overcoming “the conditions that originally justified these measures.”³⁴ Of course, the Court really should’ve gone further, as Justice Thomas pointed out in his concurring opinion.³⁵ The Court’s explanation of Section 4(b)’s anachronism applies equally to Section 5.

In practice, however, Congress has been and will continue to be hard-pressed to enact any new coverage formula, not simply due to political realities, but because the “extraordinary problem”—the “insidious and pervasive evil” of “grandfather clauses, property qualifications, ‘good character’ tests,” and other “discriminatory devices”³⁶—that justified a departure from the

²⁷ *NAMUDNO*, 557 U.S. at 201, 204.

²⁸ *Id.* at 203.

²⁹ *Shelby County*, 570 U.S. at 535.

³⁰ Transcript of Oral Argument at 32, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

³¹ *Shelby County*, 570 U.S. 554 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; *NAMUDNO*, 557 U.S. at 201).

³² Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

³³ Ilya Shapiro, “*Shelby County v. Holder*: Section 5 of the Voting Rights Act Conflicts with Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting,” *SCOTUSblog*, Feb. 14, 2013, <https://bit.ly/2Qd1t12>.

³⁴ *Shelby County*, 570 U.S. at 535.

³⁵ *Id.* at 557 (Thomas, J., concurring).

³⁶ *Katzenbach*, 383 U.S. at 309–14 (using these phrases to describe the Jim Crow South’s evasion of laws and judicial decrees protecting voting rights).

normal constitutional order is, thankfully, gone. Bringing us full circle, then, Chief Justice Roberts concluded his opinion on that point: “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”³⁷

Shelby County thus underlined that Jim Crow is dead.³⁸ Yet our political leaders are acting as if the last 50 years never happened. They declared that *Shelby County* reversed the gains that have been made and enabled “voter suppression”—when actually it’s a belated recognition that times have changed and that widespread, official racial discrimination in voting has disappeared. Attorney General Eric Holder vowed to use “every tool” at his disposal to continue federal control, including joining a lawsuit against Texas’s redistricting plan and filing his own against several states’ voter-identification laws.³⁹ But the Justice Department’s lawsuits proved the Supreme Court’s wisdom. They showed that plenty of laws exist to combat racial discrimination in voting, and it’s the effectiveness of those laws that have obviated Section 5 (and its coverage formula).

For example, Section 2 of the Voting Rights Act grants both private parties and the federal government the right to go after state practices that constitute “a denial or abridgment of voting rights.”⁴⁰ It empowers citizens to challenge specific instances of discrimination and allows them to recover from defendants the costs of their lawsuits. Section 3, meanwhile, gives courts the power to order federal supervision—including Section 5-style preclearance—over jurisdictions that have engaged in deliberate discrimination that violates voting rights and are likely to continue this conduct in the absence of that extreme remedy.⁴¹

The only difference from the Section 5 regime is that the federal government now actually has to *prove* the existence of discrimination. Indeed, it’s axiomatic that plaintiffs in civil rights cases have to prove discrimination with regard to federal protections in our education, employment, housing, lending, and public accommodations laws, for example, even if one can quibble with whether and how those laws go after disparate “impact” rather than mere disparate treatment.⁴² That’s just the way law works in the United States: having to prove liability (for racial discrimination or otherwise) in civil suits is equivalent to having to prove guilt in criminal prosecutions—and the evidentiary standard is easier to meet in the former. Voting-rights cases where plaintiffs can meet that standard undermine the claim that the Supreme Court made it impossible to enforce voting rights. In cases where they can’t, isn’t that a good thing?

Of course, progressives believe that voter-identification laws (and related ballot-integrity tweaks) are themselves evidence of discriminatory conduct. But there’s no evidence that such laws keep anyone from voting. Indeed, voter ID more generally is hugely popular, including

³⁷ *Shelby County*, 570 U.S. 557.

³⁸ See generally Hans A. von Spakovsky, “The Voting Rights Act After the Supreme Court’s Decision in *Shelby County*,” Testimony Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, July 18, 2013, <https://heritag.org/3n6PlhP>.

³⁹ See Adam Liptak & Charlie Savage, “U.S. Asks Court to Limit Texas on Ballot Rules,” *N.Y. Times*, July 26, 2013, at A1; Josh Gerstein, “DOJ Challenges North Carolina Voter ID Law,” *Politico*, Sept. 30, 2013, <https://politi.co/3tCHh0>.

⁴⁰ Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

⁴¹ *Id.* at § 3.

⁴² See generally Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 *Cato Sup. Ct. Rev.* 53 (2009), <https://bit.ly/3dLbTXJ>.

56% of Democrats and 69% of African Americans.⁴³ And majorities of all racial groups—64% of whites, 59% of blacks, and 58% of other minorities—reject the claim that voter ID laws discriminate against certain voters.⁴⁴ Indeed, many democratic countries require voter ID of some form, including Canada, France, Germany, India, Israel, Italy, Sweden, and Switzerland.

To top it off, the bipartisan 2005 Commission on Federal Election Reform, led by Jimmy Carter and James Baker, recommended voter ID as one of many common-sense reforms to promote election integrity.⁴⁵ As the Supreme Court explained five years before *Shelby County*, in a 6-3 decision written by the liberal Justice John Paul Stevens, such requirements are constitutional so long as the state doesn't unduly burden the ability to get an ID.⁴⁶ And anyway, a recent National Bureau of Economic Research study found that these provisions have “no negative effect on registration or turnout,” either overall or for any race, gender, or age group.⁴⁷

In any event, we can continue debating whether *Shelby County* was correctly decided—in my mind, Congress made it an easy case when it declined to update the coverage formula—but it neither represents improper Supreme Court fact-finding nor a distortion of American democracy.

III. *Citizens United v. FEC*: The Court Applies the First Amendment to Restrictions on Political Speech⁴⁸

Citizens United is an even less fact-dependent case than *Shelby County*, because it didn't involve the constitutionality of a law that was at one point constitutional—because of the need to address extraordinary circumstances—but gradually lost its constitutional justification when the underlying circumstances changed. The case didn't turn on the amount of money donated to political candidates or parties, or whether corporations and unions had been increasing their election-related spending. The question it asked was important, but simple and entirely a legal one: does the First Amendment allow the government to restrict independent political speech that's paid for by an organization rather than individuals?

Although some argue that *Citizens United* relied on a factual finding that independent organizational spending doesn't corrupt politics,⁴⁹ Justice Kennedy's majority opinion makes clear that it's grounded in legal reasoning. To wit, the only constitutional justification for restricting political speech is to prevent *quid pro quo* corruption or the appearance thereof:

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected

⁴³ Kerry Picket, “Voter ID Rules Popular Among Public: Polls,” *Washington Examiner*, Apr. 2, 2021, <https://washex.am/3au5BJQ>.

⁴⁴ “Election Integrity: 62% Don't Think Voter ID Laws Discriminate,” *Rasmussen Reports*, Apr. 13, 2021, <https://bit.ly/32A1S9n>.

⁴⁵ *Building Confidence in U.S. Elections*, Report of the Comm'n on Federal Election Reform (Sept. 2005), <https://bit.ly/3ei8a36>.

⁴⁶ *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

⁴⁷ Enrico Cantoni & Vincent Pons, “Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008-2018,” *Nat'l Bur. Econ. Res.* (Feb. 2019), <https://bit.ly/2ROQIRr>.

⁴⁸ This section is based on Ilya Shapiro, *Stephen Colbert Is Right to Lampoon Our Campaign Finance System (And So Can You!)*, 4 *St. Thomas J.L. & Pub. Pol'y* 317 (Spring 2012), <https://bit.ly/32qM16b>.

⁴⁹ See, e.g., Allison Orr Larsen, *Factual Precedents*, 162 *U. Pa. L. Rev.* 59, 63 (2013), <https://bit.ly/3sJBsNb>.

officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.⁵⁰

In other words, *Citizens United* was correctly decided because political speech should be free regardless of the nature of the speaker: People don't lose their rights when they get together and associate, whether it be in unions, advocacy groups, private clubs, commercial enterprises, or any other form.⁵¹ But the ruling did create the odd situation whereby independent political speech is unbridled for the most part while candidates and parties are heavily regulated. And so, if you look at who really gained for practical purposes from *Citizens United*, it's non-profits and advocacy groups and independent speakers of various kinds, be it the Heritage Foundation, the Sierra Club, the ACLU, the NRA—or at least the political advocacy arms of such tax-exempt groups—small business associations, or trade groups. The losers, meanwhile, are political parties and candidates because they, in relative terms, now have less money and less control over their message. That's not necessarily a bad thing—parties aren't privileged under the Constitution—but it does create a weird dynamic.

But anyway, debating campaign-finance policy is beside the point, because *Citizens United* didn't involve a policy judgment, let alone motivated fact-finding to support such a judgment. And it doesn't stand for half of what many people think it does. Take for example President Obama's famous statement at the 2010 State of the Union, that the case "reversed a century of law that I believe will open the floodgates of special interests—including foreign corporations—to spend without limit in our elections."⁵² In that sentence, the former constitutional law professor stated four errors of constitutional law.

First, *Citizens United* didn't overturn a century of law; it overturned 20 years at most. Obama was referring to the Tillman Act of 1907, which prohibited direct corporate donations to candidates and parties. *Citizens United* didn't touch that issue. Instead, the overturned precedent was *Austin v. Michigan Chamber of Commerce*, a 1990 case that, for the first time ever or since, sanctioned a regulation of political speech based on something other than corruption or the appearance thereof.⁵³

Second, as far as opening the floodgates to special interests goes, it depends on how you define those terms. Ten years later, there isn't much indication that there's a change in kind, a

⁵⁰ *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

⁵¹ See Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707–08 (2011), <https://bit.ly/3xkdSdh>.

⁵² "Remarks by the President in State of the Union Address," Off. of Press Sec'y (Jan. 27, 2010), <https://bit.ly/3dBsa1d>.

⁵³ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990). For a further critique of the president's factual assertion on this point, see Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 Nexus: Chap.'s J.L. & Pol'y 121, 125–26 (2011), <https://bit.ly/2PgZVAX>.

geometric increase—as opposed to growing at a standard rate, more or less constant with GDP and inflation—in spending by corporations or even independent advocacy groups (though there may be by unions). There are certainly now people running Super PACs who would otherwise be supporting candidates in other ways—as bundlers or directors of regular PACs—but Super PACs aren't a function of *Citizens United* (as I'll get to shortly). It's just unclear that any “floodgates” have been opened or what these special interests are that didn't exist before.

Third, the rights of foreigners—corporate or natural persons—is another issue about which *Citizens United* said nothing. Indeed, two years later, the Supreme Court summarily upheld the restrictions on foreign spending in U.S. political campaigns.⁵⁴

Fourth and finally, there's the charge that spending on elections now has no limits. Well that might be true in the context of independent political speech, but it's certainly not for candidates and parties—whose spending was not at issue in *Citizens United*—nor for donors to candidates and parties. *Citizens United* didn't rule on either individual or corporate contributions to candidates. What it did was to remove the limits on independent associative expenditures.

These are some very basic points that even people who agree with *Citizens United* often misperceive. The most important thing about the case was the Supreme Court's definitive ruling that the only acceptable rationale for limiting speech and enacting various other campaign finance regulations was corruption and the appearance of corruption. By overruling *Austin*, *Citizens United* made it clear that “equalizing voices” is not a constitutionally adequate justification for limiting independent spending. You can disagree with that legal analysis, but it's not based on some inappropriate fact-finding.

Moving past President Obama's four errors and related and misapprehensions about *Citizens United*, there's a more serious critique of the case that needs to be addressed. Striking down the law, the argument goes, disrespects *stare decisis*, a prudential doctrine that says that reliance interests sometimes dictate that an incorrect legal ruling be maintained, because the social cost of fixing it may be greater than the benefit. *Stare decisis* encourages deference to past decisions to promote predictable and consistent development of the law, cultivate reliance on judicial decisions, and contribute to the integrity of the judicial process.

I've co-authored an article on this subject, the upshot of which is that, much less than disrespecting *stare decisis*, *Citizens United* vindicates it.⁵⁵ That is, *stare decisis* isn't a forever-binding principle that prohibits courts from ever overturning precedent but rather a way to ensure that courts factor in reliance interests. In the Supreme Court's words, “*Stare decisis* is not an inexorable command nor a mechanical formula of adherence to the latest decision.”⁵⁶ Think about it: if *stare decisis* meant what those who criticize *Citizens United* want it to mean, then *Plessy v. Ferguson* could never have yielded to *Brown v. Board of Education* and *Bowers v. Hardwick* could have never have yielded to *Lawrence v. Texas*. Those earlier decisions—upholding state laws regarding racial segregation and homosexual activity, respectively—would still be good law. The Court will, after all, get the law wrong on occasion, but it expresses no commitment to its own integrity if it rigidly refuses to retreat in the face of persuasive logic. That would be a sign of closed-mindedness, not a wise jurisprudence of legal fidelity. So the question is, how do we apply *stare decisis*? When to overturn old precedent and when to let it be?

