

ARTICLES

DEFERENCE TO CONGRESSIONAL FACT-FINDING IN RIGHTS-ENFORCING AND RIGHTS-LIMITING LEGISLATION

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This Article examines the difficult question of the deference congressional fact-findings merit when they support legislation expanding or limiting individual rights. The deference question is crucial to judicial review of such legislation, yet the Supreme Court has offered little by way of a principled answer: platitudes about Congress's expertise and co-equal status when it wishes to defer to such findings, and bromides about the Court's superiority in constitutional interpretation when it does not. Scholars have described this important question as "radically under-theorized." Any stable and useful theory addressing Congress's ability to participate in the process of constitutional construction requires a better answer to the deference question than those which have been thus far offered. This Article proposes the outlines of such an answer.

This Article begins in Part I by identifying the three axes that should govern the deference question. Based on the insights gleaned from this analysis, Part II identifies six principles guiding the deference inquiry and applies them to congressional deference claims in several contexts: legislation enforcing the Equal Protection Clause, the Partial Birth Abortion Ban Act, a "human life" statute of the sort that has been proposed in the past, and the Voting Rights Act's preclearance requirements. This Article concludes with a call for further research on this troublesome yet crucial question, which has so far generated only incomplete, unsatisfying answers.

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INTRODUCTION

“If you don’t have the law you argue the facts. If you don’t have the facts you argue the law.”¹

In *City of Boerne v. Flores*,² the Supreme Court had the law—at least in the context of Congress’s power to enforce the Fourteenth Amendment.³ Thirty years before *Boerne*, in *Katzenbach v. Morgan*, the Court had embraced the suggestion that the enforcement power authorized Congress to substitute its own understanding of the Fourteenth Amendment for the Court’s.⁴ *Boerne*, while describing the enforcement power as “broad,” nevertheless rejected the suggestion that it gave Congress the power to interpret the Amendment.⁵ *Boerne* (and its progeny) also spoke to facts—in particular, Congress’s power to make factual findings and rest enforcement legislation on their foundation.⁶ Despite *Boerne*’s genuflection toward respect for

¹ Variations on this epigram have a long history. See BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, *THE WORK OF THE ADVOCATE* 390 (2d ed. 1911) (“If you have a case where the law is clearly on your side, but the facts and justice seem to be against you, . . . urge upon the jury the vast importance of sustaining the law. . . . [I]f the law is against you . . . insist that justice be done though the heavens fall.” (internal quotation marks omitted)).

² 521 U.S. 507 (1997).

³ See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

⁴ See *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966) (finding that allowing Congress to interpret the bounds of its Fourteenth Amendment enforcement power increased both “congressional resourcefulness” and “congressional responsibility”).

⁵ See 521 U.S. at 536 (finding, in spite of Congress’s Fourteenth Amendment enforcement power, that the ultimate authority to review the constitutionality of laws enacted by Congress belonged to the courts).

⁶ See *id.* at 530–31 (discussing congressional fact-finding in the context of the Religious Freedom Restoration Act of 1993); see also *Tennessee v. Lane*, 541 U.S. 509, 526–29 (2004) (discussing congressional fact-finding in the context of the Americans with Disabilities Act of 1990 (ADA)); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 730–35 (2003) (discussing congressional fact-finding in the context of the Family and Medical Leave Act of

Congress's fact-finding power, some of the more extravagant applications of its holding sharply restricted the ability of Congress to share in the project of constitutional construction⁷ by supplying the facts and value judgments necessary for a complete application of the Court's own Fourteenth Amendment doctrine.⁸

The story is sharply different in the abortion context. In the Partial-Birth Abortion Ban Act of 2003 (PBABA) Congress supplied findings that helped apply the Court's abortion doctrine. However, unlike in some of *Boerne's* progeny, when the PBABA was challenged, the Court accorded significant deference to Congress's empirical fact-findings, even when some of them were revealed as incorrect.⁹ Nor was this deference a mere detail: In *Gonzales v. Carhart*, the Court deferred to findings that effectively overruled its own insistence that, as a matter of constitutional law, restrictions on abortion had to make exceptions for the health of pregnant women.

The differing levels of deference accorded fact-findings in enforcement power and abortion-restricting legislation present a conundrum. Cynics can easily rationalize the divergent results by referring to the politics underlying, respectively, the Court's federalism revolution and the abortion right.¹⁰ But the question of deference is too important for such an explanation to suffice. The deference

1993); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001) (discussing congressional fact-finding in the context of the ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89–91 (2000) (discussing congressional fact-finding in the context of the Age Discrimination in Employment Act of 1967).

⁷ Constitutional construction is the process by which more precise meaning is created—or figuratively “constructed”—from the determinate and legally binding meaning of the Constitution. Because that determinate meaning often runs out before it resolves actual constitutional controversies, scholars, even originalists, have acknowledged that courts (and other actors) must often construct constitutional meaning as best they can from whatever rules the Constitution lays out. *See, e.g., Amy Barrett, The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1, 2 (2010) (“Many, though not all, new originalists accept constitutional construction as a means of dealing with constitutional ambiguity and vagueness.”). For a general discussion of constitutional construction see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

⁸ *See, e.g., Garrett*, 531 U.S. at 373–74 (finding that Congress failed to document a “serious pattern of constitutional violations” in connection with the enactment of the ADA); *Kimel*, 528 U.S. at 91 (asserting that a review of congressional fact-finding in the context of the Age Discrimination in Employment Act of 1967 showed that “Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age”).

⁹ *See Gonzales v. Carhart*, 550 U.S. 124, 161–63 (2007) (allowing Congress to legislate based on a finding that the regulated abortion procedure was never medically necessary, despite lower courts’ rejection of that finding).

¹⁰ *See infra* note 11 and accompanying text (noting one scholar’s description of cynical evaluations of courts’ deference decisions).

question impacts nearly every case in which legislation concerning individual rights is challenged as unconstitutional, since in nearly every case the government can point to findings supporting the statute's constitutionality under the relevant doctrine. The issue is especially acute with regard to congressional fact-findings, since refusal to defer to such findings implicates the additional consideration of the respect federal courts owe a coordinate branch.

In short, the deference question is too important and too omnipresent to answer it with a shrug of the shoulders and a cynical conclusion that "it's all politics."¹¹ Yet, as scholars have observed, the deference question is "radically under-theorized."¹² This question would demand a sincere effort to craft a principled doctrine under any circumstances. But the question is even more urgent today, with the fate of the Voting Rights Act under active consideration, and likely to turn largely on the validity of Congress's findings.¹³

This Article considers the appropriate degree of judicial deference due to congressional fact-findings that support legislation affecting individual rights. It argues that justifications for deference based on intuitive yet simplistic citations to Congress's institutional expertise or political legitimacy do not, without more, provide a sufficiently nuanced answer. More helpful, but still insufficient, are well-known political process-based explanations that call for skeptical judicial review of congressional findings supporting rights-diminishing legislation. Both of these explanations contain important kernels of truth. Congress *is* institutionally capable of more careful fact-finding than courts, and its political legitimacy *does* militate in favor of deference. At the same time, Congress's majoritarian nature *does* suggest caution when it legislates to restrict individual rights. But these preliminary considerations fail to justify fully the appropriate level of deference across the variety of civil rights legislation Congress enacts, from rights-protecting legislation such as the Voting Rights Act and the Americans with Disabilities Act (ADA), to rights-restricting legislation such as the PBABA.

This Article argues that a more nuanced examination of the issue requires consideration of three separate factors. First, one must

¹¹ See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 945 (1999) (asserting that judicial deference has "profound effects" and lamenting that, in spite of those effects, "[c]ritiques of deference have remained relatively superficial, often dismissing deference as a mere tool wielded by ideological judges to achieve a particular political result").

¹² John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 69 (2008); see also Solove, *supra* note 11, at 945 ("[T]he concept of deference remains malleable, indeterminate, and not well-defined.").

¹³ See *infra* Part III.E (discussing the Voting Rights Act).

examine more carefully the standard expertise and authority-based justifications for deference.¹⁴ These justifications are valid, but they must be applied with care, lest they degenerate from principled explanations to conclusory labels. A more precise application of these justifications to particular situations will give courts the analytical tools to accord deference only when Congress's findings are of the sort that Congress is apt to determine accurately and authoritatively.

Second, answering the deference question requires an awareness of the type of fact at issue.¹⁵ Too often, congressional findings are lumped together, with no conscious thought given to how the nature of a particular finding affects calibration of the deference scale. This is unfortunate. Different types of facts carry different implications for deference claims. For example, one would intuitively expect courts to accord a different deference level to an easily verifiable empirical finding than to a finding based on nuanced predictions of complex social reality. It thus becomes crucial to tease out these implications by examining how the characteristics of different types of facts influence Congress's expertise and authority to find them.

Third, one must examine the underlying judicial doctrine that Congress is seeking to implement by its fact-finding.¹⁶ Judicial doctrine plays a complex role in the deference calculus. Scholars have argued persuasively that sometimes the Court chooses a particular doctrinal rule exactly because that rule allows or disallows a role for congressional fact-finding.¹⁷ Sometimes the Court chooses doctrine for other reasons, with the deference question resolved as a necessary consequence of that doctrinal choice.¹⁸ In either case, understanding the proper level of deference to be accorded a congressional fact-finding requires understanding the doctrinal rule that Congress seeks to implement through the finding.

¹⁴ See *infra* Part I.A (examining these justifications).

¹⁵ See *infra* Part I.B (examining the types of facts for which deference is claimed).

¹⁶ See *infra* Part I.C (discussing this issue).

¹⁷ See *infra* note 83 and accompanying text (noting scholarly arguments on this point).

¹⁸ For example, the Court's evolution toward understanding equal protection as protecting sex equality—an evolution at least partially prompted by the feminist movement, see, e.g., Reva B. Siegel, *Text in Contest: Gender and Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312 (2001) (“In adopting a new framework for reviewing sex discrimination claims under the Fourteenth Amendment, the Court was intervening in a wide-ranging controversy and responding to social movement activism in matters of women’s rights”)—necessarily implies skepticism of legislative findings purporting to find “real” differences between men and women. See *United States v. Virginia*, 518 U.S. 515, 541 (1996) (“State actors controlling gates to opportunity . . . may not exclude qualified individuals based on [stereotyped gender assumptions]”).

Despite the relative lack of scholarly treatment,¹⁹ some commentators have broached the deference question. But they have often focused on one of the aforementioned aspects of the issue to the exclusion of others. Paul Horwitz has identified the authority and expertise bases for deference, both in the factual context and beyond.²⁰ John McGinnis and Charles Mulaney have considered Congress's incentives to find facts accurately,²¹ while Eric Berger has focused on the same point to call for judicial scrutiny of the process by which Congress found the challenged facts.²² Philip Frickey and Steven Smith have considered the argument for deference based on a model that views Congress as a political marketplace reflecting constituents' policy preferences.²³ David Faigman, Neal Devins, and Caitlin Borgmann focus on the importance that substantive constitutional doctrine plays in reflecting implicit conclusions about deference.²⁴ But none of these studies combines these approaches to produce a set of general guideposts for the deference inquiry. This Article takes the best of these and other analyses and distills them into just such a set.²⁵

¹⁹ See *supra* note 12 and accompanying text (noting the relative dearth of scholarship on deference issues).

²⁰ See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1061 (2008) (describing these bases for deference as "legal authority" and "epistemic, or knowledge-based, authority," respectively).

²¹ See McGinnis & Mulaney, *supra* note 12, at 95–97 (noting that Congress is incentivized to "creat[e] a legislative record that will put the legislation in the most favorable light" and noting that institutional considerations exacerbate that incentive).

²² See Eric Berger, *Deference Determinations and Stealth Constitutional Decision-making*, 98 IOWA L. REV. 465, 501 (2013) (calling for such review, and arguing that "the Court should ask whether Congress's fact-findings were based on careful analysis and empirical study of relevant facts, or bald, self-serving assertions, or something in between").

²³ See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1708 (2002) (setting out to evaluate the Supreme Court's decisional efforts at the "juncture of constitutional law and political science").

²⁴ See DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 129 (2008) (asserting that judicial deference to congressional fact-finding in a given context should reflect the level of judicial review applied to the kind of law at issue); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 35–36 (2009) ("Independent judicial review of constitutionally-significant facts goes in tandem with the importance of judicial review more generally when basic personal liberties are at issue. . . . The courts have reason in this context to be suspicious of the legislature's motives."); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172–76 (2001) (noting how judicial selection of fact-dependent or fact-independent doctrinal standards affects the degree of judicial control over constitutional law).

²⁵ See *infra* Part II. The scope of this Article is limited in two ways that merit mention. First, it brackets the distinction between "legislative facts"—facts about general social and empirical reality—and "adjudicative facts"—facts that solely concern the interaction

As suggested by its title, this Article confines itself to analysis of the deference question as applied to a particular species of federal legislation: legislation impacting individual rights. One may quite reasonably wonder about this scope limitation. Indeed, this Article's analysis and prescriptions apply in situations where congressional fact-findings influence issues of constitutional structure. Fact-findings on the subjects addressed in this Article implicate federalism; Enforcement Clause legislation explicitly affects the federal-state balance, and abortion regulations effectively do so, by preempting state laws that may provide more generous abortion rights.²⁶ Similarly, the deference question self-evidently alters the power distribution between the federal branches, most notably Congress and the federal courts. Thus, applying this Article's analysis to other areas may not entail a particularly large step. Nevertheless, "pure" structural issues may implicate different considerations. For example, such issues may present situations where the political branches are presumed to be able to defend their own interests and reach appropriate accommodations in pursuit of a workable government.²⁷ Such dynamics may well call for a different judicial role than one explicitly involving individual rights. At any rate, appropriate caution in light of this possibility coun-

between the parties to a lawsuit. For the classic statement of this distinction, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (setting out the above definitions). This distinction—while generally of considerable use to questions about the relative fact-finding competence of courts and legislatures, *see, e.g.*, CHARLES H. KOCH, JR. ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 641 (6th ed. 2010)—is not useful in the context of the fact-findings addressed in this Article, given that those fact-findings invariably fall on the "legislative" side of the legislative/adjudicative fact distinction.