⁵⁴ *Bluman v. FEC*, 565 U.S. 1104 (2012).

⁵⁵ Shapiro & Mosvick, *Stare Decisis After Citizens United*, *supra* note 53.

⁵⁶ *Payne v. Tennessee*, 510 U.S. 808, 828 (1991).

The Supreme Court has identified a set of factors relevant to *stare decisis* analysis: (1) the area of law that's at issue; (2) workability; (3) antiquity; and, as I've stressed, (4) reliance interests. A few of these have some "facy" aspects because, again, the Court is applying a prudential doctrine that by definition requires case-specific adjudication.

First, the Court had little incentive to sustain the kind of "leveling the playing field" justifications for political-speech restrictions that were put in play by *Austin v. Michigan Chamber of Commerce* and reinforced by *McConnell v. FEC*⁵⁷ because this was a constitutional (First Amendment) issue. While *stare decisis* is strong with respect to the common law cases or statutes—judicial rulings in these areas can be reversed by legislation—courts cannot give as much deference to constitutional decisions because those are much harder to change non-judicially: you need a constitutional amendment. So when *Citizens United* came before the Court and questioned its interpretation of the First Amendment, the strength of *stare decisis* was already at its lowest ebb—but not because of any new facts.

Second, with respect to workability, well, the system wasn't doing well. It was (hypothetically) banning books. It was hard for the FEC to implement and a lot turned on subjective interpretations of various magic words like "electioneering communications." It wasn't clear to major actors what the real rules of the game were, and all of these cases from *McConnell* to *Wisconsin Right to Life*⁵⁸ to *FEC v. Davis*⁵⁹ to *Citizens United* showed that there was a natural progression undoing the unworkable aspects of the regime that the McCain-Feingold campaign-finance law had put in. The Court knew all this; it didn't have to find it out in the course of deciding *Citizens United*.

Third, antiquity. In *Austin*—which, again, was decided in 1990, not 1900—the Court recognized a unique state interest in guarding against corporations' unduly influencing elections by making election-related expenditures from their general accounts (rather than PACs or other segregated funds). So it upheld a law under an equality rationale to eliminate so-called distortions caused by corporate spending. That's the first and only time that the Court endorsed something other than a "corruption or appearance of corruption rationale," and it wasn't even clear if that's what it were doing because *Austin* was facially inconsistent with existing case law. That is, the Court had resolved in both *Buckley v. Valeo* and *First National Bank v. Bellotti* that not only no compelling state interest existed in limiting independent corporate expenditures, but also that the government could not limit any persons—defined to include corporations—from making independent expenditures.⁶⁰

While *Austin* would eventually be reinforced by *McConnell*, the years between *McConnell* and *Citizens United* saw a series of cases that eroded *Austin*'s holding with respect to corporate political speech. In *Wisconsin Right to Life*, the Court held that the state interest in addressing the coercive and distortive effect of immense aggregations of wealth could not be extended to "genuine" issue ads.⁶¹ The following year, in *Davis*, the Court struck down the so-called Millionaire's Amendment to McCain-Feingold, which relaxed campaign-finance restrictions for opponents of self-funded candidates, because it burdened those "millionaire"

⁵⁷ *McConnell v. FEC*, 540 U.S. 93 (2003).

⁵⁸ *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007).

⁵⁹ *Davis v. FEC*, 554 U.S. 724 (2008).

⁶⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁶¹ *WRTL II*, 551 U.S. at 471.

candidates' First Amendment right to spend money on political speech.⁶² *Davis* didn't grapple with *Austin* directly, but it did revitalize *Buckley*'s holding that a restriction on *expenditures* wasn't justified by the government's concern in preventing corruption. It also rejected the government's argument that the expenditure cap should be upheld on the ground that it equalizes the relative resources of the candidates.⁶³ *Davis* thus reinvigorated *Buckley*'s point that the government's ability to restrict the speech of some to enhance the relative voice of others—"leveling the playing field"—is incompatible with the First Amendment. And so, the legal rule overturned by *Citizens United* didn't possess the force of antiquity. Indeed, even the precedent that been in place for 20 years had slowly been eroded in subsequent cases. It was *Austin* itself that turned out to be a departure from precedent.

That conclusion segues nicely into the final factor, reliance interests. Chief Justice Roberts said it best in his *Citizens United* concurrence, which focused on *stare decisis*: "When fidelity to any particular precedent does more to damage this constitutional ideal [the rule of law] than to advance it, we must be more willing to depart from that precedent."⁶⁴ "Abrogating the errant precedent, rather than reaffirming and extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects."⁶⁵ Of course, in *Citizens United*, it wasn't even clear there was any precedent or *stare decisis* value to rely upon. During re-argument, then-Solicitor General Elena Kagan abandoned the equalizing-speech claim—the distortion-by-corporate-voices issue—that had been *Austin*'s rationale, in favor of an argument regarding shareholder interests and a different kind of *quid pro quo* corruption. How is a court supposed to apply *stare decisis* or credit reliance on an interest that the government defending it has abandoned? The government's new argument may or may not have been meritorious, but there was quite literally no reliance value here—and thus no weighing of competing factual arguments as to the scope and significance of that reliance. As the Cato Institute pointed out in our second *Citizens United* brief, "no one is relying on having less freedom of speech."⁶⁶

Again, we can debate whether *Citizens United* was correctly decided and whether political speech should be curtailed for reasons other than the prevention of *quid pro quo* corruption, but it didn't involve Supreme Court fact-finding. And while I agree that our campaign-finance regime distorts American democracy, the original sin here is *Buckley v. Valeo* and its creation of a contribution/expenditure distinction for purposes of First Amendment analysis—plus its rewriting of the law to create an unworkable system that Congress and the Court have been grappling with ever since.

By refusing to strike down the Federal Election Campaign Act altogether, just excising its expenditure limits, the Court produced a system where candidates face an unlimited demand for campaign funds but a tapered supply. They have to spend all their time fundraising, which is another complaint people have about our current system, right? Candidates spend all their time fundraising instead of legislating. Some would say that's a feature not a bug—because the government that governs least, govern best—but nevertheless these unbalanced rules have inflated both the value of individual campaign contributions and the priority of fundraising.

⁶² *Davis*, 554 U.S. at 738.

⁶³ *Id.* at 741–742.

⁶⁴ *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

⁶⁵ *Id.* at 379.

⁶⁶ Supp. Br. for Cato Institute as Amicus Curiae Supporting Appellant at 24, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205).

Moreover, the regulations have gradually pushed the flow of money away from candidates and parties toward advocacy groups unaccountable to the public. Ironically, this dynamic undermines campaign-finance reformers' main goal, politicians' accountability to voters.

The *Buckley* Court recognized that its actions would irreparably undercut reform efforts—the justices weren't naïve—but sustained the legislation nonetheless. Chief Justice Burger admitted that the Court's decision did "violence to the intent of Congress" and questioned whether the remaining "residue" left a workable program.⁶⁷ Still, he left a dog's breakfast of campaign-finance rules that have led to a lurching series of Supreme Court decisions that is approaching but not quite yet reversing *Buckley*.

We see, therefore, that campaign regulation, trying to manage the flow of political speech, is a graveyard of well-intentioned plans. These reformist ideals always go awry in practice because political money is a moving target that, like water, has to go somewhere. If it's not to candidates, it'll be to parties, and if not there, then to independent groups. If it's not to PACs, it will be Super PACs or unincorporated individuals acting together. Because what the government does matters to people and people want to speak about the issues that concern them. Indeed, to the extent that "money in politics" is a problem, the solution isn't to try to reduce the money—which we've seen is impossible—but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people's lives and you'll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.

And even if you're concerned about the millions of dollars seemingly wasted on electioneering—though Americans spend more annually on chewing gum and holiday candy,⁶⁸ and nobody would make or broadcast those negative ads everyone complains about if they weren't effective—the problem is not with your big corporate players. Instead, it's groups composed of many individuals and smaller players who now get to speak. They can't compete with the big boys on K Street—they can't afford the same lawyers and lobbyists—but they're sure going to make the public aware of Congress's shenanigans. So even if we accept "leveling the playing field" as a proper basis for campaign finance regulation, *Citizens United's* freeing up of associative speech does level that playing field in many ways.

In sum, we're left with a system that's of unbalanced, unstable, and unworkable—and we haven't seen the last of campaign finance cases before the Court or attempts at legislative reforms. But *Citizens United* has little to do with it, and nothing to do with fact-finding.⁶⁹

⁶⁷ *Buckley*, 424 U.S. at 235–36.

⁶⁸ See, e.g., George Will's regular column on the subject. George F. Will, "America Has Shingles. A Divided Congress Could be the Cure," *Wash. Post*, Nov. 7, 2018, <https://bit.ly/3awlrDT> (campaign spending for the 2017-18 cycle was about what Americans spend every two years on Halloween candy); George F. Will, "The Stakes on Tuesday," *Wash. Post*, Oct. 31, 2014, <https://bit.ly/32xBFZc> (election spending for the 2013-14 cycle was less than half of what they spent in October 2014 for Halloween); George F. Will, "States are Cracking Down on Political Speech with Burdensome Laws," *Wash. Post*, Feb. 3, 2012 (presidential campaign spending roughly the same as what Americans spend on Easter candy), <https://wapo.st/3x0N4Nk>; George F. Will, "A Campaign-Finance Bill That Doesn't Pass Muster," *Wash. Post*, Apr. 27, 2011, (Obama may raise \$1 billion in private contributions for the 2012 campaign, about half of what Americans spend on Easter candy annually), <https://wapo.st/3am9CCG>; George F. Will, "The Democratic Vision of Big Brother," *Wash. Post*, Oct. 17, 2010 (total election spending for every U.S. office during two-year cycle is less than Americans spend on candy in two Halloween seasons), <https://wapo.st/3tRwnmv>.

⁶⁹ In 2011, the Montana Supreme Court tried to make *Citizens United* into a fact-dependent case, citing the state's unique history of corporate influence on elections as justification for restrictions on independent corporate political speech. *Western Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 13 (Mont. 2011). The U.S. Supreme Court was having

Conclusion

There may be very real problems with jurists' doing their own fact-finding, in the sense of conducting in-chambers research outside the adversarial system: problems of confirmation bias, misunderstanding of complex scientific or technical fields, or even digital-algorithm-related "filter bubbles" that show different search results to different people. But these issues with "in-house" fact-finding are very different from anything related to *amicus* briefs—and they also don't seem to have any ideological salience, or correlation to justices considered to be on the "left," "right," or "middle" of the Supreme Court. Studying the issue is worth this subcommittee's time, but associating it with the politicized debates over *Shelby County* and *Citizens United*, or polemics about the state of our democracy, detracts from that project.

none of that, concluding in a *per curiam* opinion that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (*per curiam*). Four justices dissented from that opinion—an unusual occurrence, because *per curiam*s are exceedingly rarely 5-4—mainly to argue that Montana's factual record called for reconsidering *Citizens United*. *Id.* at 518 (Breyer, J., dissenting) ("Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case.").

**Statement of Paul M. Smith
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**Senate Judiciary Committee
Subcommittee on Federal Courts, Oversight, Agency Action,
& Federal Rights**

**Hearing on “Supreme Court Fact-Finding and
the Distortion of American Democracy”
April 27, 2021**

Thank you for the opportunity to appear before you today to testify about the Supreme Court’s approach to deciding important constitutional issues that turn on factual assumptions about how the world works. I am the Vice President of Litigation and Strategy at the Campaign Legal Center, a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. I am also a Professor from Practice at Georgetown University Law School, where I teach Election Law and Constitutional Law. For 35 years, I was a private practitioner specializing in appellate and Supreme Court advocacy. I have argued 21 Supreme Court cases and worked on hundreds of others.

I will briefly describe the importance of and process for fact-finding in our constitutional system, and then discuss two Supreme Court decisions in which the Court made factual misjudgments that have fundamentally altered the landscape and ideals of our democracy—*Citizens United v. Federal Election Commission* and *Shelby County v. Holder*. Each highlights different but equally serious problems: decisions based on an absence of fact in *Citizens United*, and decisions based on a disregard of fact in *Shelby County*.

I. INSTITUTIONAL COMPETENCIES FOR FINDING FACTS AND MAKING LAW

Our nation’s legal system is defined by its commitment to adversarial justice.¹ By

¹ See, e.g., Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 2 (2011) (“The United States’ commitment to an adversarial system of justice is a

this, I mean the premise “that the parties [to a lawsuit] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”² This commitment “derives from the belief that adversarial testing is the surest route to truth.”³

The role of courts in this system is to resolve disputes between specific litigants by interpreting and applying the law.⁴ “[R]esponsibility for making the law”—including a factual record to support it—“rests with elected legislators who are better positioned, both institutionally and as a matter of democratic theory, to choose among competing policy positions and values.”⁵ According due respect to Congress’s fact-finding role promotes the all-important principle of separation of powers in our constitutional system.⁶

There is a further division of fact-finding responsibility within our judicial system, as different courts serve different functions. “[T]rial courts are supposed to resolve cases based on the factual records presented by the parties, and appellate courts are generally required to defer to district courts’ factual findings.”⁷

defining and distinctive feature of its legal system.”); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 495 (2009) (“[T]he adversarial system is widely acknowledged to be a fundamental feature of the American adjudicatory process.”).

² *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment).

³ Gorod, *supra* note 1, at 3; *see also United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (“Truth is the essential objective of our adversary system of justice.”).

⁴ *See* U.S. Const. art. III, § 2; *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁵ Gorod, *supra* note 1, at 15; *see also* Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MENN. L. REV. 1, 1-2 (1986) (“I believe that both legislative lawmaking and administrative lawmaking are superior to judicial lawmaking in three main ways: (1) The product is better in clarity, reliability, and freedom from conflict; (2) the legislative process and the administrative process are more democratic than the judicial process; and (3) the factual base for legislation and for administrative rules is normally much stronger than the factual base for judge-made law.”).

⁶ *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (“The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process.”).

⁷ Gorod, *supra* note 1, at 4. The federal rules of procedure and evidence govern how trial courts find facts and how appellate courts review those findings.

This deference is warranted because trial courts hear testimony and witnesses directly, making them better positioned to weigh and assess the evidence presented and the credibility of witnesses.⁸ Playing this role on a daily basis allows trial courts to develop distinctive expertise in making factual determinations⁹ and serves “the public interest in the stability and judicial economy” of courts.¹⁰ For these reasons, deference by appellate courts to trial court fact-finding is not only a good idea but also required by the procedural rules governing federal courts.¹¹

A problem arises when appellate courts—especially the Supreme Court—fail to give due deference to legislative and trial court factual determinations—especially with regard to the “legislative facts” that often form the basis of constitutional adjudications. “Legislative facts” is a legal term of art meaning generalized observations about the world. They include any facts “which have relevance to legal reasoning and the lawmaking process,” and can be ascertained both “by a judge or court or in the enactment of a legislative body.”¹² They stand in contrast to “adjudicative facts,” which are “simply the facts of the particular case”¹³—those showing the what, when, where, and how of a particular event in a case.¹⁴ Legislative facts are those “facts *not* specific to a certain plaintiff or defendant but

⁸ See *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930) (“Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.”).

⁹ See *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) (“The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise.”).

¹⁰ Fed. R. Civ. P. 52 advisory committee’s note to 1985 amendment (“To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.”).

¹¹ Fed. R. Civ. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); see also *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (“This standard plainly does not entitle a reviewing court to reverse the trier of fact simply because it is convinced that it would have decided the case differently.”).

¹² Fed. R. Evid. 201(a) advisory committee note to 1972 amendment.

¹³ *Id.*

¹⁴ In the voting rights context, adjudicative facts may include when a specific voter plaintiff got in line to vote or delivered their absentee ballot, or how much money the voter makes and the particular burdens for them to comply with various requirements. In the campaign finance context, adjudicative facts could include who contributed, how much, and to whom.

concerning the world more generally.”¹⁵ The Supreme Court’s sweeping assumptions in *Citizens United* and *Shelby County* about how our democracy functions were quintessential examples of legislative facts—and in these two cases, particularly unjustified.¹⁶

To be sure, “[i]t is critical to acknowledge that courts must predict legislative facts quite often.”¹⁷ A system of constitutional adjudication depends on the application of judicial common sense, which in turn requires judges to bring to bear their knowledge of the world and how it operates. But that process becomes problematic when appellate courts refuse to defer to the facts in the legislative and trial records and instead rely on factual intuitions beyond their institutional competency.¹⁸ Those intuitions become legal rules and principles that apply not only to the case at hand, but broadly—in the case of the Supreme Court, nationally.

This can be dangerous because, “[u]nlike facts found by trial courts, which are subjected to adversarial testing, facts found by appellate courts are generally subjected to no testing at all.”¹⁹ Instead, such decisions are often “driven by evidence that the parties never explained and the meaning or importance of which

¹⁵ Brent Ferguson, *Predictive Facts*, 95 WASH. L. REV. 1621 (2020) (emphasis added); see also Allison Orr Larsen, *Judging “Under Fire” and the Retreat to Facts*, 61 WM. & MARY L. REV. 1083, 1093 n.33 (2020) (“Legislative facts are generalized observations about the way the world works as opposed to a specific ‘whodunit’ fact about any particular controversy.”).

¹⁶ See *Citizens United v. FEC*, 558 U.S. 310, 357, 360 (2010) (holding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” and that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy”); *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (concluding that “[o]ur country has changed” and that Congress’s reauthorization of the Voting Rights Act’s preclearance formula did not “speak[] to current conditions”).

¹⁷ Ferguson, *supra* note 15, at 1648; see also *id.* at 1648-49 (“Unremarkable predictions exist in almost any case involving legislative facts, because any time a court relies on data to find a regular legislative fact it is implicitly assuming that the data still accurately describe the world and will continue to do so into the immediate future. Similarly, courts often review legislation intended to ameliorate a societal harm, and in most cases, the court will assume that the harm would not disappear on its own without the legislation.”).

¹⁸ See, e.g., *Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting) (“Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries[.]”).

¹⁹ Gorod, *supra* note 1, at 6 (“This failure to meaningfully test the facts underlying judicial decisions undermines both the legitimacy of the judicial process and the results of that process.”).

they never contested.”²⁰ “Compounding that problem, incorrect predictions might become factual precedents, such that lower courts feel bound to accept them even if later developments indicate that they are incorrect.”²¹ Such extra-record factfinding, when undertaken too aggressively to arrive at factual assumptions that are highly debatable, if not dubious, damages courts’ legitimacy and the sanctity of our adversarial system, leaving onlookers to question the true motivations behind court decisions.

Citizens United and *Shelby County* are two of the Supreme Court’s most imprudent and damaging ventures into legislative factfinding, illustrating related but distinct misjudgments of truth. In *Citizens United*, the Court concluded as a matter of law that independent expenditures “do not give rise to corruption or the appearance of corruption.”²² It did so without a single reference to the record, a problem of the Court’s own making that led it to purport to depend instead on the inapt records and reasoning of other cases. The result was an unfounded decision that paved the way for unlimited spending by super PACs, whose activities flout the Court’s conclusion that independent expenditures cannot corrupt. In *Shelby County*, the Court misinterpreted, second-guessed, or entirely disregarded Congress’s enormous record of legislative factfinding to conclude that voting discrimination is no longer a significant problem in modern America.²³ In reaching that conclusion, the Court expressed a wooden and overly simplistic understanding of voter suppression and substituted its own assumptions for Congress’s deliberative and nearly unanimous conclusions.²⁴

²⁰ Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 971-72 (2009).

²¹ Ferguson, *supra* note 15, at 1651 (“judges, like other human beings, are not always adept at predicting the future”); see also Allison Orr Larsen, *Factual Precedents* 162 U. PA. L. REV. 59, 102 (2013) (“A fact considered true in 1955 may seem laughable in 2015.”).

²² 558 U.S. at 357.

²³ See 570 U.S. at 554-56.

²⁴ See Bertrall L. Ross II, *The State As Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2030 (2014); Eric Berger, *When Facts Don’t Matter*, 2017 B.Y.U. L. REV. 525, 552 (2017).

Together, *Citizens United* and *Shelby County*, and their divergence from fact, have damaged the principles of adversarial justice, the legitimacy of the Supreme Court and its decisions, and the health of our democracy.

II. *CITIZENS UNITED*: A RULING WITHOUT EVIDENCE

Citizens United v. FEC, one of the most consequential recent cases affecting the health of our democracy, is premised on very few actual facts.²⁵

The case involved a challenge to the constitutionality of section 203 of the Bipartisan Campaign Reform Act (“BCRA”), which prohibited corporations from using their general treasury funds to pay for “electioneering communications,”²⁶—broadcast advertisements supporting or opposing a candidate for federal office within sixty days before a general election or thirty days before a primary.²⁷ *Citizens United*, a nonprofit corporation, argued that section 203 violated its First Amendment right to free speech by preventing use of its general treasury funds—rather than PAC money—to pay to disseminate a “movie” urging the defeat of a candidate for President.

The Supreme Court initially heard the case during the 2008-2009 Term, but then took the unusual step of ordering reargument in the 2009-2010 Term and expanding the list of questions presented to include a facial challenge to BCRA, even though one had not been pursued in the lower court.²⁸ In January 2010, the Court, 5–4, held section 203 facially unconstitutional, striking down the prohibition on corporations using general treasury funds to finance independent expenditures in elections.²⁹ The majority declared, as a matter of law, that “independent

²⁵ See, e.g., Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 35 (2012) (“*Citizens United* reflected a philosophical, rather than an empirical, position on money’s effect on politics.”).

²⁶ 2 U.S.C. § 441b(b)(2) (2002); see also 52 U.S.C. § 30118.

²⁷ See 11 CFR § 100.29.

²⁸ See Part IIA, “A Facial Ruling Built on the Record of an As-Applied Challenge”, *infra* at pp. 9-10.

²⁹ *Citizens United*, 558 U.S. at 360.

expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”³⁰ and that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy” because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”³¹ Finally, the Court held that preventing corruption is the only basis for campaign finance regulation, and construed corruption narrowly as encompassing only a quid pro quo exchange.³²

The Court’s pronouncements were as sweeping as they were wrong. As the dissent observed, the majority took “a sledge hammer rather than a scalpel” to “one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics.”³³ Worse still, it acted without any basis in fact.

The Court’s ruling was factually unjustified for two reasons. First, there was no record to support the Court’s facial constitutional holding, because the case was litigated in the courts below as an as-applied challenge and was only then converted to a facial claim by the Supreme Court itself when it ordered re-argument.³⁴ Second, in the absence of a factual record, the Court based its conclusion on two older Supreme Court cases—*Buckley v. Valeo* and *McConnell v. FEC*—even though the first offered only a conditional conclusion from more than forty years prior and the second, ironically, depended on an extensive factual record to uphold the very provision struck down in *Citizens United*. Stunningly, the Court did not even acknowledge the lengthy record that Congress developed when it enacted BCRA.³⁵

³⁰ *Id.* at 357.

³¹ *Id.* at 360.

³² *Id.* at 351-60.

³³ *Id.* at 399 (Stevens, J., concurring in part and dissenting in part).

³⁴ As described *infra* at pp. 9-10, *Citizens United* initially brought a facial constitutional challenge but stipulated to its dismissal in the lower courts, before the adversarial system could test its factual premises.

³⁵ *Cf. FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (emphasizing that “careful legislative adjustment of the federal electoral laws, in a ‘cautious advance, step by step’ . . . warrants considerable deference”) (citation omitted).

The disconnect between *Citizen United's* sweeping conclusions and the lack of facts supporting them reflects the Supreme Court's profound disregard for and misunderstanding of how elections would operate in practice under this new regime. In the name of free speech, the Court cleared the way for independent expenditure-only committees—known commonly as “super PACs”—to raise and spend unlimited amounts of money in federal elections.³⁶ And so they have, including more than \$2.1 billion spent during the 2020 election cycle alone.³⁷

The constitutional legitimacy of super PACs depends on the assumption that contributors to those entities do not exert undue influence over their government. But experience has proven otherwise. Today, super PACs, including the highly problematic single-candidate super PACs, are often closely tied to candidates for office with a mere mirage of separation. For example, super PACs are routinely established by close former aides of candidates, often contract with the same consultants as the campaigns they support, and candidates regularly appear at fundraising events for their supportive super PACs. The problem of rampant de facto coordination among super PACs and campaigns is only made worse by the high burden set for proving a coordination violation, and the ineffectiveness of FEC enforcement of this prohibition in recent years.³⁸

The proliferation of super PACs and their ability to obscure even overt coordination with campaigns has brought the core defect of *Citizens United* into sharp focus:

³⁶ See *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (striking down the Federal Election Campaign Act's limits on contributions to PACs that make only independent expenditures because *Citizens United* required it to “conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group”).

³⁷ See Ctr. for Responsive Politics, *2020 Outside Spending, by Super PAC*, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> (last visited Apr. 17, 2021).