Second, and more closely relevant to the analysis that follows, this Article does not directly engage the question of how an appellate court should review a trial court's evaluation of congressional fact-finding or, more generally, how the differences between trial and appellate courts influence the amount of deference such fact-findings are due. *Cf.* Borgmann, *supra* note 24, at 45–46 (suggesting that trial courts may be better fact-finders than appellate courts). An answer to the deference question may well require further specification of the court that is being asked to defer. In particular, application of parts of this Article—most notably of deference Principle 6, *see infra* notes 226–38 and accompanying text (discussing Principle 6 in the context of enforcement legislation)—may require further investigation of the particular court that is reviewing the congressional finding. By extension, the same might be said when considering how an appellate court should in turn review a trial court's evaluation of a congressional finding. These difficult issues require their own consideration, and are beyond the scope of this Article.

²⁶ *See generally* Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives May Be Tempted to Embrace Federalism*, 75 *FORDHAM L. REV.* 301, 301–04 (2006) (discussing the relationship between federalism and federal abortion regulation).

²⁷ *See, e.g.*, WILLIAM D. ARAIZA ET AL., *CONSTITUTIONAL LAW: CASES, HISTORY AND DIALOGUES* 463 (3d ed. 2006) (suggesting that separation of powers issues are likely to be resolved by the political branches rather than through judicial opinion).

sels in favor of this limitation, at least until further work is done applying this analysis to other constitutional contexts.

A final preliminary point requires attention. This Article's focus on judicial deference to congressional fact-findings assumes that a real difference distinguishes facts from law. This assumption is, to say the least, contested. Scholars have argued persuasively that little epistemological or ontological distinction differentiates what we call "law" from what we call "facts."²⁸ Nevertheless, this Article's focus on judicial doctrine justifies distinguishing between law and fact. The Court's doctrine assumes this distinction, by reserving for itself the power to interpret law while recognizing a role for congressional fact-finding.²⁹ Because this Article focuses on evaluating and reforming that doctrine, it takes the Court's distinction as a given. Moreover, there is nothing inherently contradictory about isolating for evaluation the Court's treatment of congressional fact-finding while conceding the lack of a durable distinction between law and fact. Indeed, this Article confronts the blurriness of that distinction, both in two of the deference principles it offers³⁰ as well as in its ultimate recognition that underlying substantive doctrine strongly influences the deference inquiry.³¹ At the same time, its analysis respects the law-fact distinction, and the Court's unequivocal,³² if controversial,³³ insistence on judicial supremacy in declaring constitutional law.

²⁸ See generally Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. REV. 1769, 1770 (2003) (asserting that the belief "that there is a qualitative or ontological distinction" between law and fact is "false"); see also McGinnis & Mulaney, *supra* note 12, at 93–94 ("[I]t is ultimately difficult to understand what it would mean to adhere to a metaphysical or epistemological distinction between legal interpretations and social facts since law itself is a social fact."); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 396–97 (1984) ("[C]haracterizing a matter as one of law or a fact is no more than a conclusion . . . that one branch of government rather than another should make the decision in question."); *id.* at 377 ("Labeling a matter 'factual' [rather than 'legal'] . . . is more a conclusion than a characterization.").

²⁹ See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (asserting that the Age Discrimination in Employment Act "prohibits very little conduct likely to be held unconstitutional" but turning to Congressional fact-findings to determine whether the law was nonetheless "reasonably prophylactic").

³⁰ See *infra* Part II.B.2–3 (considering, respectively, "legal" findings and "precisely targeted" findings).

³¹ See *infra* Part III.F (recognizing the ultimate importance of doctrine to the deference question).

³² Judicial supremacy has been accepted throughout American constitutional history, and has found recent expression in opinions that achieved broad agreement across the current Court's ideological spectrum. See *City of Boerne v. Flores*, 521 U.S. 507, 519–20, 529, 536 (1997) (reaffirming, in an opinion for six Justices, judicial supremacy in constitutional interpretation); *id.* at 545–46 (O'Connor, J., dissenting) (expressing agreement with the majority in regard to the fact that the "Court's exposition of the Constitution" is

This Article proceeds in three Parts. Part I identifies and discusses the three different axes on which deference decisions should be based. Part I.A identifies the deference rationales based on the relative authority and expertise of Congress and the courts. It analogizes those rationales to the arguments offered for deference doctrines in the administrative law context, and explains how these rationales reflect deeper theoretical insights. Part I.B argues that a proper understanding of the deference question requires distinguishing between the different types of facts Congress finds. The type of fact at issue influences the determination as to whether Congress or the courts enjoy superior authority or expertise to decide whether that fact exists. Part I.C argues that a proper resolution of the deference question also requires understanding the underlying substantive law doctrine addressed by Congress's findings. It maintains that certain of the Court's doctrinal choices carry implications for the deference question by highlighting as especially relevant those facts that lie predominantly within Congress's or the courts' authority and expertise.

Part II combines these insights to offer six deference principles to guide resolution of the deference question. Part III applies these principles to fact-findings in Enforcement Clause legislation, the PBABA, a hypothetical "human life" statute, and the Voting Rights Act.

I

THE COMPONENTS OF DEFERENCE

A. *Why Deference? Expertise and Authority*

The academic discussion of the deference question has largely focused on issues of comparative expertise and authority.³⁴ "Expertise" refers to the ability to sift through evidence to reach sound empirical and predictive conclusions. It implies consideration of both an institution's capacity to uncover evidence and its motivation to engage in a good-faith search for truth. For example, commentators

supreme); *see also, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 315 (2010) (striking down congressional limits on "the political speech of nonprofit [and] for-profit corporations" despite a long history of congressional regulation of such expenditures); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (upholding for aliens held at Guantanamo Bay the right of judicial review of constitutional privileges, specifically of the right of habeas corpus, in spite of a law intended to limit such review).

³³ *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (critiquing judicial supremacy as a historical and normative matter).

³⁴ *See, e.g.*, Horwitz, *supra* note 20, at 1061 (analyzing the deference question based on these concepts); Devins, *supra* note 24, at 1178–87 (evaluating congressional and judicial fact-finding in light of, among other things, their authority and expertise).

have long acknowledged Congress's ability to utilize its staff and hearing resources to investigate and uncover facts, while still observing that legislators often lack strong incentives to use them to engage in a good-faith search.³⁵

The second issue—authority—refers to the political legitimacy of an institution's fact-finding. For our purposes, authority reflects the relative political legitimacy of Congress and the courts in finding facts, distinct from any instrumental concerns about whether one branch is more likely than another to find them accurately. A standard authority-based argument holds that Congress, as a popularly elected and responsive branch of government, enjoys more legitimacy than courts to reach conclusions about contested facts.³⁶ Conversely, another standard authority argument maintains that courts' non-political nature gives them more authority to reach sound conclusions on matters affecting unpopular rights or other matters where our system presupposes some defect in the democratic process.³⁷

This focus on authority and expertise is not surprising. Deference is, at least in part, inherently a question of authority. In common language we “defer” to someone's judgment in part because he has the

³⁵ See, e.g., Frickey & Smith, *supra* note 23, at 1740 (discussing Congress's “remarkable” fact-finding abilities, but questioning whether they might be employed in a political, as opposed to a neutral, manner); Devins, *supra* note 24, at 1178–87 (noting Congress's institutional fact-finding capacities but questioning whether Congress might not employ those capacities in ways that serve congressional self-interest).

³⁶ See Amnon Lehari, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 559–60 (2011) (“[C]ourts generally lack the authority or political legitimacy to question fact finding, especially when it is made by the legislature.”). Cf. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370–71 (2001) (noting that facts relied on by the dissent were not adopted by Congress in its legislative findings and that it is unlikely, therefore, that Congress relied on those facts, or that the Court should). In order to isolate the proper analysis, this Article considers the archetypical case where findings are placed in the statute that is ultimately enacted by the full Congress. The proper level of deference to be accorded findings made in smaller and less formal contexts, such as in a committee report, requires further study.

³⁷ See Borgmann, *supra* note 24, at 35–40 (asserting that, in the context of “minority and unpopular rights” courts “are better positioned to conduct fact-finding with integrity”). More generally—that is, going beyond fact-finding—defects in the democratic process furnish the theoretical foundation for the Supreme Court's famous suggestion in footnote 4 of *United States v. Carolene Products Co.* that courts should review governmental action more carefully when that action either impedes the political process or burdens the rights of those who are excluded from the political process. 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”); see also *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) (suggesting, similarly, that state laws which seem to discriminate against out-of-state individuals are more likely to be found unconstitutional because they are less likely to be checked by the democratic process).

authority to render it. In American public law perhaps the best-known example of this idea is “*Chevron* deference,” the doctrine under which a court defers to an administrative agency’s interpretation of an ambiguous statute.³⁸ The Court has concluded that such deference flows less from institutional competence—although competence retains some role³⁹—and more from institutional authority.⁴⁰

Expertise is also a natural subject of the deference inquiry. Perhaps even more intuitively than authority, we speak of deference as a matter of the decision-maker’s competence to make the decision for which deference is demanded. For example, in a well-functioning classroom, students defer to teachers not just because of their authority but also because students trust them to be especially knowledgeable on the subject.

Administrative law again furnishes a paradigmatic example. *Chevron*’s deference formula is usually paired with the formula

³⁸ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984) (setting forth the deference standard to be applied “[w]hen a court reviews an agency’s construction of the statute which it administers” and asserting that when Congress’s intent is ambiguous, the Court need only ask whether the agency’s construction of the statute is “permissible”). *Chevron* deference, and its doctrinal partner, *Skidmore* deference, see *infra* notes 40–45 and accompanying text (describing *Skidmore* deference), deal with legal interpretations by administrative agencies, not fact-findings by legislatures. Nevertheless, as explained in the text, the limited analogy to these cases holds, as they are used here to illuminate and examine the general authority and expertise rationales for deference.

³⁹ See *Chevron*, 467 U.S. at 865–66 (noting the various ways in which the agency charged with the administration of a statute may be better situated to interpret it).

⁴⁰ See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (asserting that, if “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute,” then the Court ought to defer so long as the agency has interpreted the ambiguity reasonably). Commentators, however, have suggested other theoretical grounds for *Chevron* deference. Indeed, a voluminous literature considers the proper theoretical grounding for *Chevron* deference. See, e.g., Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 273 (2011) (suggesting that *Chevron* should be construed “as a doctrine of judicial self-restraint”); Peter L. Strauss, *Overseers or “The Deciders”*—*The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 817 (2008) (asserting that *Chevron* separates out those agency interpretations which ought appropriately to receive full judicial review from those for which mere “oversight” is appropriate); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637–38 (2003) (describing *Chevron* deference as a function of the congressional delegation to agencies of some “lawmaking power”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (asserting that “*Chevron* rests on implied congressional intent”); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997) (describing *Chevron* as an expression of “a coherent hierarchical relationship among the three branches of government”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (asserting that *Chevron* is premised on the idea that Congress intended for “the more politically accountable administrative agency, and not the less accountable reviewing court” to implement its intent).

enunciated in *Skidmore v. Swift & Company*.⁴¹ “*Skidmore* deference” applies when the agency lacks adequate authority to justify *Chevron* deference.⁴² Unsurprisingly, then, *Skidmore* deference focuses heavily on expertise. Under *Skidmore*, courts defer to agencies’ interpretations to the extent they are convinced that the agency likely answered the question correctly.⁴³ Thus, they consider factors such as the persuasiveness of the agency’s reasoning.⁴⁴ But *Skidmore* entails more than a simple matter of persuasion, which, as commentators have observed, really isn’t “deference” at all.⁴⁵ Rather, *Skidmore* deference also requires an inquiry into factors such as the consistency of the agency’s interpretation over time and the amount of time the agency has had to implement the statute.⁴⁶ These factors are irrelevant to the authority issue;⁴⁷ however, they are very relevant to determining how good a job the agency has likely done with the interpretive question—stated otherwise, they are good clues to its expertise.

Expertise-based deference claims require confidence not just in the claimant’s capability to reach a correct decision, but also in its incentives to do so. *Skidmore* acknowledged such a concern about incentives when it included “the thoroughness evident in [the agency’s] consideration [and] the validity of its reasoning” as factors in

⁴¹ 323 U.S. 134 (1944).

⁴² See, e.g., *Mead*, 553 U.S. at 237–39 (remanding the case to a lower court to apply *Skidmore* deference after finding “that *Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law”).

⁴³ *Skidmore*, 323 U.S. at 140 (asserting that even when agency interpretations are not binding on the courts, they may be consulted as “guidance”).

⁴⁴ *Id.* at 139–40.

⁴⁵ See, e.g., Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1146 (2012) (arguing that, properly understood, “*Skidmore* deference” is not really deference at all but rather “an element of independent judicial judgment”).

⁴⁶ See *Skidmore*, 323 U.S. at 140 (noting these factors); see also Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1255–59 (2007) (noting that some courts do more than merely inquire, in regard to *Skidmore*, whether the agency has persuaded the court that it has answered the question correctly, “with the degree of deference [to be accorded] varying according to the reviewing court’s evaluation of *Skidmore*’s contextual factors”).