³⁸ See Letter from Ann M. Ravel & Ellen L. Weintraub to Fed. Election Comm'n, at 1-2 (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf; see also Sarah E. Adams, *How Single-Candidate Super PACs Changed the Game and How to Change it Back: Adopting a Presumption of Coordination and Fixing the FEC's Gridlock*, 85 BROOK. L. REV. 851, 861 (2020) (“existing coordination regulations—which are intended to ensure that single-candidate Super PACs remain independent—often fail to achieve their desired goal by leaving campaign activity with a strong likelihood of coordination risk unaddressed”).

independent expenditures can and often do give rise to corruption or the appearance of corruption. The Supreme Court’s failure to anticipate this is a product of its own making that has led to today’s ineffectual campaign finance regulatory system, which “mocks the idea of independence and non-corruption with the same effect.”³⁹

A. A Facial Ruling Built on the Record of an As-Applied Challenge

Understanding the inappropriateness of the Supreme Court’s facial ruling in *Citizens United* first requires briefly explaining the procedural history of the case. *Citizens United* initially argued, among other things, that section 203 of BCRA violated the First Amendment on its face—*i.e.*, that the law was unconstitutional under any circumstances, as opposed to as-applied to *Citizens United*.⁴⁰ But *Citizens United* expressly abandoned this facial claim, and the parties stipulated to its dismissal.⁴¹ The district court granted summary judgment for the Federal Election Commission on alternative grounds, noting briefly that precedent would have foreclosed a facial constitutional challenge had the plaintiffs pursued one.⁴² *Citizens United* then appealed to the Supreme Court, where it again raised only as-applied claims in the questions presented to the Court.

Here is where things went wrong. After the parties argued the case in March 2009, the Supreme Court ordered that it should be reargued during the next term. Instead of hearing the same as-applied issues already presented by the parties and considered by the district court, the Court required reargument on the *facial*

³⁹ Trevor Potter, *The Failed Promise of Unlimited “Independent” Spending in Elections*, 45 HUMAN RIGHTS MAG. (June 26, 2020), https://www.americanbar.org/groups/crsi/publications/human_rights_magazine_home/voting-in-2020/the-failed-promise-of-unlimited-independent-spending/.

⁴⁰ *Citizens United*, 558 U.S. at 396 (Stevens, J., concurring in part and dissenting in part).

⁴¹ *Id.* at 397.

⁴² See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008) (three-judge court) (citing *McConnell v. FEC*, 540 U.S. 93 (2003)—the same case the Supreme Court depends on and overrules).

challenge to the law—without allowing for development of a new factual record below to inform the Court of how the law applied aside from *Citizens United*.⁴³

This procedural choice “is troubling on its own terms,”⁴⁴ because it means the Court went out of its way to make a sweeping conclusion—-independent expenditures cannot be corrupting—that was not based on any record of fact.⁴⁵ In short, the Court in *Citizens United* upended campaign finance law based on a factual foundation that “is not simply incomplete or unsatisfactory; it is nonexistent.”⁴⁶

Just as troublingly, the Court failed to acknowledge, let alone consider, the “virtual mountain of research” Congress compiled when crafting BCRA, including evidence “on the corruption that previous legislation had failed to avert.”⁴⁷ Instead, the Court “negate[d] Congress’ efforts without a shred of evidence on how [the law] ha[s] been affecting any entity other than *Citizens United*,”⁴⁸ substituting its own prescribed view of how best to address money in politics for Congress’s carefully designed scheme.

B. Misreading and Misapplying Precedent

To fill in the factual gaps left by the absence of a developed record, the Supreme Court turned to two older campaign finance cases to support its blanket conclusion. Looking to the reasoning of *Buckley v. Valeo*⁴⁹ and the record of *McConnell v. FEC*,⁵⁰

⁴³ See Gorod, *supra* note 1, at 31-32 (“by setting the case for reargument rather than remanding to the district court for further factfinding, the Court ensured that factual development would occur largely by amicus brief and other extra-record sources, rather than by the parties before the district court”).

⁴⁴ Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 311 (2011); see also Sabri v. *United States*, 541 U.S. 600, 608-09 (“Facial adjudication carries too much promise of ‘premature interpretatio[n] of statutes’ on the basis of factually barebones records.”) (citation omitted).

⁴⁵ In addition, “[b]y reinstating a claim that *Citizens United* [had] abandoned, the Court [gave] it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal.” *Citizens United*, 558 U.S. at 399 n.4 (Stevens, J., concurring in part and dissenting in part).

⁴⁶ *Id.* at 400.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 424 U.S. 1 (1976).

⁵⁰ 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

the Court noted that “[t]he *McConnell* record was over 100,000 pages long, yet it does not have any direct examples of votes being exchanged for . . . expenditures,” and concluded that this fact—plus a lack of evidence in the record below—“confirm[] *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption.”⁵¹ This statement of law and the inferences drawn from it are both incorrect.

First, the Court misinterpreted *Buckley*,⁵² the seminal case establishing our modern jurisprudence for campaign finance law. In *Buckley*, the Court “drew a constitutional distinction between limits on candidate contributions, which implicated associational rights and were upheld as a means of preventing corruption, and limits on independent expenditures, which were struck down as a burden on core First Amendment speech that could not be justified on anti-corruption grounds.”⁵³ The Court reasoned that when expenditures are made independently, they “do[] not *presently* appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”⁵⁴ The Court in *Citizens United* rewrote this language to declare, as a matter of law, that independent expenditures can *never* be corrupting.⁵⁵

There are three interrelated problems with the Court’s reliance on *Buckley*. First, *Buckley*’s holding was indeterminate, not categorical: it stated only that independent expenditures “do[] not *presently* appear to pose dangers of real or apparent corruption.”⁵⁶ This language makes clear the temporally and factually limited nature of the Court’s ruling, which stands in stark contrast to the absolute

⁵¹ *Citizens United*, 558 U.S. at 360 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (per curiam)); see also *id.* (finding that “there is only scant evidence that independent expenditures even ingratiate.”).

⁵² See *id.* at 356-57 (discussing *Buckley*, 424 U.S. at 47).

⁵³ Potter, *supra* note 39.

⁵⁴ *Buckley*, 424 U.S. at 46 (emphasis added).

⁵⁵ *Citizens United*, 558 U.S. at 357 (“independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

⁵⁶ *Buckley*, 424 U.S. at 46 (emphasis added); see also *id.* at 47. (“independent expenditures *may* [] provide little assistance to the candidate’s campaign and indeed *may* prove counterproductive”) (emphasis added).

and prospectively binding disposition of *Citizens United*. This also highlights the second problem: *Buckley* was decided more than thirty years before *Citizens United*, so its record and conclusion were rooted in the circumstances of the time—as the decision itself qualified. The Court in *Citizens United* should not have rewritten *Buckley*'s cabined proposition—let alone expanded it categorically—without reevaluating the facts underlying it in light of thirty plus years of changes in the political process. Finally, the issue of *corporate* independent expenditures was not before the Court in *Buckley*, so even *Buckley*'s tentative conclusion did not extend to the Federal Election Campaign Act (“FECA”)’s regulation of corporations and unions. Such entities were not entirely barred from making independent expenditures; they simply had to fund such spending with money raised by their separate segregated funds—commonly known as PACs.

Moreover, to support its absolute reading of *Buckley*, the Court turned to a small part of the factual record developed in *McConnell*, where the Court had actually rejected a facial challenge to the same statute at issue in *Citizens United*, *i.e.*, section 203 of BCRA.⁵⁷ In stark contrast to *Citizens United*, the majority in *McConnell* came to its constitutional conclusions based on an extensive record of over 100,000 pages.⁵⁸ Yet the Court in *Citizens United* insisted that the lack of evidence in *McConnell* of “direct examples of votes being exchanged for . . . expenditures”—*i.e.*, direct quid pro quos—was proof enough, when combined with the (unsurprising) lack of evidence in the record below, that independent expenditures “do not give rise to corruption or the appearance of corruption.”⁵⁹

Besides the fact that the *McConnell* “record [was] not before [the Court]” in *Citizens United*,⁶⁰ the lack of evidence of quid pro quo corruption in *McConnell* is easily

⁵⁷ See *McConnell*, 540 U.S. at 203-09. This means, perversely, that the Supreme Court used *McConnell*'s own record to overturn it. See Teachout, *supra* note 44, at 311 (“The fact that the *McConnell* court came to a different conclusion [from *Citizens United*] after review of a 100,000 page record might indicate that facts actually matter.”).

⁵⁸ See *Citizens United*, 558 U.S. at 360 (quoting *McConnell*, 251 F. Supp. 2d at 209).

⁵⁹ *Id.* at 357.

⁶⁰ *Id.* at 400 n.5 (Stevens, J., concurring in part and dissenting in part).

explained: the “district court did not find quid pro quo corruption, at least in part, because it was not seeking it.”⁶¹ The district court was focused on the constitutionality of other aspects of BCRA, namely the extent to which Congress could regulate beyond “express advocacy.”⁶² The underlying reason for that focus was that the Supreme Court had already upheld the constitutionality of a limit on corporate independent expenditures in *Austin v. Michigan Chamber of Commerce*.⁶³ Thus, *McConnell* was concerned only with the scope of communications that Congress could regulate as election-related, even if lacking the “magic words” of express advocacy. In particular, *McConnell* analyzed whether the new definition of “electioneering communication” was overbroad and held that it was not; the Court had no reason to revisit the foundational *Austin* precedent that corporate election expenditures could potentially cause corruption or its appearance.

In light of this history, *Citizens United*'s reference to *McConnell* was nothing more than a red herring. The misleading reference to the *McConnell* record—as proof of “scant evidence that independent expenditures even ingratiate”⁶⁴—ignores the fact that the record in *McConnell* was developed to prove a different point. In sum, the Court “relied on the *absence of evidence of direct corruption as evidence of no corruption.*”⁶⁵ And to make matters worse, the Court ignored the fact that it would have been quite difficult to find recent quid pro quo corruption involving corporate independent expenditures since the nation’s prohibition on corporate independent expenditures had been in effect for several decades. In other contexts, the Court has recognized that it cannot expect litigants to marshal a robust record of past wrongdoings (and their consequences) when such misbehavior has long been illegal.⁶⁶

⁶¹ Teachout, *supra* note 44, at 310.

⁶² *McConnell*, 540 U.S. at 104.

⁶³ 494 U.S. 652 (1990).

⁶⁴ *Citizens United*, 558 U.S. at 360.

⁶⁵ Teachout, *supra* note 44, at 313 (emphasis added).

⁶⁶ See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (recognizing the “difficulty of mustering evidence to support long-enforced statutes” because “there is

In sum, the circularity of the Court’s reasoning in *Citizens United* is dizzying and obscures the baselessness of its conclusions.⁶⁷ But the groundlessness of the Court’s decision cannot be ignored when looking at its effects.

C. *SpeechNow: The Case That Could Have Been*

The Court’s unwarranted decision in *Citizens United* to reach beyond the questions presented and greenlight unchecked independent expenditures is even more egregious because it didn’t have to happen: the same issues were already being considered in a deliberative manner in another case ongoing at exactly the same time.

SpeechNow.org v. Federal Election Commission involved a challenge to FECA’s contribution limits as applied to political committees that make only independent expenditures,⁶⁸ and the FEC assembled a lengthy factual record of the potential corruption caused by independent expenditures.⁶⁹ The FEC’s proposed findings of fact demonstrated the danger of independent expenditures and the ways in which “[1] individuals attempt to influence or gain access to candidates through contributions to groups that make independent expenditures; [2] independent expenditure groups are used to circumvent direct contribution limits; and [3] independent expenditures then lead to indebtedness or access, pose a danger of quid pro quo arrangements, and create the appearance of corruption.”⁷⁰

no recent experience” without them); *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (“Of course, we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption or coercion involving federal contractor contributions [where] such contributions have been banned since 1940.”); cf. *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting) (“[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet”).

⁶⁷ See *Larsen, Judging “Under Fire”*, *supra* note 15, at 1090 (noting that *Citizens United* is written “using facty language to discuss the evidence (or lack of evidence) of corruption caused by campaign spending”).

⁶⁸ See 599 F.3d at 689.

⁶⁹ See Defendant Federal Election Commission’s Proposed Findings of Fact, *Speechnow.org v. FEC*, 1:08-cv-00248-JR, at 18-118 (Oct. 28, 2008), https://www.fec.gov/resources/legal-resources/litigation/speechnow_fec_finding_facts.pdf.

⁷⁰ *Id.* at 18-19.

But this extensive factual record showing the actual corruptive risks of independent expenditures proved irrelevant to the case's ultimate decision. Two months after the Supreme Court decided *Citizens United*, the en banc D.C. Circuit voted 9–0 to strike down FECA's contribution limit as applied to what are now known as “super PACs,” reasoning that *Citizens United* required it to “conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group.”⁷¹ The holding of *Citizens United* therefore forced the D.C. Circuit to cast aside the FEC's thoroughly developed factual record because it believed it was bound by the Supreme Court's categorical holding that independent expenditures are incapable of causing corruption.

The combined consequences of these two cases have been disastrous. Together, *Citizens United* and *SpeechNow* “opened the floodgates”⁷² to unlimited contributions to and expenditures by super PACs, provided they operate independently of the candidates they support. As noted above, such “independence” is often nothing more than a legal fiction. Thus, *Citizens United* and *SpeechNow*, coupled with chronic inaction by the FEC and its failure to update its coordination regulations, have “led to a proliferation of super PACs . . . many of which appear to be closely associated with particular candidates.”⁷³

D. Single-Candidate Super PACs: The Corrupt, But Foreseeable, Consequence of *Citizens United* and *SpeechNow*

Since *Citizens United* and *SpeechNow*, super PACs have been allowed to raise unlimited contributions from individuals and corporations. This lightly regulated framework has resulted in an explosion of money in politics.

In 2010, total independent expenditures in federal elections were just over \$200 million.⁷⁴ By 2012, that number jumped to over \$1 billion.⁷⁵ And the flood of money

⁷¹ *SpeechNow*, 599 F.3d at 695.

⁷² Adams, *supra* note 38, at 861.

⁷³ Letter from Ravel & Weintraub, *supra* note 38, at 1-2.

⁷⁴ Adams, *supra* note 38, at 862.

⁷⁵ *Id.*

has not relented since: in 2020 alone, more than two thousand super PACs spent more than \$2 billion in federal elections.⁷⁶

Much of this spending has been driven by single-candidate super PACs, which accounted for more than \$640 million—almost one third—of 2020 spending.⁷⁷ In total, between 2012 and 2020, single-candidate super PACs spent over \$1.6 billion to influence federal elections.⁷⁸

The problem with super PACs—especially single-candidate super PACs—is that their constitutional grounding depends on the Supreme Court’s explicit presumption that they are truly separate from, and independent of, candidates’ campaigns, but in practice many are not. The ample examples of this not-so-separate relationship involve candidates from both major parties:

- In 2012, the first presidential election after *Citizens United*, both Barack Obama and Mitt Romney benefited from super PACs that their recent close aides established.⁷⁹ Together, the two super PACs spent over \$170 million during the 2012 election on supposedly independent expenditures.⁸⁰
- Throughout 2019, Pete Buttigieg’s presidential campaign paid fundraising consultant Zachary Allen’s firm; then, in early 2020, the pro-Buttigieg super PAC VoteVets hired Allen’s firm, and maxed-out direct Buttigieg

⁷⁶ See Ctr. for Responsive Politics, *2020 Outside Spending, by Super PAC*, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> (last visited Apr. 17, 2021).

⁷⁷ See Ctr. for Responsive Politics, *2020 Outside Spending by Single-Candidate Super PACs*, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=C> (last visited Apr. 17, 2021).

⁷⁸ See Ctr. for Responsive Politics, *2012-2020 Outside Spending by Single-Candidate Super PACs*, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C> (last visited Apr. 17, 2021).

⁷⁹ See Matea Gold, *Former Obama aides launch independent fundraising groups*, L.A. TIMES (Apr. 29, 2011), <https://www.latimes.com/politics/la-xpm-2011-apr-29-la-pn-obama-fundraising-committee-20110429-story.html>; Dan Eggen & Chris Cillizza, *Romney backers start 'super PAC'*, WASH. POST (June 23, 2011), https://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH_story.html.

⁸⁰ See Priorities USA Action, 2011-2012 Total Disbursements, FEC, <https://www.fec.gov/data/committee/C00495861/?tab=spending&cycle=2012>; Restore Our Future, Inc., 2011-2012 Total Disbursements, FEC, <https://www.fec.gov/data/committee/C00490045/?tab=spending&cycle=2012>.

donors began writing six-figure checks to the super PAC for his benefit, in lock step with the candidate they supported.⁸¹

- Iowa U.S. Senate candidate Joni Ernst's campaign paid the firm of the fundraising consultant Claire Holloway Avella; simultaneously, the pro-Ernst super PAC, Iowa Values Action, and the pro-Ernst 501(c)(4) organization, Iowa Values, were both paying the same fundraiser.⁸²
- Candidates sometimes even establish super PACs themselves before formally declaring their candidacies. Jeb Bush, for example, launched the super PAC Right to Rise and raised over \$100 million for it to support his presidential run before formally declaring his candidacy in 2015.⁸³ And Senator Rick Scott started and chaired New Republican PAC just a year before the super PAC began spending in support of Scott's 2018 U.S. Senate run in Florida.⁸⁴

Because current law does not sufficiently recognize the dangers of, let alone prohibit, these types of close relationships between campaigns and supportive super-PACs, single-candidate super-PACs are an enticing vehicle for deep-pocketed donors to evade the candidate contribution limits designed to guard against corruption.⁸⁵ Wealthy special interests can simply funnel millions to groups

⁸¹ See Maggie Severns, *Pro-Buttigieg super PAC hired Buttigieg finance staffer amid ad blitz*, POLITICO (Feb. 21, 2020), <https://www.politico.com/news/2020/02/21/pete-buttigieg-super-pac-staffer-116607>; CAMPAIGN LEGAL CTR., *Disclosures Shed Light on Relationship Between VoteVets and Buttigieg Campaign* (June 5, 2020), <https://campaignlegal.org/update/disclosures-shed-light-relationship-between-votevets-and-buttigieg-campaign>.

⁸² See Search for Disbursements to Holloway, Consulting, LLC from 2019-2020, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00546788&committee_id=C00751768&recipient_name=holloway&two_year_transaction_period=2020&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (last visited Apr. 17, 2021); see also Elizabeth Meyer, *'Dark Money' Group Funnels Money To Super PAC Boosting Ernst*, IOWA STARTING LINE (Oct. 30, 2020), <https://iowastartingline.com/2020/10/30/dark-money-group-funnels-money-to-super-pac-boosting-ernst/>.

⁸³ See Alex Isenstadt, *Jeb Bush's \$100M May*, POLITICO (May 8, 2015), <https://www.politico.com/story/2015/05/jeb-bush-right-to-rise-super-pac-campaign-117753>.

⁸⁴ See Ledyard King, *Florida Gov. Rick Scott's message to Republicans: Time for a makeover*, USA TODAY (May 11, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/11/florida-gov-rick-scotts-message-republicans-time-makeover/101551646/>.

⁸⁵ An individual may give only \$2,900 per election to a candidate, and corporations cannot give at all from their corporate treasuries, but individuals and corporations may contribute unlimited amounts to super PACs. So, when a super PAC supports only a single candidate—effectively operating as an extension of a candidate's campaign—a \$1 million corporate contribution to a super PAC can be as valuable to a candidate as a \$1 million corporate contribution to their campaign—and poses a similar risk of corruption or its appearance.

claiming to spend independently of candidates, but that operate functionally as an arm of the campaign.

- For example, in 2016, the private prison company GEO Group gave \$225,000 to a pro-Trump super PAC in the final stretch of the 2016 election, just after the Obama administration announced a plan to phase out federal private prison contracts.⁸⁶ A few months later, the new Trump administration reversed this plan, and GEO's stock soared.⁸⁷

Super PACs, especially single-candidate super PACs, are thus enabled to blur the distinction between contributions and independent expenditures, proving that activities “need not be formally prearranged or contracted with the campaign in order to be valuable to the candidate, *and to raise corruption issues.*”⁸⁸

“When writing a check to a super PAC earns a donor a closed-door dinner with the candidate that super PAC supports, when a campaign directs donors to the supportive super PAC, when a super PAC is established by close aides of the campaign, or when a super PAC coordinates its media strategy with the campaign, the line between the campaign and the super PAC blurs to the point that contributions to the super PAC almost become indistinguishable in function and effect from contributions made directly to that candidate. And, for those, the Court has repeatedly acknowledged that heightened corruption concerns justify capping those contributions.”⁸⁹ To hold otherwise for contributions to super PACs, especially

⁸⁶ See Fredreka Schouten, *Private prisons back Trump and could see big payoffs with new policies*, USA TODAY (Feb. 23, 2017), <https://www.usatoday.com/story/news/politics/2017/02/23/private-prisons-back-trump-and-could-see-big-payoffs-new-policies/98300394/>.

⁸⁷ See Brendan Fischer & Maggie Christ, *Americans Left in the Dark Over Reasons Behind Private Prison Policy Reversal*, CAMPAIGN LEGAL CTR. (Dec. 8, 2017), <https://campaignlegal.org/update/americans-left-dark-over-reasons-behind-private-prison-policy-reversal>; Amy Brittain & Drew Harwell, *Private-prison giant, resurgent in Trump era, gathers at president's resort*, WASH. POST (Oct. 25, 2017), https://www.washingtonpost.com/politics/with-business-booming-under-trump-private-prison-giant-gathers-at-presidents-resort/2017/10/25/b281d32c-adee-11e7-a908-a3470754bbb9_story.html.

⁸⁸ Potter, *supra* note 39 (emphasis added).

⁸⁹ *Id.*

single-candidate super PACs, in the face of evidence today “mocks the idea of independence and non-corruption with the same effect.”⁹⁰

In sum, *Citizens United*'s erroneous factual assumptions have introduced several levels of corruptive risk into federal elections, all rooted in the Court's failure to deal properly in its procedural choices and use of facts to support its sweeping conclusions.

III. *SHELBY COUNTY V. HOLDER*: A RULING DISREGARDING EVIDENCE

Shelby County v. Holder typifies the Supreme Court's rejection of Congress's factfinding in favor of the Court's misguided intuitions.⁹¹ There, the Court held unconstitutional a key provision of the 1965 Voting Rights Act (“VRA” or the “Act”) that required certain jurisdictions to preclear proposed voting laws with the federal government before going into effect.⁹² In reaching this conclusion, the Court made erroneous judgments about both the current state of voting rights and the forecast for the future, glossing over Congress's 15,000-page record that supported the opposite conclusions. The *Shelby County* decision represents a major setback in our nation's struggle to break down the entrenched barriers that minority groups must overcome to participate equally in the political process.

A. Congress's Historic Role in Protecting Voting Rights

Passed in the immediate aftermath of Bloody Sunday in Selma, Alabama in 1965 and other violence targeted at Americans seeking to vote, the VRA was a milestone and a turning point. Congress enacted the VRA in an effort to achieve the Constitution's unfulfilled promise of an equal franchise, and the Supreme Court immediately upheld the constitutionality of Congress's goal and chosen means “to rid the country of racial discrimination in voting.”⁹³ The Court recognized that Congress's decision to “shift[] the advantage of time and inertia [away] from the

⁹⁰ *Id.*

⁹¹ See 570 U.S. 529.

⁹² *Id.* at 537-38 (describing the interplay of Section 4(b) and Section 5).

⁹³ *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (discussing prior cases).

perpetrators of the evil” of voter suppression by “marshall[ing] an array of potent weapons against the evil” was “rational in both practice and theory” to achieve this worthy ambition.⁹⁴

Chief among those weapons was the combined framework established in Section 4(b) and Section 5 of the VRA. Section 4(b) provided a coverage formula Congress used to identify jurisdictions with a history of voting discrimination that must “preclear” election changes with the federal government,⁹⁵ and Section 5 establishes the substantive standard that prohibits any covered jurisdiction from enacting voting laws or practices that discriminate against minority voters by worsening their position compared to the status quo.⁹⁶

Since 1965, Congress reauthorized the Section 4(b) formula enforcing Section 5 on five occasions.⁹⁷ Every time, it did so with overwhelming bipartisan support because the many successes of the preclearance scheme showed that it was necessary both to block current discriminatory proposals and to prevent future backsliding.⁹⁸ Until *Shelby County*, the Supreme Court repeatedly agreed, rejecting numerous constitutional challenges to the VRA by deferring to Congress’s careful judgment that the reauthorizations advanced the Constitution’s guarantee of an equal and fair right to vote.⁹⁹ The Court did so because the Constitution gives Congress, not courts, the power “to assess and weigh the various conflicting considerations” in

⁹⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 328-30, 337 (1966).

⁹⁵ 52 U.S.C. § 10303(b) (2013). Section 4(b)’s formula covered jurisdictions that maintained a voting test or device in November 1964, 1968, or 1972, and in which less than 50% of persons of voting age were registered or voted in the 1964, 1968, or 1972 presidential elections. *Id.*

⁹⁶ *Beer v. United States*, 425 U.S. 130, 141 (1976) (ruling that Section 5 requires measuring voting changes against the status quo to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”).

⁹⁷ See Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CONG. RESEARCH SERV. 18-23 (2015), <https://fas.org/sgp/crs/misc/R43626.pdf>.

⁹⁸ U.S. COMM’N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 31 (2018), www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [hereinafter “USCCR Report”].