⁴⁷ *Chevron* deference features no requirement that the agency have had a long-standing position on the issue, or that it have had longstanding regulatory authority. Rather, an agency can obtain *Chevron* deference even when it changes its mind frequently and even if its regulatory authority is relatively new. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863 (1984) (“The fact that the agency has from time to time changed its interpretation of the [statutory term] does not . . . lead us to conclude that no deference should be accorded the agency’s interpretation of the statute.”); *id.* at 839–41, 857–58, 866 (upholding an agency’s statutory interpretation even though its regulatory authority on the matter was relatively new and the agency had changed its mind as to how best to regulate).

the deference calculus.⁴⁸ So too in our context, congressional fact-findings cannot claim expertise-based deference simply because Congress possesses the raw capabilities to find certain facts accurately. Such capabilities are crucial, but do not suffice to vindicate the expertise-based claim. The question of incentives, and thus of the trustworthiness of the process by which Congress finds facts, will shadow this Article's discussion of expertise-based claims for deference to Congress.⁴⁹

The difference between the authority and expertise justifications for deference goes beyond doctrine and finds expression in legal theory. Scholars describe a difference between "theoretical authority" and "practical authority" that tracks the expertise-authority distinction explained above. They define "theoretical authority" in terms that explicitly invoke expertise.⁵⁰ For example, Vincent Wellman explains, in a manner paralleling the theory of *Skidmore* deference, that "what is claimed about a theoretical authority is that [the speaker's] utterances are reliable within her area of expertise. If *X* . . . is an authority, what she says about her area is significantly more likely to be true. Therefore, your beliefs . . . will more likely be true if you believe as does *X*."⁵¹

Deference based on practical authority (what this Article refers to simply as "authority") rests on a different foundation. This justification for deference flows from the sense that the entity in question has the license—literally, the authority—to compel particular conduct without persuading the compelled party of the wisdom of that course of conduct. Steven Burton illustrates the concept through the example of a baseball umpire who, by the rules of the game, enjoys the authority to compel players to take certain actions when he raises his hand.⁵² As Burton notes, the holder of practical authority—unlike the holder of expertise-based "theoretical authority" illustrated in *Skidmore*—does not have to be believed to be usually right about his

⁴⁸ 323 U.S. at 140.

⁴⁹ See *infra* Part II.B.3.b (discussing whether the legislative process provides reasons to trust Congress's fact-findings).

⁵⁰ See, e.g., Vincent A. Wellman, *Authority of Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 573, 573 (Dennis Patterson ed., 1996) ("Those who are expert in a field are said to be authorities about issues within their area of expertise. This context of authority is often described as *theoretical* authority, or authority about what to believe.").

⁵¹ *Id.* at 575; see also, e.g., Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 121 (1993) (explaining the difference between theoretical and practical authority by identifying the former as based on expertise and the latter as based on the speaker's social role, such as the role an umpire plays in a baseball game).

⁵² Burton, *supra* note 51, at 121.

decisions. The players need not believe that the umpire's call is correct in order for them to view him as an authority to whom deference is owed.⁵³

Practical authority is not perfectly analogous to *Chevron* deference, or indeed, to authority-based deference more generally. Unlike the practical authority of the baseball umpire, deference implies at least some review by an external party. Thus, unlike a plaintiff in either a *Chevron* case or our situation, the baseball player in Burton's example cannot complain that the umpire's call, while owed deference, nevertheless must be reversed as manifestly erroneous.⁵⁴ For our purposes, however, the important point is that the distinction between practical and theoretical authority tracks the authority-expertise distinction prevalent in legal doctrine. That distinction is firmly grounded in both doctrine and legal theory. It must play a crucial part in any analysis of the deference question.

Despite the importance of this distinction, general invocations of congressional expertise or authority do not exhaust the analysis of how these justifications should influence the deference question. Expertise and authority are not absolute, but comparative, as they must be in a system where we must decide whether Congress or the Court has the predominant say in determining the facts in a given situation. Thus, when deciding whether expertise or authority considerations justify greater or lesser deference to congressional findings, it becomes crucial to consider not just the weight to be accorded congressional expertise and authority, but how that weight compares with the weight to be accorded to judicial expertise and authority. Scholars focusing exclusively on doctrine sometimes elide this distinction. For example, David Faigman recognizes that legislatures' "power . . . to gather facts must be duly recognized."⁵⁵ Nevertheless, he concludes that "this acknowledgment does not necessarily affect the standard of review courts bring to legislative fact-finding,"⁵⁶ given the particular fact-finding advantages that courts enjoy. Faigman's conclusion is sufficiently general that it cannot be considered wrong. However, its very generality elides the more granular inquiries that ought to be conducted before comparing the fact-finding capabilities and authority of

⁵³ See *id.* (drawing this analogy).

⁵⁴ Video-based review of pro football referees' decisions demonstrates that some professional sports leagues track *Chevron*-type decisional structures. OFFICIAL PLAYING RULES OF THE NAT'L FOOTBALL LEAGUE § 15-9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf> (noting that an on-field ruling can only be overturned on video review where "the [reviewer] has *indisputable visual evidence* available to him that warrants the change").

⁵⁵ FAIGMAN, *supra* note 24, at 133.

⁵⁶ *Id.*

courts and Congress. One of those more nuanced inquiries concerns the nature of the findings for which deference is claimed.

B. The Nature of the Facts Found

The expertise and authority justifications discussed in Part I.A cannot stand on their own as all-purpose, abstract justifications for deference. Rather, their strength in any given case turns in part on the characteristics of the findings for which Congress claims deference. For example, if one reason for deferring to congressional fact-findings is Congress's supposed expertise at finding facts, then this justification must wax and wane with factors such as the extent to which the fact at issue is susceptible to accurate discovery through the processes Congress uses and, indeed, the extent to which the fact is susceptible to accurate discovery at all. This Subpart engages this issue by categorizing facts and examining how the characteristics defining those categories influence the authority and expertise justifications for deference.

This Article categorizes legislative facts⁵⁷ as empirical, evaluative, or value-based. These categories are necessarily approximate: As explained in Part II's distillation of deference principles, they do not demarcate hermetically sealed fact-types.⁵⁸ However, this taxonomy balances precision with workability, thus allowing us to reach helpful conclusions.

These categories are not the only ones possible. For example, David Faigman divides legislative facts into "doctrinal facts" and "reviewable facts."⁵⁹ Faigman describes doctrinal facts as those that "are employed to determine or justify the development of [legal] rules or standards that apply to all similarly situated cases."⁶⁰ For example, he identifies facts relating to the original intention of the Constitution's drafters as doctrinal facts, given their role in determining the Constitution's meaning.⁶¹ He explains reviewable facts as those that "embody the more generally recognized function of legislative fact-finding in constitutional cases."⁶² He uses as an example a congressional finding that a particular intrastate activity substantially affects interstate commerce.⁶³

⁵⁷ See *supra* note 25 (explaining this Article's focus on legislative facts).

⁵⁸ See, e.g., *infra* note 198 and accompanying text (providing one instance of fact-types shading into each other).

⁵⁹ See FAIGMAN, *supra* note 24, at 46–48 (drawing this distinction).

⁶⁰ *Id.* at 46.

⁶¹ See *id.* (identifying this type of fact as "doctrinal").

⁶² *Id.* at 47.

⁶³ See *id.* at 47–48 (employing this example).

Faigman’s distinction is useful; indeed, one of the deference principles this Article identifies considers the amount of deference appropriately due facts of the sort he labels “doctrinal.”⁶⁴ But it also elides differences in fact-types that produce different deference results when analyzed in conjunction with the distinct justifications of expertise and authority.⁶⁵ Thus, facts may differ in ways not fully captured by Faigman’s distinction, but that are nevertheless relevant for a complete analysis of the deference question.

1. *Empirical Facts*

Empirical facts can be defined as facts whose truth or falsity can be tested by experience or experiment in the world.⁶⁶ An example is a fact relevant in *Gonzales v. Carhart*: whether “there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.”⁶⁷ This is an empirical fact, since it can be objectively verified.⁶⁸

“Verifiable” does not mean unambiguous. For example, with regard to the medical school curriculum fact, one might question as a definitional matter the concept of instruction or curriculum. Calling these facts empirical also does not imply ease of discovery. For example, determining the medical school instruction fact might require more than skimming medical schools’ catalogs or websites—perhaps it might require seeking out instructors’ statements about the actual content of their classes.⁶⁹ Even so, that finding presents an easy case; other empirical facts—such as the degree to which human activity is causing climate change—present significantly harder challenges. However, these ambiguities and difficulties do not transform these facts into something other than empirical ones. In theory—

⁶⁴ See *infra* Part II.B.2 (discussing “legal” facts).

⁶⁵ See, e.g., *infra* Part II.B.1 (explaining how the expertise and authority justifications for deference apply differently to empirical, evaluative, and value-based findings).

⁶⁶ See, e.g., 5 OXFORD ENGLISH DICTIONARY 188 (2d ed. 1989) (defining “empirical” as “pertaining to, or derived from, experience”).

⁶⁷ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(B), 117 Stat. 1201, 1204 (codified at 18 U.S.C. § 1531 (2006)).

⁶⁸ See Pilchen, *supra* note 28, at 378 (“Facts are thought of as empirical, evidentiary, and as capable of being determined with a degree of detached certainty”) (footnote omitted).

⁶⁹ See, e.g., *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 980–82 (D. Neb. 2004) (taking evidence on this fact question and concluding that the congressional finding was incorrect), *rev’d*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Nat’l Abortion Fed. v. Ashcroft*, 330 F. Supp. 2d 436, 490 (S.D.N.Y. 2004) (same), *vacated*, *Nat’l Abortion Fed. v. Gonzales*, 224 F. App’x 88 (2d Cir. 2007); *Planned Parenthood Fed. of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1029 (N.D. Cal. 2004) (same), *rev’d*, *Gonzales v. Carhart*, 550 U.S. 124 (2007).

and, to a large degree, as a practical matter—an empirical fact is one that can be verified.

2. *Evaluative Facts*

Evaluative facts are statements reflecting conclusions drawn from empirical facts. For example, a judgment that deregulation of financial markets will create prosperity, on the theory that free markets control inappropriate risk-taking by financial institutions, constitutes an evaluative fact. Evaluative facts can be distinguished from their empirical cousins by their stronger basis in ideology. Evaluative facts also go beyond predictions, to include conclusions about the present state of the world. For example, conclusions that financial institutions are adequately capitalized, or that a particular monetary policy strikes the optimal balance between low unemployment and low inflation, constitute evaluative facts.

Evaluative facts differ in at least two relevant ways from the empirical facts discussed in the prior Subpart. Most obviously, they are at least somewhat more speculative. For example, findings in the form of predictions about complex economic behavior illustrate the added complexity posed by many evaluative judgments. As an initial matter, this added complexity suggests an expertise-based rationale for deference to Congress, given its superior fact-finding capability (leaving aside, for the moment, the question of Congress's incentives to use that capability).⁷⁰

More significantly, evaluative facts entail a mixture of empirical observation and value judgment that triggers a distinct, authority-based deference rationale. Consider financial regulation. One may know the empirical facts about the current condition of American financial institutions—their accumulated capital, debt loads, and so on. But predicting how a proposed policy will impact their future condition—or even describing how current policies affect them—often requires, in addition to technocratic expertise, some degree of ideological precommitment. For example, depending on whether or not one believes in the ultimate intelligence of free markets, one would conclude that a deregulatory policy is having, or will have, a certain set of effects or a completely opposite set.⁷¹ Thus, while as a

⁷⁰ See *supra* note 35 and accompanying text (citing scholars who note Congress's impressive fact-finding capabilities); *infra* note 76 (quoting a Supreme Court opinion acknowledging Congress's superior ability to find complex facts).

⁷¹ A striking example of the ideological nature of evaluative facts can be found in the following colloquy between Representative Henry Waxman and then-Chairman of the Federal Reserve Alan Greenspan, about Chairman Greenspan's understanding of the mortgage industry:

conceptual matter empirical facts are purely testable and verifiable, evaluative facts include an element of ideological precommitment that, either conceptually or as a practical matter, renders them less subject to conclusive proof or disproof.

These insights matter because they impact the authority justification for deference. As explained later,⁷² the ideological component of these assumptions justifies increased deference to the resulting findings, since Congress is the institution presumed to best represent the current ideological commitments of the American people.⁷³

Indeed, when considering the deference owed congressional findings on such facts, the Supreme Court has largely adopted this analysis. In two cases from the 1990s, the Court considered First Amendment challenges to legislation regulating cable television. The challenged legislation, which forced cable operators to carry broadcast stations' signals, was grounded on Congress's prediction that without such regulation broadcasters would go out of business and free,

On October 23, 2008, in testimony before the [U.S.] House of Representatives Oversight Committee, Greenspan admitted that "those of us who have looked to the self-interest of lending institutions to protect shareholders [sic] equity (myself especially) are in a state of shocked disbelief." House Oversight Committee Chairman Henry Waxman asked Greenspan whether "your ideology pushed you to make decisions that you wish you had not made?" Greenspan replied:

Mr. GREENSPAN. . . . [Y]es, I found a flaw, I don't know how significant or permanent it is, but I have been very distressed by that fact. . . .

Chairman WAXMAN. You found a flaw?

Mr. GREENSPAN. I found a flaw in the model that . . . defines how the world works, so to speak.

Chairman WAXMAN. In other words, you found that your view of the world, your ideology, was not right, it was not working.

Mr. GREENSPAN. Precisely. That's precisely the reason I was shocked, because I had been going for 40 years or more with very considerable evidence that it was working exceptionally well.

Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327, 1347 (2009) (quoting *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 17, 36–37 (2010) (Statement of Alan Greenspan), available at <http://democrats.oversight.house.gov/images/stories/documents/20081024163819.pdf>).

⁷² See *infra* Part II.B.1 (explaining why empirical facts should receive relatively more judicial scrutiny and, thus, value-based findings relatively less).