⁹⁹ See *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973).

legislating to protect voting rights,¹⁰⁰ and the Supreme Court “must accord substantial deference to [Congress’s] predictive judgments” and factual conclusions.¹⁰¹

B. Congress’s Investigative and Predictive Factfinding Role

Once again in 2006—just seven years before the Supreme Court decided *Shelby County*—Congress near-unanimously reauthorized the Section 4(b) coverage formula to continue Section 5’s effective preclearance requirements.¹⁰² Congress determined that covered jurisdictions with a legacy of entrenched and state-sponsored voting discrimination still threatened to impede minority voters’ freedom to equally participate in the political process. Importantly, it made this judgment after completing a careful and comprehensive process that included twenty-one hearings and collected over 15,000 pages of evidence describing the enduring discriminatory voting conditions in the covered jurisdictions.¹⁰³

Based on these findings, Congress emphasized that improvements to voting rights since 1965 provided strong reasons to continue the VRA preclearance formula—because it was working.¹⁰⁴ At the same time, it recognized that significant work remained to be done. As the House explained, although “[d]iscrimination today is more subtle than the visible methods used in 1965,” “the effect and results are the

¹⁰⁰ See *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (“It is not for [the Supreme Court] to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”).

¹⁰¹ See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994).

¹⁰² See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. Law 109-246, July 27, 2006, 120 Stat 577 [hereinafter “2006 Reauthorization”]; see also *Bush Signs Voting Rights Act Extension*, NBC NEWS (July 26, 2006), www.nbcnews.com/id/wbna14059113 (noting that the Senate passed the 2006 VRA Reauthorization 98–0, and the House of Representatives passed the bill 390–33). In 2006, the Section 4(b) formula covered nine states and fifty-six local jurisdictions with a history of voting discrimination. See USCCR Report, *supra* note **Error! Bookmark not defined.**, at 48.

¹⁰³ See H.R. Rep. No. 109-478, at 5, 11-12 (2006); S. Rep. No. 109-295, at 2-4, 15 (2006); see also *Shelby County*, 570 U.S. at 565 (Ginsburg, J., dissenting) (“The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages.”).

¹⁰⁴ See 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, § 2(b)(1).

same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates.”¹⁰⁵

The evidence of these lasting dangers of voting discrimination fell into three principal categories: (1) data on minority voter turnout, registration, and rates of officeholding; (2) figures showing preclearance submission outcomes; and (3) comparisons of voting rights violations and litigation between covered and non-covered jurisdictions.¹⁰⁶

First, Congress recognized that due to the combined effect of minority voters’ painstaking efforts and the VRA’s protections, certain racial disparities in voting access had improved in many of the previously worst jurisdictions.¹⁰⁷ Nonetheless, many substantial barriers and discriminatory conditions persisted.¹⁰⁸ For example, numerous covered jurisdictions still had significant underrepresentation of racial minority groups in elected office. Looking to Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, Black people made up approximately 35% of the population but held only 20.7% of state legislative seats; they fared even worse for statewide office.¹⁰⁹ This underrepresentation revealed to Congress that minority voters in covered jurisdictions still faced discriminatory barriers to voting and effectively translating votes into seats.

Despite some progress addressing so-called “first generation” discrimination affecting voter turnout and registration, Congress found that several covered jurisdictions—specifically Virginia, South Carolina, Texas, and Florida—still had stark racial disparities in these areas.¹¹⁰ Moreover, disaggregating the data to isolate low Latino voter participation figures further exposed lasting inequities in

¹⁰⁵ H.R. Rep. No. 109-478, at 6 (2006).

¹⁰⁶ See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 195 (2007).

¹⁰⁷ H.R. Rep. No. 109-478, at 2 (2006).

¹⁰⁸ See, e.g., USCCR Report, *supra* note **Error! Bookmark not defined.**, at 10 (summarizing turnout disparity data); see also *id.* at 205-17 (analyzing tabled data).

¹⁰⁹ H.R. Rep. No. 109-478, at 33 (2006).

¹¹⁰ *Id.* at 25-32.

covered states.¹¹¹ Congress also determined that all covered jurisdictions had substantial “second generation” barriers.¹¹² These include more subtle forms of discrimination such as dilutive redistricting practices or conditions of highly racially polarized voting that often gave governing lawmakers a political incentive to “prevent minority voters from fully participating in the electoral process.”¹¹³ Based on these extensive factual findings, Congress determined that the VRA’s preclearance coverage was still necessary because much work remained to be done to eliminate voting inequality.

Second, Congress evaluated the outcomes and processes for the voting changes covered jurisdictions submitted for preclearance. Between 1982 and 2006, the U.S. Department of Justice objected to more than 700 proposed voting changes in covered jurisdictions due to their discriminatory purpose or effect on minority voters.¹¹⁴ This included eighty-eight blocked proposals in Louisiana alone, among them every congressional redistricting plan the State submitted.¹¹⁵ Congress also considered the number and results of preclearance submissions in which DOJ did not formally object but asked the jurisdiction to provide more information to relieve concerns about discrimination.¹¹⁶ Jurisdictions withdrew over a quarter of preclearance submissions after receiving such requests, further suggesting that

¹¹¹ See Persily, *supra* note **Error! Bookmark not defined.**, at 197 & n.90.

¹¹² See 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, §§ 2(b)(1)-(2).

¹¹³ See *id.*, §§ 2(b)(2)-(3).

¹¹⁴ H.R. Rep. No. 109-478, at 21-22 (2006).

¹¹⁵ See *Shelby County v. Holder*, 811 F. Supp. 2d 424, 470 (D.D.C. 2011) (citing Voting Rights Act: Evidence of Continued Need at 264, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 142 (Mar. 8, 2006)).

¹¹⁶ H.R. Rep. No. 109-478, at 40-41 (2006); USSCR Report, *supra* note **Error! Bookmark not defined.**, at 219; see also Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 47 (Ana Henderson ed., 2007) (studying the deterrent effect of section 5 generally and the DOJ’s “more information” requests specifically); Ellen Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248, 250 (2014) (explaining that the preclearance “regime’s deterrent effect . . . had been documented by substantial record evidence,” but that the Court in “*Shelby County* did not address this evidence”).

those jurisdictions were seeking to make discriminatory changes to their voting laws and that the VRA worked to prevent such changes from going into effect.¹¹⁷

Third, Congress assembled an extensive record of voting rights violations and numerous examples of modern intentional racial discrimination in covered jurisdictions, with nearly 300 pages dedicated to collecting these violations.¹¹⁸ They ranged from outright voter suppression to more subtle forms of voting rights deprivations, such as intimidation and violence against minority voters, discriminatory election administration, inequitable reductions in registration and voting opportunities, racial vote dilution and gerrymandering, and hostility toward non-English speaking voters.¹¹⁹ Congress also examined the litigation responses to these violations, including an authoritative study on VRA Section 2 cases¹²⁰ that revealed how voting discrimination continued to be an outsized problem in covered jurisdictions.¹²¹

In sum, Congress amassed and relied on an extensive factual record to conclude that voting discrimination was still a serious problem in covered jurisdictions in 2006, and that any improvements in voting and representation depended on the power of minority voters' mobilization and the effectiveness of the VRA's preclearance mechanism. It then voted near-unanimously to include this factual evidence in the enacted law instead of only in committee reports,¹²² further

¹¹⁷ H.R. Rep. No. 109-478, at 2 (2006).

¹¹⁸ See S. Rep. No. 109-295 apps. I-III, at 65-363 (2006).

¹¹⁹ See, e.g., H.R. Rep. No. 109-478, at 36-39 (2006) (recounting instances specifically in Mississippi, Georgia, Louisiana, and Texas); *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30–34, 43 (2006) (describing discrimination related to federal observer program); see also Persily, *supra* note **Error! Bookmark not defined.**, at 202 (collecting sources).

¹²⁰ Section 2 of the VRA, codified at 52 U.S. § 10301, provides a nationwide prohibition of discriminatory denials or abridgements of minority groups' voting rights. See *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

¹²¹ See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 655-56 (2006). The House included the Katz study in the record. See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 964 (2005).

¹²² See 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, § 2.

solidifying the reliability of the record.¹²³ Given its findings, Congress also made an informed prediction about the future: “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹²⁴

Rather than confront this evidence and evaluate the sturdiness of Congress’s conclusions from it, the *Shelby County* Court chose to ignore the record almost entirely and substituted its own contrary forecast about voting rights going forward. With grave consequences for the country, the Court simply got it wrong.

C. The Court Substituted its Own Factual Conclusions

Despite Congress’s default factfinding role in our constitutional design,¹²⁵ the Supreme Court decided in *Shelby County* to make its own improvised judgments about the state of voting rights in the country. The Court spun a different factual narrative, touting advancements for voting equality in America only by “selectively emphasiz[ing] certain record evidence, second-guess[ing] other evidence, and simply ignor[ing] other evidence” that Congress considered.¹²⁶

The Court’s disregard for the record was apparent almost immediately in the oral argument for the case. In a widely criticized exchange,¹²⁷ Chief Justice Roberts suggested that voting discrimination was worse in Massachusetts than Mississippi, and pressed the federal government’s attorney to explain why the reauthorized VRA

¹²³ The Court routinely gives increased deference to Congress’s specific factual findings included in enacted law. See, e.g., *King v. Burwell*, 576 U.S. 473, 481-83 (2015); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 29 (2010); see also Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 696–97 (2019) (collecting examples).

¹²⁴ 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, § 2(b)(9).

¹²⁵ See *supra* notes 6, **Error! Bookmark not defined.****Error! Bookmark not defined.**-101.

¹²⁶ Ross, *supra* note **Error! Bookmark not defined.**, at 2061.

¹²⁷ See Nina Totenberg, *In Voting Rights Arguments, Chief Justice Misconstrued Census Data*, NPR (Mar. 1, 2013), www.npr.org/sections/itsallpolitics/2013/03/01/173276943/in-voting-rights-arguments-chief-justice-may-have-misconstrued-census-data; Ryan Gabrielson, *It’s a Fact: Supreme Court Errors Aren’t Hard to Find*, PROPUBLICA (Oct. 17, 2017), www.propublica.org/article/supreme-court-errors-are-not-hard-to-find.

covered the latter but not the former.¹²⁸ But the Chief Justice reached that conclusion only by deriving flawed assumptions from the turnout and registration data he cited.¹²⁹ He also did so in direct conflict with the 2006 Congress’s careful conclusions, the Court’s prior VRA decisions recognizing the limitations of similar data, and the parties’ briefing to the Court that pointed out these limits.¹³⁰

Later in the oral argument, Justice Scalia also disregarded the legislative record to second-guess Congress’s stated reasons for reauthorizing the VRA. Scalia bluntly posited that Congress’s near-unanimous decision represented members’ “perpetuation of [a] racial entitlement” motivated by a desire to avoid political reproach rather than a commitment to minority voting rights.¹³¹ Of course, Congress’s exhaustive legislative record and statements of purpose undermined Justice Scalia ascription.¹³² Instead, Congress understood that guaranteeing an equal franchise is no “racial entitlement” but, in the words of the late John Lewis, is necessary to protect the “most powerful nonviolent tool we have in a democracy” to “actualize the true meaning of equality[.]”¹³³ Justice Sotomayor pointedly addressed

¹²⁸ Transcript of Oral Argument at 32, *Shelby County. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

¹²⁹ The type of state-to-state comparison of census data that the Chief Justice conducted was methodologically and substantively flawed. See, e.g., Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. F. 799, 813 (2018) (detailing problems and collecting sources). Moreover, scholars and courts have concluded that bare turnout comparisons are a notoriously imprecise metric for measuring the effects of voting discrimination. See Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 770-77 (2016); see also *Veasey v. Abbott*, 830 F.3d 216, 261 (5th Cir. 2016) (en banc) (rejecting reliance on turnout in a VRA Section 2 case).

¹³⁰ See, e.g., H.R. Rep. No. 109-478, at 2, 26-29, 120 (2006) (recognizing limits of turnout and registration data); *City of Rome*, 446 U.S. at 180-82 (same); Brief For Respondent-Intervenor Harris at 56 n.33, *Shelby County. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (addressing Massachusetts and Mississippi comparison).

¹³¹ Transcript of Oral Argument at 46-50, *Shelby County. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

¹³² 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, §§ 2(a)-(b).

¹³³ John Lewis, *Opinion: Why we still need the Voting Rights Act*, WASH. POST (Feb. 24, 2013), www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html.

this difference, compelling Shelby County’s counsel to concede that Congress “intended to protect those who had been discriminated against.”¹³⁴

On opinion day, the *Shelby County* majority proceeded undeterred, invoking the factual mischaracterizations made during oral argument and other unsupported conclusions in its decision to immobilize the VRA’s preclearance framework. The Court ignored Congress’s considered choice in favor of its own assumptions and ill-informed predictions, using those assumptions to hold that the reauthorized preclearance coverage formula was unconstitutional because Congress had imposed “current burdens” that were not rationally justified by “current needs.”¹³⁵

Setting aside the doctrinal defects of the decision,¹³⁶ the Court’s willingness to discard the extensive 2006 congressional record is astonishing. Harkening back to Chief Justice Roberts’s remarks in oral argument, the Court surmised that “disparities in voter registration and turnout due to race [have been] erased,”¹³⁷ while glaringly overlooking Congress’s contrary record evidence¹³⁸ and failing to

¹³⁴ Transcript of Oral Argument at 62-63, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

¹³⁵ *Shelby County*, 570 U.S. at 536 (citation omitted); see also Ross, *supra* note **Error!** **Bookmark not defined.**, at 2062.

¹³⁶ The Court read a strong “equal sovereignty” rule into the Constitution that even proponents admit was “pulled . . . out of thin air.” Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1091 (2016); cf. Judge Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives’ imagination*, SLATE (June 26, 2013) (“[T]here is no doctrine of equal sovereignty. The opinion rests on air.”). It relied on the theory that laws have a “constitutional shelf life” that had a substantial mismatch with the exhaustive record of modern conditions. See Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 61, 110 (2015). The Court gave short shift to the scope of Congress’s power to enforce the Fifteenth Amendment. See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549 (2020). And it entertained a facial constitutional challenge from a discriminatory jurisdiction that would have qualified for preclearance coverage under any formula. See Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 734 (2014).

¹³⁷ *Shelby County*, 570 U.S. at 533.

¹³⁸ See Ian Vandewalker & Keith Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 107 (2015) (“At its heart, *Shelby County* is an opinion about levels of minority voter registration and turnout: they are mentioned repeatedly, almost to the exclusion of any other measure of discrimination.”).

“take into account turnout data among Asian, Latino, and Native Americans, who are also protected under the VRA[.]”¹³⁹

Along the lines of Justice Scalia’s “racial entitlement” hunch, the Court ruled that it could simply disregard Congress’s factfinding concerning severe and enduring discrimination because, as the Court boldly concluded, “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”¹⁴⁰

In total, the Court “spent less than a page of its opinion reviewing the 15,000-page legislative record.”¹⁴¹ Still, it declared that “[o]ur country has changed” because the discriminatory “conditions that originally justified [the VRA’s preclearance] measures no longer characterize voting in the covered jurisdictions.”¹⁴² It then dismissed out of hand the VRA’s documented deterrence effect, and forecasted based on its implicit assumptions that nullifying the preclearance system would not lead to unleashed voting discrimination.¹⁴³

Justice Ginsburg’s moving dissent for four justices emphasized how the majority’s treatment of Congress’s factual findings and conclusions fundamentally misunderstood “who decides” whether the preclearance system “remains justifiable[.]”¹⁴⁴ The dissent thoroughly detailed Congress’s factfinding in the record, including the lasting turnout and registration disparities in certain jurisdictions, widespread “second-generation” barriers, high racial polarization, DOJ’s many preclearance objections and responses, and the study on Section 2 litigation.¹⁴⁵ Recounting this ranging and irrefutable evidence, the dissent complained that the majority had simply announced that it “decline[d] to enter the debate about what the record shows.”¹⁴⁶ The dissent also questioned the majority’s optimistic

¹³⁹ USCCR Report, *supra* note **Error! Bookmark not defined.**, at 54.

¹⁴⁰ *Shelby County*, 570 U.S. at 553; *see also id.* at 554 (“[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.”).

¹⁴¹ Ross, *supra* note **Error! Bookmark not defined.**, at 2028.

¹⁴² *Shelby County*, 570 U.S. at 535, 557.

¹⁴³ *Id.* at 553, 557.

¹⁴⁴ *Id.* at 559 (Ginsburg, J., dissenting).

¹⁴⁵ *See id.* at 565-66, 571-80.

¹⁴⁶ *Id.* at 580 (citing majority opinion) (internal quotation marks and alterations omitted).

predictions about the future of voting rights in the absence of Section 5 preclearance and its deterrent effects, observing that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹⁴⁷

D. *Shelby County’s Assumptions and Predictions Proved Wrong*

The majority in *Shelby County* gravely misjudged the landscape of voting rights in making its prediction for the future. As Justice Ginsburg warned, the rain of discriminatory voting changes came almost immediately. North Carolina and Texas offer two of the most blatant examples.

In North Carolina, the General Assembly passed a piece of voting legislation ignobly dubbed the “monster” law, which tried to erect deliberate and discriminatory barriers to voting in nearly every possible area.¹⁴⁸ Pre-*Shelby County*, the North Carolina Assembly had introduced an election bill that it expected to submit for federal preclearance and included some relatively benign provisions and a narrower voter ID requirement.¹⁴⁹ Within a day of the *Shelby County* decision, however, the General Assembly announced its intent to “move ahead with the full bill”—an enormous voter suppression bill that North Carolina lawmakers had held off introducing in anticipation of the Supreme Court’s decision.¹⁵⁰ Freed from preclearance, the Assembly engaged in a rushed and secretive process that included collecting racial data on minority voting practices to ensure the new law would “target African Americans with almost surgical precision.”¹⁵¹ Plaintiffs challenged the law in court and, after three years of protracted litigation that included multiple

¹⁴⁷ *Id.* at 590.

¹⁴⁸ See Voter Information Verification Act, S.L. 2013-381, 2013 N.C. Sess. Laws 1505 (HB 589); Act of June 22, 2015, S.L. 2015-103, 2015 N.C. Sess. Laws 225 (HB 836); see also William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, WASH. POST (Sept. 2, 2016), <http://wapo.st/2bXdfR3>.

¹⁴⁹ See *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 227-29 (4th Cir. 2016).

¹⁵⁰ See *id.* at 228-29.

¹⁵¹ See *id.* at 214; see also Wan, *supra* note **Error! Bookmark not defined.** (describing legislative process).

appeals and court decisions,¹⁵² the Fourth Circuit ruled the entire bill was unconstitutional because the legislators demonstrated clear discriminatory intent.¹⁵³ The court ordered the State to pay the plaintiffs nearly \$6 million in attorneys' fees and costs.¹⁵⁴ But that has not stopped North Carolina from taking another shot at enacting a new voter ID law, which is again the subject of litigation over its discriminatory burdens and intent.¹⁵⁵

Texas tells a similar story. Before *Shelby County*, the State had attempted to enact a voter ID law but failed to obtain preclearance because of the law's discriminatory burdens on minority voters.¹⁵⁶ After *Shelby County* and unrestrained by Section 5's requirements, Texas officials acted immediately¹⁵⁷ to pass the strictest voter ID law in the country.¹⁵⁸ Plaintiff groups sued to stop the law from going into effect and prevailed in the Fifth Circuit, but only after a lengthy court process with high costs to litigants and the State.¹⁵⁹ In the end, Texas paid the plaintiffs almost \$7 million in attorneys' fees and costs.¹⁶⁰ But the State was able to continue using a watered-

¹⁵² See also *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 233 (4th Cir. 2014).
¹⁵³ *McCrorry*, 831 F.3d at 215.

¹⁵⁴ See Memorandum Order Granting Plaintiffs' Motion for Attorneys' Fees and Costs at 19, *N. Carolina State Conf. of NAACP v. McCrorry*, No. 1:13-cv-658 (Dec. 7, 2018) (Doc. 508).

¹⁵⁵ See Rusty Jacobs, *North Carolina's Photo ID Law Is On Trial. Again*, N.C. PUBLIC RADIO (Apr. 12, 2021), www.wunc.org/politics/2021-04-12/north-carolina-photo-id-law-trial-voting-rights.

¹⁵⁶ See *Texas v. Holder*, 888 F. Supp. 2d 113, 127 (D.D.C. 2012), *vacated and remanded in Shelby County*, 570 U.S. 928 (2013).

¹⁵⁷ Greg Abbott, then Texas Attorney General, said that "with today's [*Shelby County*] decision, the state's voter ID law will take effect immediately. Redistricting maps passed by the legislature [but blocked in 2011] may also take effect without approval from the federal government." See Campbell Robertson, *Texas to Move Quickly on Voter Laws and Maps*, N.Y. TIMES (June 23, 2013), <http://nyti.ms/11F9AdA>. Then Texas Governor Rick Perry also commented shortly after the *Shelby County* decision that "Texas may now implement the will of the people without being subject to outdated and unnecessary oversight and the overreach of federal power." See Michael Cooper, *After Ruling, State Rushes to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <https://nyti.ms/2luifAc>.

¹⁵⁸ Texas Senate Bill 14, Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619 (SB 14) (original strict ID bill); Texas Senate Bill 5, Act of June 1, 2017, 85th Leg., R.S., 2017 Tex. Sess. Laws ch. 410 (SB 5) (mid-litigation amendment to lessen burdens of proposed ID requirements).

¹⁵⁹ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

¹⁶⁰ See Alex Ura, *Texas on the hook for \$6.8 million after long voter ID fight*, TEXAS TRIBUNE (May 27, 2020), www.texastribune.org/2020/05/27/texas-voter-id-legal-fees-court-costs/.

down version of its voter ID law that still imposes significant burdens on minority voters.¹⁶¹

In both North Carolina and Texas, plaintiffs were able to muster enough resources and blatant proof of discrimination to at least address the worst aspects of those State's responses to *Shelby County*. But in many other places, especially smaller localities, the gap in voting rights enforcement left after *Shelby County* gutted the VRA's preclearance protections is unmistakable. Take for example Augusta-Richmond County, Georgia, which decided after *Shelby County* to move certain local elections to off-cycle dates in July instead of November.¹⁶² Although DOJ blocked an identical proposal a year earlier under Section 5 preclearance because the change would have substantial discriminatory effects on minority voters,¹⁶³ plaintiffs in a post-*Shelby County* world struggled to challenge those same effects in court and, ultimately, the changed election dates went into effect.¹⁶⁴

Consider also Waller County, Texas, an area outside of Houston with a dark history of voting discrimination.¹⁶⁵ In the last two decades, the county has repeatedly tried to enact discriminatory laws or practices burdening Black college students, but failed to do so under Section 5's preclearance oversight.¹⁶⁶ Now that Waller County is unrestrained by these requirements, it has renewed its efforts to increase voting barriers by disproportionately eliminating voting opportunities for Black college

¹⁶¹ See *Veasey v. Abbott*, 870 F.3d 387, 393-94 (5th Cir. 2017) (Graves, J., dissenting).

¹⁶² See Zachary Roth, *Georgia GOP dusts off Jim Crow tactic: Changing election date*, MSNBC (Nov. 21, 2013), <https://www.msnbc.com/msnbc/gop-revives-jim-crow-tactic-msna217276>.

¹⁶³ U.S. Dep't of Justice, *Voting Determination Letter by the Department of Justice to Dennis R. Dunn, Deputy Attorney General of Georgia* (Dec. 21, 2012), www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_121221_0.pdf (last accessed Apr. 17, 2021).

¹⁶⁴ See *Howard v. Augusta-Richmond Cnty.*, No. 1:14-cv-097, 2014 WL 12810317, at *1 (S.D. Ga. May 13, 2014).

¹⁶⁵ See *Shelby County*, 570 U.S. at 574 (Ginsburg, J., dissenting) (listing Waller County's discriminatory practices that preclearance requirements blocked).

¹⁶⁶ See, e.g., *Veasey v. Perry*, 71 F. Supp. 3d 627, 635 (S.D. Tex. 2014) (addressing discrimination against Black students); Consent Decree, *United States v. Waller County*, No. 4:08-cv-3022 (S.D. Tex. Oct. 17, 2008) (Doc. 8) (blocking discriminatory registration practices and procedures); Consent Order, *Prairie View Chapter of NAACP v. Kitzman*, No. 4:04-cv-459 (S.D. Tex. Feb. 24, 2004) (Doc. 11) (relieving prosecution threats against Black student voters).

students.¹⁶⁷ Those reductions, which assuredly would not have passed preclearance scrutiny, are currently subject to costly, drawn-out, and uncertain litigation.¹⁶⁸

In a year of alarming efforts by state lawmakers to make voting harder across the country, 2021 will give new meaning to the damaging effects of *Shelby County's* incorrect factual assumptions and predictions.¹⁶⁹ In previously covered states alone, lawmakers have already introduced or enacted at least 108 bills this year that would restrict voting rights—a striking total, particularly given how many of them threaten to disproportionately harm minority voters.¹⁷⁰ *Shelby County* paved the way for these discriminatory bills to become discriminatory laws. These efforts and outcomes are the proof that indeed “our country has changed” after *Shelby County*, undoubtedly for the worse for minority voters and the health of our democracy.

IV. CONCLUSION

In both *Citizens United* and *Shelby County*, the Supreme Court reached beyond its limits to opine on how elections work, basing those conclusions more on philosophical judgments than empirical reality. And in both cases, the Court got it wrong—unchecked money in politics and the rise of voting discrimination have had profound distortive effects on our electoral system that hinder voters’ ability to prevent corruption and to hold elected officials accountable. In this way, the Court’s arrogation of Congress’s factfinding role was doubly misguided because it

¹⁶⁷ See Alex Ura, *Texas’ oldest Black university was built on a former plantation. Its students still fight a legacy of voter suppression.*, TEXAS TRIBUNE (Feb. 25, 2021), www.texastribune.org/2021/02/25/waller-county-texas-voter-suppression/.