⁷³ Cf. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1006 (D. Neb. 2004) ("When the answer to the relevant question can only be a guess because the answer will turn on accurately predicting future facts, Congress, *being an elected body*, is most often the place to make that guess.") (emphasis added), *rev'd on other grounds*, *Gonzales v. Carhart*, 550 U.S. 124 (2007).

over-the-air television would wither.⁷⁴ At this stage of the Article, the standard of review the Court adopted⁷⁵ is less important than its reasoning. According to Justice Kennedy, the fact that these findings took the form of predictions about future economic conditions warranted respect for reasons of both expertise and authority. Thus, he explicitly analogized the respect courts owed such congressional findings to the respect they owed similar administrative agency findings, given the expertise of both institutions.⁷⁶ However, he continued that Congress was due “an additional measure of deference out of respect for its *authority* to exercise the legislative power.”⁷⁷

3. Value-Based Facts

Value-based facts are those that reflect a heavier component of value choice than empiricism.⁷⁸ They include judgments about morality (for example, whether abortion is always wrong) and identity (for example, which groups are similar to other groups, and on what basis). They also include judgments that are perhaps less controversial or fundamental, but which still require a grounding in values rather than simple empiricism (for example, whether eighteen-year-olds possess sufficient maturity to deserve the franchise).⁷⁹ These examples

⁷⁴ See *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 191–93 (1997) (discussing the congressional findings); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 632–34 (1994) (*Turner I*) (same).

⁷⁵ Justice Kennedy, writing in both cases and speaking for the Court in one, called for “substantial deference” to such findings. *Turner II*, 520 U.S. at 195; *Turner I*, 512 U.S. at 665 (plurality opinion). However, he also noted in one of these cases that such a standard did not preclude “meaningful . . . review” by the courts, particularly given the sensitive nature of the First Amendment rights implicated by the legislation under review. *Turner I*, 512 U.S. at 666.

⁷⁶ See 520 U.S. at 195–96 (“We owe Congress[s] findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions [T]he deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise.” (quoting *Turner I*, 512 U.S. at 665–66) (internal quotation marks omitted)).

⁷⁷ *Turner II*, 520 U.S. at 196 (emphasis added); see also *id.* (“Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings . . . , lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.”).

⁷⁸ Cf. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1264 (2012) (“[A]n assertion of fact is a descriptive statement that can (at least theoretically) be falsified. This feature of a fact arguably distinguishes it from statements of value or policy preferences.”). Larsen’s taxonomy implies a distinction between facts and “non-facts,” while my own categorization groups both empirical and value-based facts as “facts.”

⁷⁹ See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 206 (1970) (Harlan, J., concurring in part and dissenting in part) (describing this question as one that “depends ultimately on the values and the perspective of the decisionmaker”).

may lead one to question the nature of these findings as *factual*. But in a real sense they are. They relate to social phenomena that exist in the real world, even if they are not empirically verifiable.⁸⁰

Even if one is uncomfortable calling such judgments “factual,” they remain legitimate subjects of the deference inquiry, since they are not abstractions of the sort that we normally think about when we think about law.⁸¹ For example, an interpretation of a statute is an abstraction. It turns on logic, language rules, and rules and conventions internal to the process of statutory interpretation, rather than on any particular state of the world.⁸² (Of course, the state of the world may influence the interpretation, but only because the rules of interpretation allow that.) By contrast, for example, a judgment that disability discrimination is invidious, rather than appropriate shunning of individuals whom God has punished, or that a particular abortion procedure coarsens human nature, does not turn on such internal logic, rules, or conventions. It is a judgment about the world. Such judgments are not empirically verifiable, nor are they predictions about the future empirical state of the world. But at the same time, these judgments do not turn on logic internal to the rules of legal reasoning. As such, they become legitimate subjects of the deference inquiry, subject to the guidelines distilled from the expertise and authority justifications explained in Part I.A.

4. *The Way Forward*

No typology can comprehensively catalog something as broad as the universe of fact types. But the classifications defined above capture the main distinctions between various species of congressional fact-finding. As such, they interact with the authority and expertise justifications for deference sketched out in Part I.A to help yield answers to the deference question.

The combination of these three different types of facts and two different theoretical justifications for deference creates the following

⁸⁰ See, e.g., 5 OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989) (defining “fact” as “[s]omething that has really occurred or is actually the case; . . . a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it”); see *infra* note 81 (quoting a scholar distinguishing facts from opinions and value preferences).

⁸¹ Cf. Pilchen, *supra* note 28, at 379 (“Facts are distinguished from opinions or value preferences.”).

⁸² See Allen & Pardo, *supra* note 28, at 1793 (recounting this argument by describing “legal facts” as referring “to human-made, linguistic creations such as statutes, judicial opinions, and regulations”); but see *id.* at 1794–95 (expressing the authors’ disagreement with this view).

grid, which reveals—incompletely for now—how this Article’s typology of facts interacts with Part I.A’s justifications for deference.

FIGURE 1

	Authority	Expertise
Empirical Facts		
Evaluative Facts		
Value-Based Facts		

The axes of this grid point the way for the rest of this Article. First, as explained earlier, the deference question cannot be analyzed in the abstract; rather, it must be understood against the backdrop of the relevant substantive law doctrine. Part I.C of this Article explains why and how doctrine matters. Part II of this Article then synthesizes these three considerations—the theoretical justifications for deference (the grid’s horizontal axis), the nature of the findings (the vertical axis), and the role of underlying substantive law doctrine—to yield six principles that should guide courts’ resolution of the deference inquiry. Part II concludes by replicating the grid, but in its completed form, noting the principles that reflect each box’s fundamental rationale. With that filled-in grid unifying and completing the theoretical analysis in Parts I and II, Part III concludes this Article by applying these principles to real-world examples.

C. Substantive Doctrine and Fact-Finding

One might wonder why an Article examining the deference question must consider the underlying substantive law doctrine. The reason is as straightforward as it is important: The appropriate level of judicial review depends heavily on that doctrine.

1. Foundation: The Basic Argument

Scholars have persuasively argued that underlying judicial doctrine should either heavily influence or even completely answer the deference question. For example, David Faigman argues that the amount of deference owed a legislative finding turns largely on the deference triggered by the statute more generally.⁸³ Faigman’s

⁸³ See FAIGMAN, *supra* note 24, at 129–33 (arguing that courts should review a legislature’s fact-findings with whatever level of scrutiny or deference is accorded the statute to which the findings apply); *id.* at 129 (“[T]he constitutional resolution of the question of what level of deference is owed legislative fact-finding is fairly straightforward. The standard of review of legislative fact-finding should abide by the same basic principle that guides the entire enterprise of judicial review when laws implicate constitutional values.”).

observation makes a great deal of sense: If a particular doctrine reflects judicial suspicion of legislative action, then that suspicion should extend to the legislature's findings supporting its chosen policy. Such a suspicion can be identified in the Court's 2000 decision in *United States v. Morrison*.⁸⁴

In *Morrison*, the Court struck down the civil remedy provision of the Violence Against Women Act (VAWA).⁸⁵ In enacting VAWA, Congress created a lengthy factual record documenting the substantial effects of gender-motivated violence on interstate commerce. However, the Court, which five years earlier had suggested the usefulness of such findings,⁸⁶ declined to rely on that record. Rather, the Court dismissed the reasoning substantiated by those facts because that reasoning would allow Congress to convert the commerce power into a general police power, in contravention of judicial doctrine.⁸⁷ The Court thus interpreted the "substantial effects" prong⁸⁸ to impose a near-absolute rule against congressional regulation of non-economic activity, regardless of Congress's fact-finding.

This doctrinal innovation likely resulted, at least in part, from a struggle between Congress and the Court over judicial supervision of the commerce power. That struggle commenced with the lower court decision in *United States v. Lopez*,⁸⁹ where the appellate court struck down a federal guns-in-schools statute in part because of the lack of findings tying gun possession to interstate commerce.⁹⁰ That opinion,

See also McGinnis & Mulaney, *supra* note 12, at 92–94 (arguing that reviewing courts should review legislative fact-findings the same way they review legislative legal conclusions); Pilchen, *supra* note 28, at 397 (arguing that courts should review congressional findings supporting Enforcement Clause legislation with whatever level of deference results from determining how much substantive control Congress should enjoy when legislating under the Clause).

⁸⁴ 529 U.S. 598 (2000).

⁸⁵ 42 U.S.C. § 13981 (2006).

⁸⁶ *See* *United States v. Lopez*, 514 U.S. 549, 562–63 (1995) (suggesting the usefulness of congressional findings documenting the substantiality of the interstate commerce effects of the regulated activity when "no such substantial effect was visible to the naked eye").

⁸⁷ *See Morrison*, 529 U.S. at 615 (concluding that Congress's findings in VAWA were "substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers" and that, "[g]iven these findings . . . the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded").

⁸⁸ The "substantial effects" prong refers to that component of the modern Court's Interstate Commerce clause doctrine which allows Congress to regulate intra-state activity that "substantially affect[s]" interstate commerce. *See* *United States v. Lopez*, 514 U.S. 549, 559 (1995) (identifying this prong of the doctrine).

⁸⁹ 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

⁹⁰ *See* 2 F.3d at 1366–67 (discussing the lack of congressional findings tying gun possession in schools to interstate commerce).

and the Supreme Court's subsequent decision to review it, set the stage for the first Supreme Court opinion in nearly sixty years to find a federal statute to exceed Congress's power to regulate interstate commerce. VAWA, enacted between the lower court and Supreme Court decisions in *Lopez*,⁹¹ may well have included the findings that it did as inoculation against invalidation based on the appellate court's reasoning. If so, then Congress's fear was well-founded: When *Lopez* reached the Court it echoed the lower court's concern about the statute's lack of findings. But Congress appeared to have crafted VAWA well, given that in *Lopez* the Court suggested that findings would allow the Court to identify an interstate commerce connection to activity that, at first blush, seemed to lack such a connection.⁹²

In *Morrison*, the Court confronted the natural result of *Lopez*'s implicit invitation of congressional fact-findings: a statute that appeared to fail *Lopez*'s test for Commerce Clause regulation, but that included an extensive factual record revealing an otherwise-hidden connection between the regulated activity and interstate commerce. For the five-Justice majority in *Morrison* (the same majority that decided *Lopez*), the existence of those findings in an otherwise constitutionally doubtful statute posed the choice starkly: (1) Defer to those findings, uphold VAWA, and essentially abandon the *Lopez* project of imposing judicially enforced limits on federal legislative power; (2) continue to accept in principle *Lopez*'s openness to congressional findings, but engage in a disrespectful disagreement with Congress about the findings in VAWA; or (3) simply adopt a doctrinal rule making VAWA's findings irrelevant. In fact, the Court chose the third option. If the Court were truly serious about moving forward with the *Lopez* project, it had no attractive choice other than to create doctrine disallowing a role for congressional findings.

2. *Nuance: The Relationship Between Doctrine and Other Deference Factors*

Despite the cogency of the argument that doctrinal choices drive deference decisions, an exclusive focus on doctrine obscures other factors that should influence the deference inquiry. Most notably, the different roles constitutional doctrines accord to congressional fact-finding have a complex relationship to the expertise and authority

⁹¹ See Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1796, 1902 (1994) (enacted Sept. 13, 1994). The Court granted certiorari in *Lopez* on April 18, 1994, 511 U.S. 1029, and decided the case on April 26, 1995, 514 U.S. 549.

⁹² See *Lopez*, 514 U.S. at 562–63 (discussing the helpful role findings play when the relationship between activity regulated by Congress and interstate commerce is not immediately visible).

justifications for deference. For example, the Court's hesitance to defer to congressional fact-finding in some federalism doctrines reflects the Court's suspicion that Congress cannot be trusted to be a faithful guardian of the federal-state balance.⁹³ On this theory, Congress's political responsiveness—a characteristic that otherwise endows it with authority to find facts—threatens the federal-state balance, as legislators respond to popular demands for federal regulation from an electorate that does not particularly care about the proper allocation of regulatory authority between the federal government and the states.⁹⁴ Thus, the legitimacy Congress enjoys by virtue of its political responsiveness—which in some cases translates into authority to find facts—here cuts *against* its authority to find facts relevant to legislation that invades areas of traditional state concern.

⁹³ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 587–88 (1985) (O'Connor, J., dissenting) (criticizing the majority's reliance on the political process to protect state prerogatives as amounting to reliance on Congress's "underdeveloped capacity for self-restraint"); see also Devins, *supra* note 24, at 1194–200 (expressing doubt that Congress has incentives to find facts accurately when legislating in areas affecting the federal-state balance).

⁹⁴ See, e.g., Devins, *supra* note 24, at 1194–95 (explaining "Congress's expansionist tendencies" as a result of three factors: (1) constituent preferences for national legislation; (2) the nationalization of the "political culture" due to the rise of mass media and "modern political advertising"; and (3) voter impatience with rejection of legislation for abstract reasons such as federalism); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 94 Nw. U. L. REV. 89, 96–97 (2004) (arguing that voters have very little information—and very little incentive to collect information—about federalism). Indeed, defenders of broad congressional authority to legislate in ways that implicate the federal-state balance sometimes attempt to argue that Congress is, in fact, responsive to federalism concerns. See, e.g., *New York v. United States*, 505 U.S. 144, 190–91 (1992) (White, J., concurring in part and dissenting in part) (arguing that the federal legislation struck down was favored by state officials as a method of resolving a difficult interstate conflict); *Garcia*, 469 U.S. at 552–53 (noting that states have been successful in receiving federal grants); see also *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) (arguing that allowing the federal government to enlist state law enforcement to enforce federal laws obviates the need to increase the scope of federal law enforcement activity in the states). See generally Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that the party structure of American politics links state and federal politicians and thus serves as a structural safeguard for states' interests). On the other hand, defenders of a judicial role in policing the federal-state balance argue that such structures do not protect the real value of federalism—the protection against tyranny offered by the existence of competing federal and state power—because state politicians may be complicit in shirking responsibility and accountability by allowing inappropriately broad federal regulation. See, e.g., *New York*, 505 U.S. at 182 (discounting the relevance of the fact that state officials favored the federal law struck down on federalism grounds).

The point here is not to resolve the argument about which way Congress's political responsiveness cuts on federalism questions. Rather, the point is simply that constitutional doctrine—here, for example, non-deferential judicially enforced limits on federal power over the states—may stem from concerns about Congress's popular responsiveness.