¹⁶⁸ See *Allen v. Waller County*, No. 4:18-cv-3985 (S.D. Tex.) (holding trial in fall 2020).

¹⁶⁹ See, e.g., Joan Biskupic, *How the Supreme Court laid the path for Georgia’s new election law*, CNN (Mar. 27, 2021), www.cnn.com/2021/03/27/politics/supreme-court-georgia-voting-law-john-roberts-shelby-county/index.html; Jeremy Duda, *Supreme Court ruling on Voting Rights Act opened floodgates for new restrictions*, VIRGINIA MERCURY (Oct. 7, 2020), www.virginiamercury.com/2020/10/07/supreme-court-ruling-on-voting-rights-act-opened-floodgates-for-new-restrictions/.

¹⁷⁰ See *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUSTICE (Apr. 1, 2021), www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 (last visited Apr. 17, 2021); *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUSTICE (Apr. 1, 2021), www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021 (last visited Apr. 17, 2021).

simultaneously discounted the popular will expressed through elected representatives and curtailed the people's ability to make their representatives truly speak for them in the future.

The Court's ability to conduct its own legislative factfinding is at times necessary and helpful. But the Court must do so with a humble recognition of its structural limitations, while offering great deference to Congress's factual determinations. Nothing is natural or inevitable about the Court's recent assertive factual encroachments in *Citizens United* and *Shelby County*. Indeed, our constitutional design counsels against it, and the Court used to get this right by respecting Congress's superior factfinding role as a matter of institutional competency and separation of powers.¹⁷¹ It previously did so in the campaign finance context, repeatedly acknowledging that the "legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, [and] the Court in practice defers to empirical legislative judgments[.]"¹⁷² The same was true for the Voting Rights Act, where the Court historically deferred to Congress's assessment of the factual landscape for minority voting rights and the tools necessary to prevent discrimination.¹⁷³ Returning to that deferential default to Congress's legislative factfinding is a roadmap for the future and the Court must correct course.

In the meantime, Congress can act now to address some of the worst effects of the Supreme Court's factual miscalculations in *Citizens United* and *Shelby County*. Passing the For the People Act and the John Lewis Voting Rights Advancement Act

¹⁷¹ *Turner*, 520 U.S. at 199 ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process."); *Turner*, 512 U.S. at 665 (collecting cases and summarizing that the Court "must accord substantial deference to [Congress's] predictive judgments"); *accord Blodgett v. Holden*, 275 U.S. 142, 147-148 (Holmes, J., concurring) (observing that judging Congress's decisionmaking is "the gravest and most delicate duty that this Court is called upon to perform").

¹⁷² *Nixon v. Shrink Mo. Gov'l PAC*, 528 U.S. 377, 402 (2000); *see also Nat'l Right to Work Comm.*, 459 U.S. at 209 (emphasizing that "careful legislative adjustment of the federal election laws, in a 'cautious advance, step by step' . . . warrants considerable deference" (citation omitted)).

¹⁷³ *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 324; *City of Rome*, 446 U.S. at 178.

would reaffirm to the American people that transparency, equality, and popular accountability are the hallmarks of our democracy.

On the campaign finance side, for example, Title VI, Subtitle B of the For the People Act would add new tools to specifically address the problem of barely disguised coordination between super PACs and candidates, putting more teeth behind the requirement of truly “independent” expenditures.¹⁷⁴ For voting rights, the For the People Act sets a new federal baseline to standardize basic registration and voting access across the country,¹⁷⁵ and would block the landslide of discriminatory election laws that state legislatures have introduced in 2021.¹⁷⁶ Importantly, the John Lewis Voting Rights Advancement Act also restores federal preclearance protocols to block racial discrimination in voting wherever it may arise.¹⁷⁷

The Supreme Court in *Citizens United* and *Shelby County* made dangerously wrong factual judgments and predictions about the way elections work in our country, but Congress can help reverse some of the most harmful consequences of those decisions.

¹⁷⁴ See *The For the People Act: How Key H.R. 1 Provisions Would Fix Democracy Problems* at 24-27, CAMPAIGN LEGAL CTR. (Dec. 2020), <https://campaignlegal.org/sites/default/files/2021-01/FINAL%20HR%201%20Document%2012.24%2010.40am.pdf> (last visited Apr. 17, 2021).

¹⁷⁵ See *id.* at 3-9.

¹⁷⁶ See *Congress Could Change Everything*, BRENNAN CTR. FOR JUSTICE (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/congress-could-change-everything> (last visited Apr. 17, 2021).

¹⁷⁷ See U.S. Senator Patrick Leahy, *John Lewis Voting Rights Advancement Act One-Pager*, <https://www.leahy.senate.gov/imo/media/doc/John%20Lewis%20Voting%20Rights%20Advancement%20Act%20one%20pager.pdf> (last visited Apr. 17, 2021).

**U.S. Senate Judiciary Committee Subcommittee on Federal Courts, Oversight, Agency Action
and Federal Rights:
April 27, 2021 Hearing on Supreme Court Fact Finding and the Distortion of American
Democracy**

**Testimony of Prof. Theodore M. Shaw, Julius L. Chambers Distinguished Professor of Law and
Director of the UNC Center for Civil Rights**

I am honored to speak to the Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights on what I believe to be one of the most important aspects of the challenge facing our republic today. Our nation stands at an important crossroad. It can be described as the intersection of law and democracy. What happens here, at this time, may determine the continued viability of what many are referring to as “the American experiment”, suggesting that its success is not guaranteed. At least since the end of the Civil War, we have believed that the threat of disunion is no longer a danger, and that American democracy is vouchsafed by its Constitution, by the core principles in which its people believe, and by its institutions, including the Supreme Court. Recently that belief has been challenged and shaken, even here in these hallowed halls, where the sacred business of democracy is carried out. That belief is not only challenged by the political unrest and violence carried out by extremists on January 6th, 2021, as the Senate met to fulfill its Twelfth Amendment obligations, but also by at least two Supreme Court decisions that undermine democracy: *Citizens United v. FCC* in 2010 and *Shelby County v. Holder* in 2013.

*Citizens United v. Federal Elections Commission*¹ was a challenge to a law that prohibited corporations and private organizations from engaging in partisan electioneering. In 2008, when Hillary Clinton was a candidate for President of the United States, Citizens United, a conservative nonprofit organization, released in theatres and on DVD what purported to be a documentary film titled “Hillary: The Movie”. Citizens United also explored a deal with an on demand online video streaming company which would make the film available for free.

The Bipartisan Campaign Reform Act of 2002 (the BCRA)² prohibited corporations and unions from making direct contributions to political candidates for certain qualified offices from general treasury funds. Corporations and unions are also barred from contributing to independent expenditures that, through any form of media, support or oppose political candidates for certain federal offices. The BCRA amended the Federal Elections Campaign Act of 1971 (FECA)³, the Communications Act of 1934⁴, and other parts of the U.S. Code⁵. In 2003, the Supreme Court described the BCRA as “the most recent federal enactment designed to ‘purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign

¹ 558 U.S. 310 (2010).

² 116 Stat. 81; 2 U.S.C. §441 (b).

³ 86 Stat. 11, as amended, 2 U.S.C.A. § 431, *et seq.*

⁴ 48 Stat. 1088, as amended, 47 U.S.C.A. §315

⁵ 18 U.S.C.A. §607 (Supp. 2003), 36 U.S.C.A. §§510-511; See *McConnell v. F.E.C.*, 540 U.S. (2003).

contributions.”⁶ The BCRA continued a century of national legislation aimed at limiting the influence of corporate wealth in American politics. The thread of this legislative intent weaves back through the Supreme Court’s decision upholding the BCRA in *McConnell v. F.E.C.*, through *United States v. Automobile Workers*⁷, in which Justice Felix Frankfurter reached back to “President Theodore Roosevelt’s call in 1907 for legislation forbidding all contributions by corporations “to any political committee or for any political purpose”⁸. Roosevelt’s call led to the enactment of legislation aimed at keeping corporate money from corrupting democracy.

Frankfurter’s opinion for the Court in *Automobile Workers* in 1957 pointed to “the integrity of our political process and ... the responsibility of the individual citizen for the successful functioning of that process”, matters “basic to a democratic society”.⁹ In sum, for more than a one hundred years, from the late Nineteenth Century through the Twentieth, and into the Twenty-first, Congress legislated, and the Supreme Court upheld, the principle that corporate money should not flow to electoral politics. It guided the Court’s 1990 decision in *Austin v. Michigan Chamber of Commerce*¹⁰, “which held that political speech may be banned based on the speaker’s corporate identity”¹¹. That principle remained intact until the Supreme Court’s 2010 *Citizens United* decision. Writing for a 5-4 Court, Justice Anthony Kennedy turned to the First Amendment, concluding that “*stare decisis* does not compel continued acceptance of *Austin*”¹², and that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether”¹³.

Thus, the Supreme Court has ruled that political speech by corporations is protected by the First Amendment, opening the floodgates of electoral politics to corporate money in a manner that gives thunderous voice to corporate creatures and dwarfs the voices of individual citizens. Corporations and wealthy individuals can give unlimited sums of money anonymously, distorting democratic processes and destroying democracy. The transmogrification of political speech is rendered complete by the role of “dark money”, which hides the voices and identities of the powerful and the elite.¹⁴ “Super PACs empower the wealthiest donors while hiding the identities of those who exercise outsized influence and control over the political system.

⁶ *McConnell v. FEC*, 540 U.S. (2003)

⁷ 352 U.S. 567, 571 (1957)

⁸ *Op cit.*, at .

⁹ 352 U.S. at 570.

¹⁰ 494 U.S. 652 (1990).

¹¹ 558 U.S. (2010).

¹² *Id.*, at .

¹³ *Id.*, at .

¹⁴ Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (Doubleday, 2016)

Shelby County v. Holder

In 2006 I was the Director-Counsel and President of the NAACP Legal Defense Fund, the organization first led by Thurgood Marshall. During my time as Director-Counsel, the temporary provisions of the Voting Rights Act, originally enacted in 1965. The Voting Rights Act has been the crown jewel of civil rights legislation. As you know, some of its provisions are permanent; others periodically must be renewed if they are to continue in force. §5 of the VRA required jurisdictions with a history of racial discrimination in electoral politics to pre-clear electoral changes with either the U.S. District Court for the District of Columbia or with the Attorney General of the United States. Voting Rights advocates and lawyers came to the 2006 renewal process with a clear understanding that there would be opposition to renewal based on the passage of time and changed conditions. The record that was submitted to Congress was carefully constructed. Congress had before it substantial evidence that discrimination in electoral politics was a shape-shifting phenomenon which required constant recommitment to protection of the civil rights of African Americans.

Shelby County v. Holder did not come as a surprise. The author of the *Shelby County* spent a lifetime in opposition to the Voting Rights Act. While the vote to re-enact the expiring provisions of the VRA was overwhelming, it was always clear that the renewed Act would be challenged, and it would likely go to the Supreme Court.

Congress carefully reviewed all of the covered jurisdictions and considered the question of whether the bailout provision should change. Those of us who advocated for renewal of the expiring provisions of the VRA knew full well how important it was to ensure that the record in support of the renewed Act, in the name of Rosa Parks, Coretta Scott King, and Betty Shabazz, rested on strong evidence. I testified before both houses of Congress, and I have been no stranger to the Senate Judiciary Committee. Nothing was more important to those of us who advocated for the Act than to ensure that the Act would be upheld in Court.

Chief Justice John Roberts opined in *Shelby County* that fifty years after the passage of the VRA, things had changed drastically. There was truth in that statement, but not as much truth as the Chief Justice thought. Immediately after the *Shelby County* decision, a number of jurisdictions originally covered by §5, pursuant to the §4 coverage formula, enacted schemes intended to make voting more difficult for African Americans and Latinx people. It is clear beyond doubt that while there has been significant progress, the need for the VRA's §5 coverage pursuant to a new coverage formula was, and is, in fact, demonstrable. Rather than render §5 immune from review, as Chief Justice Roberts suggested, Congressional scrutiny of the VRA's temporary provisions, especially the now invalidated §4 coverage formula was intense and carefully calculated.

Chief Justice Roberts opined that "Today the nation is no longer divided along [race] lines, yet the Voting Rights Act treats it as if it were". One wonders, in this "George Floyd moment", and in this moment in which so many jurisdictions once covered by the §4 coverage formula, whether the Chief Justice still believes what he said in his *Shelby County* opinion. Our nation's

continuing struggle with race is still a central element of our identity. The renewal of the Voting Rights Act, and the negation of the Court's opinion in *Shelby County v. Holder*, is a national imperative. With all due respect, *Shelby County* was wrongly decided. It needs Congressional attention, and reconsideration by the United States Senate.