Similar observations animate scholars' arguments for less deference to congressional fact-findings that support restrictions on individual rights.⁹⁵ These arguments ultimately rest on the familiar rationale that majoritarian legislatures cannot be trusted to legislate in ways that limit individual rights—especially those that are politically unpopular (such as flag burning), or those that are usually invoked by members of unpopular groups (such as criminal procedure rights).⁹⁶ As with federalism, here too Congress's political responsiveness—a characteristic that normally endows it with authority to find facts—militates against deference, at least as a general matter.⁹⁷

Doctrine not only interacts with the theoretical justifications for deference, but also with the nature of the facts at issue, to influence the requisite degree of deference. Judicial doctrine on a given constitutional issue often elevates particular types of facts to a level where they are essentially dispositive of the case. For example, a congressional judgment that a content-based restriction on speech rights constitutes the only means of effectuating Congress's goal, if deferred to, would go a long way toward ensuring that the statute survived judicial review.⁹⁸ Such a finding might be subject to the criticism that by explicitly applying a doctrinal test (the narrow-tailoring requirement in First Amendment law⁹⁹), this type of finding merits less deference, an argument considered later.¹⁰⁰ But even a less doctrinally resonant finding—for example, that without access to cable facilities,

⁹⁵ *E.g.*, Borgmann, *supra* note 24, at 38 (“While legislatures may be the more appropriate bodies to formulate broad social policies, their susceptibility to political influence makes it inappropriate for courts to rely upon them to resolve conflicting facts when a legislative proposal curtails basic individual rights.”).

⁹⁶ *See, e.g.*, Corinna Barrett Lain, *Upside Down Judicial Review*, 101 *GEO. L.J.* 113, 167–68 (2012) (“Whether articulated in terms of protecting unpopular minorities or otherwise, today most normative theories of judicial review are based on the Court’s ability to act in a counter-majoritarian manner.”); Thomas O. Sargentich, *The Future of the Item Veto*, 83 *IOWA L. REV.* 79, 131 (1997) (“One reason why students of American constitutionalism defend vigorously the ‘counter-majoritarian’ role of the federal courts as the protectors of minorities and unpopular individuals is that the majority itself can disregard the interests of such persons.”).

⁹⁷ The caveat is necessary because, as this Article explains throughout, such broad claims are insufficient to explain both legislative action and motivations and thus insufficient as answers to the deference question. *See, e.g., infra* notes 203–16 and accompanying text (illustrating the insufficiency of this answer in light of both the technical complexity underlying some fact-findings impacting individual rights and Congress’s history of protecting such rights).

⁹⁸ *Cf. Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 129–31 (1989) (considering a government argument for deference to such a finding, but concluding that Congress had not actually made such a finding).

⁹⁹ *See, e.g., Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (stating this test).

¹⁰⁰ *See infra* Part II.B.2.

over-the-air broadcasting would wither—may fit easily into the Court’s doctrinal analysis, triggering suspicion, yet be so complex as to warrant judicial deference.¹⁰¹

These two examples demonstrate that fact-findings of various types can influence the Court’s doctrinal analysis. Thus, just as with the *Morrison* example in the prior subpart, a Court intent on retaining power for itself may choose to craft a doctrine that limits the role for such findings. But the two examples add an additional insight: The nature of those facts—as empirical, evaluative, or value-based—interacts with judicial doctrine to influence the deference question. For example, a Court wishing to reserve control over the First Amendment may choose to craft doctrine that reserves to itself the ultimate power to make the narrow tailoring judgment that is the subject of the first of these examples. A court may similarly choose a doctrine that reserves to itself the judgment about complex social facts, such as the survival prospects of over-the-air broadcasting in the absence of compelled access to cable systems (the second example discussed above).¹⁰² But courts making such choices must be mindful of the different natures of these facts, and how those different natures impact their susceptibility to competent and legitimate judicial discovery.

3. Summary

Scholars are surely correct to note the importance of underlying doctrine to the deference question. As illustrated by this Article’s account of *Morrison*, the Court may make doctrinal choices instrumentally, with an eye toward how the deference question affects the struggle between Congress and the Court over constitutional meaning. But doctrine is not always an independent variable. If it were, then a court in a given case would accord the same level of deference to any finding by Congress, whether empirical, evaluative, value-based, or even purely legal (if one accepts the lack of a law-fact distinction). Indeed, it would also ignore the question of how the particular doctrine influenced Congress’s expertise and authority to find facts. Our intuition rebels at this unthinking answer to the deference question, and the other factors discussed in Part I provide reasoned grounds for that skepticism. Moreover, courts insist that these other factors matter and act at least somewhat consistently with that claim.¹⁰³ Even if we

¹⁰¹ See *Turner II*, 520 U.S. 180, 196 (1997) (noting the technical complexity of the facts found); *Turner I*, 512 U.S. 622, 665–66 (1994) (same).

¹⁰² Cf. *supra* note 101 (noting the deference analysis in *Turner I* and *Turner II*).

¹⁰³ See *supra* text accompanying notes 74–77 (discussing examples where the Court has relied on those other factors).

take that insistence with a large grain of salt, the differences among fact types and between the two theoretical justifications for deference warrant an exploration of how these factors interact with doctrine to influence deference decisions.

II

SYNTHESIS: JUDICIAL REVIEW OF CONGRESSIONAL FACT-FINDING IN INDIVIDUAL RIGHTS

The three axes discussed in Part I—the authority and expertise justifications for deference, the types of facts involved, and the underlying substantive law doctrine—interact to yield six principles courts should consider when answering the deference question. This Part identifies and discusses these principles.

These principles seek to balance the fact-finding discretion properly enjoyed by Congress with the appropriate judicial role in matters of constitutional interpretation generally, and constitutional individual rights in particular. They reflect insights about both institutional competence and the legitimate roles of courts and Congress in our constitutional structure. An appropriate allocation of authority between those institutions allows both to participate in the project of applying constitutional meaning while respecting the other's prerogatives and capabilities. In this sense, these principles aim at nothing less than implementing the fundamental principle of our system of separated powers within an effective government.¹⁰⁴

A. *The Vagueness Objection*

A preliminary point about these principles requires consideration. Offering somewhat imprecise “principles” to determine an already-vague deference standard layers vagueness upon vagueness. To return again to the administrative law analogy, the murkiness surrounding the proper application of *Chevron* deference only grows when one layers onto it an equally intricate inquiry into when *Chevron* deference even applies.¹⁰⁵ As the objection goes, deference standards are vague enough without layering on top of them a series

¹⁰⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (observing that the Constitution requires both separation and interdependence to ensure a workable government).

¹⁰⁵ See *United States v. Mead Corp.*, 533 U.S. 218, 239, 243 (2001) (Scalia, J., dissenting) (noting that the majority replaced the presumption that *Chevron* deference was owed with a threshold inquiry into Congress's intent as to whether deference was owed an agency determination).

of underdeterminative principles governing the appropriate level of deference.¹⁰⁶

This objection is a fair one. But vagueness comes with the territory. The difficult truth is that standards of deference to congressional fact-finding, like any review standard, can only approximate the human process of determining the weight to accord another's fact statements. As Justice Frankfurter famously remarked, a deference standard reflects nothing more than a "mood";¹⁰⁷ it cannot create a mechanical formula that yields completely predictable results.¹⁰⁸ Perhaps on the positive side, a frank recognition of the justifications for deference and a transparent implementation of those justifications via a set of principles may help courts identify and more precisely apply the appropriate deference level. In other words, the existence of this additional inquiry may actually increase, not reduce, the determinacy of deference decisions. Indeed, Part III's application of these principles to real-world examples is designed in part to demonstrate how they may lead to more, not less, determinate deference decisions.

With this preliminary objection answered (even if full proof remains subject to Part III's application of these principles), this Article now proceeds to identify six principles of deference based on Part I's analysis.

B. *The Principles of Deference*

1. *Courts Should Focus Their Scrutiny on Empirical Findings*

This suggestion might seem counterintuitive. After all, isn't Congress's expertise justification strongest in the context of empirical findings? However, carefully compared with the other categories of findings, empirical findings are often most appropriate for judicial scrutiny.

Empirical facts are often better suited for judicial scrutiny than evaluative facts because they are verifiable. As cautioned earlier,¹⁰⁹ verifiable does not mean "easily accessible." Some empirical facts are particularly difficult for courts to uncover. For example, facts about broad social conditions may be difficult for courts to verify within the confines of the judicial process, which necessarily features, at best,

¹⁰⁶ See, e.g., Berger, *supra* note 22, at 527 (noting the difficulty inherent in calibrating deference levels).

¹⁰⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

¹⁰⁸ *Id.* at 489 ("Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata.")

¹⁰⁹ See *supra* Part I.B.1 (noting the complexity of many empirical facts).

limited participation in a formalized format ill-suited for the airing of multiple perspectives,¹¹⁰ and a decision maker assisted only by a small, generalist staff. Concededly, each of these restrictions can be relaxed. Amici and interveners can participate, experts can testify, informal discussions among the parties can inform the judge's decision, and the judge can delegate matters to specialists such as special masters. But none of these steps fundamentally transforms the process. Indeed, their use throws into sharp relief the limitations of the archetypical format.

These features suggest that the decisionmaker has less access to information compilation and expert analysis than is available to legislators.¹¹¹ To return to the (admittedly imperfect)¹¹² administrative law analogy, it is well settled that judicialized processes are ill-suited to policymaking, including the finding of broad social facts.¹¹³ Indeed, this understanding is so ingrained as black letter law that courts will strain to avoid requiring agencies to follow judicialized processes when finding such facts, in order to allow them to act through the legislative-type format we know as notice-and-comment rulemaking.¹¹⁴

Despite this advantage, as a relative matter courts should focus on empirical findings. First, many empirical facts are clearly easier for courts to discern than other types of facts. For example, the PBABA's finding about American medical schools' failure to teach particular abortion methods provided important support for Congress's conclusion that those methods were medically unnecessary outliers that

¹¹⁰ See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 77–78 (1991) (noting the limitations adjudication often imposes on a broad representation of interests).

¹¹¹ See, e.g., FAIGMAN, *supra* note 24, at 132–33 (noting this advantage). *But see* McGinnis & Mulaney, *supra* note 12, at 103–09 (arguing that courts are institutionally better suited to find even complex social facts).

¹¹² The analogy is imperfect because it abstracts out the very different incentives of administrators and legislators, for example, their differing concerns about the electorate's and interest groups' approval. Compare Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *CORNELL L. REV.* 486, 491–508 (2002) (noting the processes of administrative decision making and the risks raised by those processes), with Frickey & Smith, *supra* note 23, at 1728–31 (noting the uncertainties characterizing any theory of legislators' motivations), and McGinnis & Mulaney, *supra* note 12, at 94–97 (considering the processes of legislative decision making and how the incentives facing legislators prompt certain types of decision-making conduct).

¹¹³ See, e.g., Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 *VA. L. REV.* 337, 347 (1986) (“Formal rulemaking, whatever its conceptual virtue in ensuring due process, has failed in practice because it emphasizes trial-type procedures that are not suited for exploration of the general characteristics of an industry.”).

¹¹⁴ See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 234–38 (1973) (establishing this rule); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 199–200 (3d ed. 1991) (explaining this rule).

contradicted medical schools' focus on preserving life.¹¹⁵ Yet nothing prevents a court from competently reviewing this finding, which was neither particularly complex nor multifaceted.¹¹⁶ Thus, depending on their complexity and overall nature, some empirical facts may be equally susceptible to determination by courts and Congress. At least as an expertise matter, no reason exists to assume that courts are incapable of reviewing such findings.

Second, even if some empirical issues present difficulties for courts, other types of facts present even greater expertise and authority challenges. In particular, evaluative findings often entail, in addition to empirical information, particular ideological precommitments.¹¹⁷ This additional component reduces courts' authority to perform searching review of those findings.¹¹⁸

Consider an example. A law regulating capital markets would presumably rest on a combination of empirical data about those markets' current states, evaluations of the economic and other factors currently influencing them, and predictions about how they would respond to particular incentives. Those evaluations and predictions necessarily rest on a foundation in ideology—here, a set of beliefs about the world, subject to empirical support but not empirically verifiable.¹¹⁹ Because a belief that, say, markets naturally self-correct cannot be conclusively established in the way that, say, a particular chemical reaction can, a finding based on that belief cannot be subject to the sort of verification that is at least theoretically within the judicial ken when courts review empirical findings. Rather, the finding's

¹¹⁵ See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105 § 2(14)(B)-(C), 117 Stat. 1201, 1204 (2003) (making this finding); see also *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1169 (9th Cir. 2006) (discussing this finding), *rev'd sub nom. Gonzales v. Carhart*, 550 U.S. 124 (2007); *Carhart v. Gonzales*, 413 F.3d 791, 793 (8th Cir. 2005) (discussing this finding), *rev'd*, 550 U.S. 124 (2007).

¹¹⁶ Of course, a judicial determination whether a particular fact lies within the judicial ken involves the court in yet another determination, thus increasing the complexity of the deference inquiry. This difficulty would be mitigated through a general presumption favoring judicial review of empirical facts. Still, some empirical facts are highly complex and quite difficult to uncover, thus suggesting that this threshold inquiry might in fact entail difficult choices for a court.

¹¹⁷ Cf. *Larsen*, *supra* note 78, at 1264 (noting the distinction between falsifiable facts and conclusions that are based in whole or part on value judgments).

¹¹⁸ See *supra* text accompanying notes 71–73 (explaining this argument); cf. *McGinnis & Mulaney*, *supra* note 12, at 106 (arguing that the task of finding “social” facts does not require or benefit from the finder having a particular background because “social facts of the kind that support the constitutionality of legislation more often comprehend impersonal and general data where inferences depend on techniques of objective analysis, including statistical inference”). This insight might be true of empirical facts, but far less so of evaluative facts.

¹¹⁹ See *supra* note 71 (providing an example of such an ideologically based evaluation of empirical facts).

ideological component makes it less appropriately subject to judicial review, given Congress's superior authority to instantiate into law the ideological commitments of the American people.

Given that last conclusion, one might think that the final category of facts—those based purely or predominantly on values—present an open-and-shut case. If even partially ideological evaluative facts threaten to exceed the bounds of meaningful judicial review, surely value-based facts must. This is true, but with an important caveat. The Constitution embraces certain values. To the extent those values are relevant to a particular legal controversy, a court's decision to defer to Congress's contrary value choices would amount to deference to Congress's interpretation of the Constitution—or, in the extreme case, deference to a *de facto* congressional amendment.

An extreme example illustrates the point. Suppose that, sometime in the future, a rise in racial tensions leads to renewed broad public acceptance of forthrightly racist thinking. "Experts" announce that race largely determines people's morality, intelligence, and capacity to contribute to society. A large faction of voters embraces those arguments and adopts social attitudes mirroring those of the Jim Crow or even the antebellum South. Congress, reflecting those views, enacts laws reestablishing an official racial hierarchy. If those laws were supported by findings expressing the moral worth of persons of a particular race, one might, at first blush, be hard-pressed to explain why such findings should not be accepted by a court. The obvious response is that the Constitution makes the choice about racial equality for us. But in terms of the deference question, another way to express that response is to conclude that the Constitution has preempted such value-based legislative findings.

Thus, this seemingly odd combination—a call for substantial deference to congressional evaluative findings but not for all pure value-based findings—becomes understandable as a straightforward application of the authority justification for deference. In the Jim Crow case—where a value-based finding conflicts with core constitutional meaning—the authority for making such a finding can be said to rest with "We the People," who employed it when endowing a particular finding with constitutional stature by enacting the Reconstruction Amendments.¹²⁰ But where a higher-level decisionmaker has not claimed that authority, such value-based legislative findings merit significant judicial deference.

¹²⁰ It bears repeating that such core constitutional meaning flows from the Supreme Court in its role as the supreme expositor of constitutional meaning. See *supra* note 32 (noting the Court's consensus on the general issue of judicial supremacy).

To be sure, exceptionally difficult questions present themselves when the Court sets out to determine what value-based findings “We the People” enshrined when enacting a particular constitutional provision. The stakes are high: The Court’s answers to those questions effectively demarcate the allowable space for value-based congressional findings. But understanding the issue in this way at least identifies the question as one of legal interpretation rather than fact-finding. That distinction may be difficult to draw with clarity, but as long as the Court insists on it, and insists on its own superiority with regard to the former,¹²¹ then calling things by their proper names plays a salutary role in clarifying the tasks at hand and each institution’s proper domain in performing them.

2. *The More “Legal” the Finding, the Less Deference Courts Should Accord*

A basic characteristic of constitutional individual rights doctrines is judicial supremacy in defining the scope of the right at issue. When courts identify and protect individual rights, the counter-majoritarian nature of courts explains and justifies this judicial supremacy.¹²² When the issue is congressional enforcement of constitutional rights, the doctrine of *City of Boerne v. Flores* implies a distinction between enforcement of the right (a task where Congress enjoys at least some latitude) and demarcation of the scope of the right, which remains the Court’s province.¹²³ Thus, despite the difficulty of drawing a watertight distinction between law-making and fact-finding,¹²⁴ resolution of the deference question requires distinguishing between these two acts, and considering the extent to which congressional findings deserve deference when they channel legal analysis.¹²⁵

¹²¹ See *supra* note 32 (citing cases where the Court has insisted on this division of authority).

¹²² See, e.g., Borgmann, *supra* note 24, at 35–40 (making this argument).

¹²³ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (explaining that when Congress seeks to enforce rights it has the authority to prohibit “a somewhat broader swath of conduct” than that delineated by the right itself); *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (insisting on the distinction between identifying and enforcing rights, even while conceding that it is sometimes difficult to uncover the precise dividing line between those two activities); see also Thomas W. Beimers, *Searching for the Structural Vision of City of Boerne v. Flores: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L.Q. 789, 822 (1999) (“In *Boerne*, Congress was not merely disagreeing with the Court’s application of the facts to the law, but was disagreeing with the law itself. It altered the constitutional standard to be applied.”).

¹²⁴ See, e.g., McGinnis & Mulaney, *supra* note 12, at 93–94 (challenging this distinction).

¹²⁵ Cf. FAIGMAN, *supra* note 24, at 52 (identifying “doctrinal facts” as those “used to define constitutional doctrine . . . or establish a reviewable [legal] standard”).

The Court's acceptance of a law-fact distinction, and its insistence on judicial supremacy with regard to law interpretation, implies an authority-based limit on congressional fact-finding that turns on the degree to which the finding appears legal in nature. An example may help illuminate this idea. Congress sometimes drafts civil rights legislation that purports to "find" that the protected group is a "discrete and insular" minority.¹²⁶ This "finding" carries deep resonance for constitutional law, as it entitles that group to the heightened judicial protection provided by the Court's *Carolene*-based equal protection doctrine.¹²⁷ In a very real sense, such a congressional finding reflects the conclusion of a legal analysis, akin to Congress's finding in the Religious Freedom Restoration Act (RFRA)¹²⁸ that strict scrutiny was the appropriate standard to apply to Free Exercise Clause claims.¹²⁹

If one accepts an authority-based distinction between the judicial and congressional roles in law-interpreting, such legal "findings" by Congress cannot enjoy significant deference. Even if they do not amount to explicit congressional statements of constitutional meaning, such findings nonetheless carry the potential to control the outcome of legal tests. More to the point, to the extent such findings are cast in terms ("discrete and insular minorities" or "strict scrutiny") that reflect primarily jurisprudential concepts, they pose even greater problems than the "constitutional facts" considered in the next Subpart.¹³⁰ A rule according such findings significant deference conflicts with the assumed authority of the Court to state constitutional meaning conclusively.

¹²⁶ See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336 § 2(a)(7), 104 Stat. 327, 328–29 (1990) ("Congress finds that . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society"), amended by Pub. L. No. 110-325 § 3(2), 122 Stat. 3553, 3555 (2008) (striking § 2(a)(7) along with "discrete and insular" language); see also Resolution Trust Corporation Completion Act, Pub. L. No. 103-204 § 33(a)(5), 107 Stat. 2369, 2414 (1993) (noting the ADA's finding); S. 2238, 103d Cong. § 2(7) (1994) (finding that gays and lesbians are a "discrete and insular minority"); H.R. 4526, 103d Cong. § 2(4) (1994) (finding that children are a "discrete and insular minority").

¹²⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (implying that "prejudice against discrete and insular minorities" may be "a special condition" calling forth heightened judicial scrutiny).

¹²⁸ Religious Freedom Protection Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), invalidated by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹²⁹ Indeed, the conclusion in RFRA is arguably even more extreme, because it purports to prescribe the appropriate standard by which a type of constitutional claim should be evaluated, rather than simply purporting to find that standard to have been satisfied.

¹³⁰ See *infra* Part II.B.3 (considering precisely targeted "constitutional facts").

But the matter is more complicated than suggested by describing the question as a simple choice between deference and no deference. The complexity arises in part because there is no limit on the extent to which “legal” congressional findings can determine the ultimate legal issue. For example, Congress may “find” that a certain type of discrimination is irrational—a finding that, if accepted, presumably ensures a conclusion that it violates the Equal Protection Clause.¹³¹ Somewhat less aggressively, Congress might find that such discrimination reflects stereotyping—a finding that certainly influences the constitutional analysis, but perhaps does not conclusively determine its outcome.¹³² Such findings also vary based on their type, as categorized earlier in this Article.¹³³ In particular, they may occupy various locations on a spectrum between purely legal concepts and empirical reality. For example, a finding that a particular government action “satisfies strict scrutiny” may be especially problematic because of its fundamentally legal content; by contrast, a finding that Americans have developed a reasonable expectation of privacy in their household garbage, while similarly powerful in terms of the doctrinal results it forces,¹³⁴ has at least some grounding in social reality.

The hard fact is that legal tests come in all shapes and sizes; thus, fact-findings can test the law-fact boundary in a variety of ways. The implication is clear: If the deference principle currently under discussion calls for more careful judicial review of findings that are “legal” in nature, one must concede that findings are “legal” in varying degrees. Thus, this principle requires varying degrees of deference.

This conclusion is disheartening for anyone seeking a simple, predictable approach to the deference question. Again, however, it may be better for courts to recognize this difficult problem forthrightly than to bury it under unconvincing platitudes about either respect for Congress or protection of the judiciary’s ultimate authority in constitutional interpretation. Like most platitudes, these contain important

¹³¹ Cf. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 470–72 (1994) (arguing that the Religious Freedom Restoration Act violates the principle of *United States v. Klein*, 80 U.S. 128 (1871), by prescribing a rule of decision (the strict scrutiny test) for the Court to follow).

¹³² See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (“Intentional discrimination on the basis of gender . . . violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”).

¹³³ See *supra* Part I.B (categorizing facts as empirical, evaluative, or value-based).

¹³⁴ Cf. *California v. Greenwood*, 486 U.S. 35, 39–41 (1988) (finding no reasonable expectation of privacy in household garbage left on the street for collection, and therefore rejecting an argument that evidence discovered in that garbage, and further evidence whose discovery was prompted by that discovery, should be excluded from trial).

kernels of truth. But they must be applied with an eye to the inevitable complexities involved in the balance between Congress and the Court. It is far better to acknowledge outright the complexities inherent in this analysis than to hide them behind boilerplate rhetoric that is embraced and abandoned as convenience demands.¹³⁵

3. *The More Precisely Tailored the Fact-Findings Are to the Legal Test, the Less Deference They Merit*

a. The Argument

Even with findings normally thought to be non-legal, room exists for an authority-based critique of congressional findings to the extent they precisely satisfy a particular doctrinal test. Consider the PBABA's finding that "partial-birth" abortions are never medically necessary.¹³⁶ This finding—not legal in nature—nevertheless is analogous to a finding that certain discrimination is irrational, in that it plugs perfectly into a doctrinal test and mandates a particular result under that test. Indeed, scholars call such facts "constitutional facts" given that they become, as one scholar said, "decisive of a constitutional claim."¹³⁷ This label is not novel—nor is the question of judicial scrutiny of another government actor's finding of such a fact. Indeed, the concept of a constitutional fact dates back at least to *Crowell v. Benson*,¹³⁸ the landmark 1932 case where the Court insisted that Article III required courts to re-find such facts when made by an administrative agency.

Judicial review of such findings raises difficult issues. As noted above, these "findings" may not differ significantly from legal conclusions, over which courts presumably retain ultimate authority. For example, a "finding" that partial-birth abortions are never medically necessary is functionally equivalent to a "finding" that the abortion right is less robust than that set forth in the caselaw.¹³⁹ "Findings" that segregated education does not harm African-American children,¹⁴⁰ or

¹³⁵ See, e.g., Berger, *supra* note 22, at 525–26 (arguing that more transparency in courts' processes for reviewing legislative fact-finding promotes judicial candor).

¹³⁶ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105 § 2(1), 117 Stat. 1201, 1201 (2003) ("The Congress finds and declares the following: . . . the practice of performing a partial-birth abortion . . . is never medically necessary . . .").

¹³⁷ Anthony B. Kolnec, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 TEX. REV. L. & POL. 171, 187 (2005).

¹³⁸ 285 U.S. 22 (1932).

¹³⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845 (1992) (reaffirming that abortion restrictions, to be constitutional, must include a health exception).

¹⁴⁰ Cf. *Brown v. Bd. of Ed.*, 347 U.S. 483, 493–95 (1954) (relying on the harm segregation causes African-American children to hold that segregation violates the Fourteenth Amendment).

that a particular speech restriction is the only way for government to achieve a particular legitimate government goal¹⁴¹ would similarly alter the relevant legal doctrine, as a practical matter. On the other hand, the nature of such facts is often such that they can be fairly described as empirical or evaluative, and thus more within Congress's expertise and authority than purely legal conclusions. Indeed, the medical necessity finding in the PBABA can be so described—at some level, the finding reflects Congress's presumed capacity to gather information about medicine and science and make findings based on that information.¹⁴²

This paradox can perhaps be eased by analogizing this problem to those that emerge in equal protection cases. When courts consider whether a facially neutral law is motivated by a disfavored intent (e.g., to classify based on race), they consider several evidentiary factors.¹⁴³ One such factor is the extent of the law's disparate impact on the group alleged to be the victim of discrimination.¹⁴⁴ Analogously, one can understand precisely focused findings of the sort identified by Principle 3 as imposing a severe "disparate impact" on a protected right. As such, courts may properly treat these types of findings with at least some suspicion, just as a facially neutral law with severe racially disparate impact merits a closer judicial look to determine whether it reflects a disfavored motivation.

This analogy goes further. Courts operate under a presumption of government regularity.¹⁴⁵ In equal protection cases, this presumption requires the plaintiff to present evidence that something irregular is afoot before a court engages in more careful scrutiny.¹⁴⁶ So too in the fact-finding context. For example, in the PBABA one might begin with a presumption that Congress is simply using its fact-finding expertise to investigate medicine. But just as a disparate impact showing in the equal protection context justifies a closer judicial look

¹⁴¹ Cf. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (applying the strict scrutiny test of narrow tailoring to meet a compelling government interest to a speech restriction).

¹⁴² Cf. *Crowell v. Benson*, 285 U.S. 22, 71–72 (1932) (Brandeis, J., dissenting) (criticizing the majority's insistence on judicial re-finding of administratively found constitutional facts, on the ground that there is nothing about those facts that renders them any more incapable of accurate determination by administrative agencies).

¹⁴³ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (explaining the multi-factor approach).

¹⁴⁴ See, e.g., *id.* at 268 (noting this factor).

¹⁴⁵ See, e.g., *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (noting this presumption).

¹⁴⁶ See, e.g., *Arlington Heights*, 429 U.S. at 270 n.21 (discussing the burden-shifting process for equal protection claims); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing a similar approach for Title VII discrimination claims).

at the legislative action, so too a fact's "disparate impact" on a protected right—that is, the finding's precisely targeted impact on that right—justifies a similarly hard look.

So understood, a finding like the one in the PBABA, while certainly deserving of some respect, does not unambiguously reflect Congress's fact-finding authority. Instead, it raises the suspicion that Congress is attempting to go beyond its appropriate authority and wrest interpretive power away from the courts.¹⁴⁷ This analysis can also be cast as relevant to the expertise rationale for deference. One can be legitimately suspicious whether Congress has used its fact-finding expertise in good faith when those facts just happen to be exactly the ones necessary to mandate a certain constitutional result,¹⁴⁸ just as one can be suspicious when a facially neutral law heavily affects racial minorities without significantly burdening whites,¹⁴⁹ or when a tax on newspapers based on ostensibly neutral criteria just happens to burden nearly all of the papers opposed to a governor while leaving untouched virtually all of the papers favoring him.¹⁵⁰

b. Objections

One might object that subjecting these types of findings to more careful judicial scrutiny misconstrues the legislative process. The argument is that when the Court announces a doctrinal test whose application turns on the existence of certain facts, Congress should not be punished when it focuses precisely on those facts. To use a colloquial

¹⁴⁷ See *supra* notes 122–23 (noting the boundary between appropriate congressional fact-finding and inappropriate assertion of constitutional interpretive power); see also Eisgruber & Sager, *supra* note 131, at 469–72 (arguing that RFRA was unconstitutional because it wrested interpretive power away from the courts by prescribing a rule of decision).

¹⁴⁸ One can discern a distant echo here of *United States v. Klein*, 80 U.S. 128 (1871), the Reconstruction-era case that struck down a federal statute purporting to dictate that presidential pardons given to former Confederates were proof of *disloyalty* to the Union, hence disqualifying them from reimbursement for property seized or destroyed by the Union Army in the Civil War. *Klein* includes the cryptic statement that Congress violated the separation of powers when it purported to "prescribe rules of decision" for the federal courts. *Id.* at 146. For our purposes, the precision of the analogy between *Klein* and congressional findings of the sort identified in Principle 3 is less important than the general idea that the separation of powers is threatened when congressional action comes close to forcing courts to reach certain outcomes in cases.

¹⁴⁹ See *Arlington Heights*, 429 U.S. at 266 (noting that the extent of a law's disparate impact is relevant to a determination of its discriminatory intent).

¹⁵⁰ See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936) (striking down such a newspaper tax); see also *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579–80 (1983) (describing *Grosjean* with reference to the disparate impact of the challenged newspaper tax on the Governor's opponents, and describing the opinion as motivated by the tax's "intent to penalize a selected group of newspapers").

analogy, a bank robber robs banks because that's where the money is. So too, one might argue, Congress finds facts that precisely tie into doctrinal tests because that's where the constitutional results lie.

This objection raises a fundamental question about the Court's willingness to insist on a particular vision of the legislative process and the extent to which that vision corresponds to reality. If—as seems at least plausible—Congress views constitutional questions as little more than roadblocks to its preferred policy, then one should not be surprised when the winning faction in Congress uses its fact-finding power instrumentally, checking the necessary boxes and “finding” that the state of the world is exactly what the Court says it needs to be in order for its preferred policy to be upheld. This “cynical” understanding of the legislative process conflicts with the “sincere” vision implied by the Court's past examination of congressional findings. Those cases imply a process where Congress is expected to engage in a good-faith search for facts informing its judgment, rather than one in which the legislators' imperative to vindicate their preferred policy drives their search for supporting facts.¹⁵¹

This issue raises both a descriptive and a normative question. First, is the Court's view of the legislative process plausible? Second, even if it is not, is judicial review of fact-finding in pursuit of that vision nevertheless desirable? If the answers to both of these questions are “no,” then insistence on sincere fact-finding reflects a naïveté that does not advance sophisticated judicial review of the legislative process. In such a case, the Court would be well advised either to alter its constitutional doctrines to minimize a special role for fact-findings¹⁵² or simply to have courts find facts for themselves when federal laws are challenged. However, if the answer to either question is “yes,” then perhaps one can salvage a role for congressional fact-finding, as long as principled deference rules are developed.

¹⁵¹ For example, it is hard to understand cases such as *Garrett*, which discounted facts supporting the ADA because they were not presented to Congress itself, unless one assumes a model of the legislative process in which it is expected that Congress will deliberate in good faith on facts, and rest its judgment only on the facts in the formal record. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (identifying various failures of legislative deliberation in the ADA); see also Frickey & Smith, *supra* note 23, at 1725–27 (identifying *Garrett* as a striking example of the Rehnquist Court's insistence on careful legislative deliberation); cf. *infra* note 156 (arguing that much congressional fact-finding occurs “off the record”).

¹⁵² Indeed, it may not be a coincidence that it was Justice Scalia who eventually defected from the Court's previous consensus in favor of the congruence and proportionality standard, given his general reluctance to rely heavily on anything but enacted text when reviewing statutes. See Frickey & Smith, *supra* note 23, at 1750–51 (noting the inconsistency of legislative record review with Justice Scalia's and Justice Thomas's textualism).

The answer to the first question is equivocal. No single theory explains congressional action.¹⁵³ However, it is surely naïve to describe the lawmaking process exclusively as one featuring legislators who lack preexisting policy preferences and act only after conscientious wrestling with the facts developed exclusively in the formal legislative process. The real picture is far more complex. Legislators have preexisting policy preferences of their own, or adopt those of their constituents, their party leaders, or others who matter to them based on their ultimate goals¹⁵⁴ (which themselves might range from re-election, service to a particular cause or interest group, advancement within the party, or lucrative post-government employment).¹⁵⁵ Moreover, the fact-finding process often unfolds outside of formal channels.¹⁵⁶

Regardless of one's views about the legislative process, closer scrutiny of precisely targeted findings may still play a salutary role. As explained earlier,¹⁵⁷ such findings raise legitimate concerns that they effectively alter the scope of judicially announced rights, much as facially neutral laws causing disparate racial impact trigger concerns about discriminatory purpose. Despite such concerns, if, as the "naïve" model of the legislative process holds, Congress finds such facts in good faith, they would likely survive careful judicial scrutiny unless some isolated misfire caused Congress's good-faith investigation to produce a flawed finding.¹⁵⁸

¹⁵³ See, e.g., Frickey & Smith, *supra* note 23, at 1730 ("In our view of the state of political science, no theory of legislative decisionmaking exists that is capable of addressing the issues adequately.").

¹⁵⁴ See, e.g., Douglas Laycock, *A Syllabus of Errors*, 107 MICH. L. REV. 1169, 1175 (2007) (book review) ("[O]ften [legislators] are locked into positions by ideology or political pressure before the hearing ever begins.").

¹⁵⁵ See Frickey & Smith, *supra* note 23, at 1730 (noting such goals).

¹⁵⁶ See, e.g., Laycock, *supra* note 154, at 1175 ("Most of the real discussions in which legislators 'find' facts occur *ex parte* and off the record.").

¹⁵⁷ See *supra* text accompanying notes 143–46 (characterizing precisely targeted facts as raising this concern).

¹⁵⁸ Equal protection again provides an analogy. As John Hart Ely explained, "[t]he goal [that a statute's] classification in issue is likely to fit most closely, obviously, is the goal the legislators actually had in mind." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145 (1980). However, under current doctrine, even after a plaintiff makes out a *prima facie* showing that the law purposely discriminates (for example, because of its disparate impact) the government may rebut that showing by proving that it would have enacted the same law absent any discriminatory intent. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (describing the burden shifting). Analogously, if a plaintiff makes out a *prima facie* case that the finding's precise targeting of the right reflects an illegitimate intent to alter that right, Congress can always rebut that showing by demonstrating the accuracy of its finding, and thus the good faith of its fact-finding procedure.

If, by contrast, the fact-finding process is driven by legislators' instrumental desires to vindicate preexisting policy preferences, then heightened review of such findings is even more appropriate.¹⁵⁹ Targeted findings made by an instrumentally minded Congress present a serious challenge to the Supreme Court's interpretive supremacy. To paint the picture harshly, in such a case Congress, seeking to ram through a policy in tension with Court-announced constitutional principles, employs facts simply as tools to enable the statute to survive judicial review. In this picture, Congress conscripts the fact-finding process in order to control the results courts reach—that is, to wrest interpretive power into its own hands. This threat justifies heightened review of such findings.

Nevertheless, the types of precisely targeted findings under discussion are not the full equivalent of the legal findings addressed in Principle 2. They are still findings of “fact,” not “law.” Thus, such precisely targeted findings mark an intermediate point between explicit legislative declaration of actual constitutional principles and the “simple,” if not necessarily guileless, gathering of empirical evidence relevant to a constitutional question. On this spectrum, evidence-gathering lies at one end, followed by general fact-findings not as precisely targeted as the ones under discussion here, followed in turn by these precisely targeted findings, and, finally, “findings” that amount to law declarations. Understanding these findings as a point along this spectrum helps identify the level of deference such findings merit.

The different levels of deference owed to precisely targeted fact-findings and legal conclusions create a space for Congress in the task of applying constitutional tests. Findings of fact—even precisely targeted ones—can play an important role in the dialogic process between Congress and the Court, in which legal standards announced by the latter are applied by the former through its investigations and fact-findings. But as long as the Court claims for itself the ultimate authority to determine constitutional meaning, findings that effectively assert law-interpreting authority must be subject to significant judicial scrutiny.¹⁶⁰

¹⁵⁹ It should be clear that the “naïve” and “cynical” characterizations of the legislative process presented in the text are archetypes that stand at the extremes of a spectrum. How the legislative process actually works in a given case turns on many factors and is contested by scholars. *See, e.g.*, Frickey & Smith, *supra* note 23, at 1730 (noting the existence of various positive political theories of legislative action). Teasing out when the process corresponds more to one or the other of these extremes is far beyond the scope of this Article.

¹⁶⁰ *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (“[W]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . .”).

4. *If Congress Has a Track Record of Faulty Fact-Finding on the Issue, Its Findings Merit Less Deference*

This Principle reflects a common sense application of expertise-based deference claims. If Congress has stumbled in some of its fact-finding, it stands to reason that its related handiwork merits closer examination for similar flaws.¹⁶¹

This Principle should not elicit complaints from Congress or those who favor substantial deference to it. Substandard congressional fact-finding *should* trigger increased judicial scrutiny, just as a finding's precise targeting of the right at issue prompts a closer look,¹⁶² and, indeed, just as a law's racially disparate impact does in equal protection.¹⁶³ In all these cases, the presumption of government regularity has been overcome, thus justifying more searching judicial scrutiny.

This Principle also serves as a salutary incentive for Congress, regardless of how one understands the legislative process.¹⁶⁴ Legislators sincerely concerned about basing policy on facts should not complain if courts question the foundation for those policies in light of flaws in related fact-findings. Indeed, enforcement of this Principle might prompt such "sincere" legislators to create a better factual record.¹⁶⁵ Similarly, legislators who use fact-finding instrumen-

¹⁶¹ Of course the determination that Congress has "stumbled" implies some meaningful level of judicial scrutiny, thus raising the prospect of an infinite regress as the deference question itself poses a preliminary issue for application of this deference Principle. But this concern is not insurmountable. First, the other deference principles explained in this Article provide mechanisms for judicial scrutiny of congressional findings that might lead a court to conclude that Congress has indeed stumbled with regard to other findings. In turn, such stumbles provide a foundation for application of the instant Principle. Second, at least some stumbles are easy to find. For example, it was easy for the Court to conclude that Congress was mistaken when in the Partial-Birth Abortion Ban Act (PBABA) it found that "partial-birth" abortion procedures were never taught in American medical schools. See *infra* Part III.C.4. Under this Article's analysis, such a conclusion would trigger the instant Principle.

¹⁶² See *supra* Part II.B.3 (arguing for closer scrutiny of precisely targeted facts).

¹⁶³ See *supra* text accompanying notes 143–50.

¹⁶⁴ See, e.g., FAIGMAN, *supra* note 24, at 133 (arguing that rigorous judicial scrutiny of legislatively found facts incentivizes legislators to create a better factual record).

¹⁶⁵ Professor Berger suggests that courts can more directly incentivize better fact-finding processes by simply reviewing that process itself. See Berger, *supra* note 22, at 520–21 (arguing that judicial scrutiny of Congress's fact-finding process in a particular statute would incentivize careful fact-finding oriented toward the public good). Certainly such direct review of the legislative process, if performed competently, could have such incentivizing effects. But even assuming that this type of civil republican conception is normatively attractive, courts may find such process-based review impossible to perform competently in many cases. See *id.* at 520–21, 527 (conceding this difficulty in some cases). Indeed, it might even be that the very structure of the federal legislative process makes the required deliberation unlikely. Frickey & Smith, *supra* note 23, at 1743–44.

tally would presumably respond to this Principle by excluding questionable findings with flaws that might infect others.¹⁶⁶ Even if such “cynical” legislators retain flawed findings, this Principle incentivizes them to buttress their other findings with sufficient evidence to survive the more careful judicial scrutiny resulting from skepticism of their flawed companions.

5. *If Congress Has Found Conflicting Empirical Facts Without Explanation, the Most Recently Found Fact Merits Less Deference*

Another reason for courts to refrain from deferring to congressional findings is if those findings reflect an inconsistent history. The theory is that the finding is inherently less reliable if a previous Congress had found contrary facts. This Principle corresponds to the administrative law analogue that has shadowed much of this Article’s analysis: Under *Skidmore* deference, courts consider the consistency of the agency’s position as one factor when reviewing an agency’s legal interpretation.¹⁶⁷

The *Skidmore* analogy also reveals this Principle’s grounding in the expertise justification for deference.¹⁶⁸ As such, it suggests that this Principle may be most relevant to empirical findings, whose congressional claims for deference rest on an expertise justification, and least relevant to value-based findings, whose deference claims rest on an authority justification. One reaches the same conclusion about the scope of this Principle by considering it from the standpoint of the authority justification for deference. Because authority-based deference claims rest on Congress’s constantly renewed political legitimacy, demanding consistency—or even looking for it—makes no sense when Congress bases its deference demand on its electorally grounded authority to find value-based facts.

In addition to its limitation to empirical facts, this Principle is also subject to the obvious caveat that the world changes. A congressional finding in 1964 that racial discrimination by motels retards interstate commerce may be perfectly reasonable, even if a (hypothetical) congressional finding one hundred years before had been to the

¹⁶⁶ If the finding in question was so crucial to the statute’s survival on judicial review that legislators decided to retain it notwithstanding this risk, then Principle 3 would likely be triggered, and the finding would be subjected to heightened scrutiny as a precisely targeted finding. See *supra* Part II.B.3 (explaining heightened scrutiny for precisely targeted findings).

¹⁶⁷ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting this consistency factor).

¹⁶⁸ See *supra* text accompanying notes 41–49 (explaining *Skidmore* deference as grounded in expertise).

contrary.¹⁶⁹ There is little sense to a rule that reviews congressional findings skeptically simply because an earlier Congress, investigating a different world, found different facts. But in most cases courts should be able to determine whether empirical changes render an earlier contradictory fact-finding obsolescent and therefore irrelevant for purposes of applying this Principle.

This Principle, like previous ones, meshes with both archetypal views of the legislative process. If courts view legislators as sincere fact-seekers, then skepticism is entirely appropriate if they continually contradict themselves. By contrast, if courts view Congress's fact-finding process as primarily instrumental, then such continual contradiction only strengthens the suspicion that Congress's work in this area is especially lacking in expertise-based credibility.

At this point, however, underlying substantive doctrine cabins the scope of this rule. If that doctrine insists merely on evidence that a fact *might* exist, then a finding might survive judicial review even if it results from a relatively non-trustworthy fact-finding process in which legislators use findings instrumentally and freely find inconsistent facts as legislative majorities change over time. In particular, when courts apply the rational basis standard, they do not insist on proof that an actual state of affairs exists; rather, they are content to presume the existence of facts necessary to establish the requisite connection to a legitimate government purpose.¹⁷⁰ In those situations, the sufficiency of merely a plausible set of facts means that a history of congressional flip-flops on its findings is neither fatal nor even particularly relevant. By contrast, courts demand actual facts when they subject a government action to heightened scrutiny.¹⁷¹ This demand flows from the nature of heightened judicial review. As part of its insistence on the least possible intrusion on the protected value, heightened scrutiny requires that the reviewing court have in front of it the actual facts of the situation—the government's actual interest and the real factual background.

Based on this analysis, if an empirical finding provides important support for legislation infringing on a fundamental right, there may be

¹⁶⁹ While of only indirect relevance here, it bears mentioning that the Congress that enacted the Civil Rights Act of 1875 relied solely on its power to enforce the Fourteenth Amendment, rather than its power to regulate interstate commerce. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1832 (2010) (comparing the striking down of the 1875 Act under the Fourteenth Amendment with the upholding of the Civil Rights Act of 1964 under the Commerce Clause).

¹⁷⁰ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (noting this presumption).

¹⁷¹ See, e.g., *United States v. Virginia*, 518 U.S. 515, 535–36 (1996) (requiring actual justifications when reviewing a government action that discriminated based on sex).

less room for a flip-flopping Congress to insist on expertise-based deference. Under either the “sincere” or “cynical” conception of the legislative process, the substantive doctrine’s insistence on actual facts defeats any claim for deference to empirical facts about which successive Congresses have reached contradictory conclusions. By contrast, the rational basis standard’s more forgiving approach to findings—and to the existence of facts generally—allows deference to even temporally inconsistent findings.

This Principle does not freeze the first set of facts found by a Congress. Nor, therefore, should it be understood as triggering a race to Congress, in which the first political faction to enshrine a set of findings in a statute achieves an insurmountable advantage in entrenching its policies. Congress can still reconsider facts that a previous Congress has found. This Principle simply requires that courts not accept such a reconsideration unquestioningly, especially when the underlying substantive doctrine places heavy reliance on the facts being true rather than merely plausible. Indeed, little would remain of the expertise justification for deference if a subsequent Congress were free to find the opposite facts that a prior Congress had found and still demand deference as the expert fact-finder. When one realizes this, the argument for relatively less deference in cases of temporal inconsistency becomes quite reasonable.

6. *If Courts Have Encountered Difficulty Finding the Relevant Facts, then Congressional Fact-Findings Should Enjoy More Deference*

As a matter of both expertise and authority, judicial difficulty in finding the relevant facts militates in favor of increased deference to congressional findings. First, the expertise argument rests on the realization that, ultimately, expertise is relative: If courts are especially incompetent relative to Congress at finding particular facts, then no reason exists to rely on them as careful checks on congressional fact-finding. In a colloquial but very real sense, if a decision has to be made, and the courts are less competent than Congress to make it, then the former should get out of the way. Of course, “getting out of the way” should not be taken literally; even an incompetent court should perform at least some examination of congressional fact-finding, just as a non-expert court reviews the highly technical findings of an expert agency to ensure against arbitrariness.¹⁷²

¹⁷² Consider, for example, Judge Wald’s description of the court’s duty when reviewing an administrative agency’s rulemaking on a complex issue: “We reach our decision after interminable record searching We have . . . studied [the agency’s] references . . .

Second, with regard to the authority justification, judicial difficulty with finding the relevant facts should lead courts to conclude that the issue is committed to the legislative branch. The political question doctrine provides an analogy here. When deciding whether an issue presents a political question, courts consider, among other questions, whether judicially manageable standards exist and whether the issue has been committed to another branch.¹⁷³ Judges applying these criteria have noted their interrelatedness, observing that the lack of such standards (what we might call a lack of expertise) suggests such a commitment to another branch (what we might call a lack of judicial authority).¹⁷⁴

This interrelationship between expertise and authority finds an analogue in the fact-finding context. Consider congressional enforcement of equal protection. Much equal protection doctrine consists of very general principles, such as the rule against arbitrary or unfair classifications and classifications based on animus.¹⁷⁵ The Court has attempted to apply these principles through mediating doctrines, such as *Carolene's* political process theory, which are at least somewhat more amenable to competent judicial application. Still, these mediating doctrines are just that—doctrines that seek to approximate the results that would obtain under the actual constitutional rule, if that rule were susceptible to judicial application.

The difficulty courts have encountered applying equal protection in many cases (what the political question doctrine calls the lack of judicially manageable standards) naturally suggests some congressional role (what that doctrine calls commitment to another branch), instantiated through judicial deference along the lines this Principle suggests. The authority justification for deference is especially strong

endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job.” *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981).

¹⁷³ See *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (noting these criteria).

¹⁷⁴ See, e.g., *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (“[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of [such] standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”); see also *id.* at 240 (White, J., concurring in the judgment) (“In [inferring] that the Constitution has committed final interpretive authority to one of the political branches, courts are sometimes aided by textual evidence that the Judiciary was not meant to exercise judicial review—a coordinate inquiry expressed in *Baker's* ‘lack of judicially discoverable and manageable standards’ criterion.”).

¹⁷⁵ See William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 514 (2010) (noting the generality of equal protection’s core requirements).

when Congress finds facts enforcing equal protection, because the types of findings most relevant to the Court's equal protection doctrine—findings about animus, arbitrariness, and fundamental fairness¹⁷⁶—constitute judgments that are essentially moral in character. As the institution whose numerosity, national scope, and constantly renewed electoral legitimacy renders it the most representative of the nation, Congress enjoys unique authority to make those types of judgments.¹⁷⁷

Under this approach a variety of congressional findings should command some degree of judicial deference. These include findings in the ADA evaluating society's attitudes about the disabled. They also include the moral judgments underlying the Genetic Information Nondiscrimination Act: that differential treatment of persons based on their genetic make-up is fundamentally unfair.¹⁷⁸ As a final example, this Principle arguably includes any social classification judgments that Congress may make about transgender Americans—in particular, findings that transgender discrimination reflects gender expectations and thus constitutes a subset of sex-based discrimination, rather than discrimination based on the unique category “transgender.”¹⁷⁹ What unites these disparate findings is their moral or social-constructive character—that is, their character as judgments about morality and identity.¹⁸⁰ That character renders the judgments

¹⁷⁶ See, e.g., *Watkins v. U.S. Army*, 837 F.2d 1428, 1444 (9th Cir. 1988) (“The second factor that the Supreme Court considers in suspect class analysis is difficult to capsule and may . . . represent a cluster of factors grouped around a central idea—whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious.”), amended by 847 F.2d 1329 (9th Cir. 1988), vacated and *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

¹⁷⁷ See generally *supra* Part I.B.3 (explaining congressional authority to make value-based findings).

¹⁷⁸ See Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 478 (2010) (discussing legislative history reflecting this understanding).

¹⁷⁹ *Compare Smith v. City of Salem*, 378 F.2d 566, 571–72 (6th Cir. 2004) (concluding that transgender discrimination constitutes a form of sex discrimination under federal employment law), with *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–86 (7th Cir. 1984) (concluding that transgender status is a distinct status from “sex” as understood under federal employment discrimination law); see also Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 209–10 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/43/LRColl2008n43Hendricks.pdf> (arguing that transgender and gay and lesbian workers' rights should be protected by amending the definition of “sex” in Title VII of the Civil Rights Act of 1964 to include sexual orientation and gender identity, rather than enacting a stand-alone statute protecting LGBT workers).

¹⁸⁰ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074 (1980) (“[I]n looking at social attitudes toward groups, one cannot simply play Linnaeus and engage in taxonomy. One cannot speak of ‘groups’ as though society were objectively subdivided along lines that are just there to be discerned.

underlying those findings primarily moral,¹⁸¹ and hence more legitimately made by the People's representatives, rather than their judges.¹⁸²

By contrast, and perhaps counterintuitively, at least some empirical questions are just as susceptible to judicial resolution as to resolution by Congress. Most fundamentally, some empirical facts do not pose serious epistemic difficulties. For example, as noted in the discussion of Principle 1,¹⁸³ there is no particular reason to believe that Congress is better able to determine whether a given abortion method is taught in American medical schools. Just as a court is equally capable as Congress of looking in a history book and concluding that George Washington was the first president, nothing prevents a court taking evidence on the question of medical school pedagogy, and reaching a competent decision.¹⁸⁴ Neither expertise nor authority necessarily cuts in favor of the People's representatives deciding such questions.

Of course, other empirical questions pose harder challenges, and test judicial expertise more severely. Does the ubiquity of cable television threaten the viability of free over-the-air broadcasting?¹⁸⁵ How much global climate change is caused by human activity? These types of questions require the sort of long-term, multi-stage, multi-input investigation that Congress is best suited to undertake, much as administrative rulemaking is better suited than adjudication for resolving broad issues of social policy.¹⁸⁶ Yet the empirical components of even these questions are at least theoretically susceptible to

Instead, people *draw* lines, attribute differences, as a way of ordering social existence"); *see also id.* at 1074 (suggesting that antebellum apologists for slavery may have justified the practice essentially by creating a racial category whose constructed distinctiveness explained and justified differential treatment); *cf.* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406, 423 (1857) (holding that Africans originally transported into the nation as slaves and their descendants were considered members of an inferior class, and not intended to be included in the nation's political community), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁸¹ *See* Tribe, *supra* note 180, at 1074 (suggesting the socially created, rather than objectively existing, nature of groups).

¹⁸² This point is expanded upon when this Article applies Principle 6 to Enforcement Clause legislation. *See infra* Part III.B.1.

¹⁸³ *See supra* Part II.B.1 (explaining the verifiability of empirical facts).

¹⁸⁴ *See supra* note 69 (listing cases finding Congress to have mistakenly found that a particular abortion method was not taught in American medical schools); *see also* *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J.) ("If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce.").

¹⁸⁵ *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 632–34, 646 (1994) (considering legislation in light of findings by Congress regarding the cable and broadcasting industries).

¹⁸⁶ *See supra* text accompanying note 114 (noting the preference for rulemaking when administrative agencies decide such questions).

judicial discovery—or, at least, a meaningful judicial check on a challenged congressional finding. By contrast, to the extent answers to these questions require application of one's economic, social, or political philosophy to empirical facts, such questions elicit fundamentally non-empirical conclusions ill-suited to searching judicial review.¹⁸⁷

Distinguishing among the infinite variety of findings for which Congress and courts may possess different expertise and authority is well beyond the scope of this Article. For our purposes, what is important is the general principle that reduced judicial competence and authority to find such facts should trigger enhanced deference to their discovery by Congress. This may seem self-evident, but it is a lesson the Court has not learned. In several post-*Boerne* cases the Court has confronted enforcement legislation protecting groups to which the Court has declined to give heightened protection, largely due to institutional competence concerns.¹⁸⁸ Following the analysis above, one would think that the Court's recognition of its own incompetence in that area would lead it to defer to congressional findings that fill in the gap. Conversely, the empirical nature of many of the findings in *Gonzales*, when combined with their suspiciously targeted nature, suggests that a closer judicial look was warranted.¹⁸⁹ Yet in these cases the Court took the exact opposite approaches.¹⁹⁰

C. Deference Factors and Principles

Before applying these principles to examples, a second look at the grid provided earlier may help the analysis, by connecting those principles more explicitly to Part I's theoretical insights. The following figure reproduces that grid, with the addition of those principles (identified by their number) in the boxes that reflect the principle's fundamental rationale.

¹⁸⁷ See *supra* Part I.B.3. *But see* McGinnis & Mulaney, *supra* note 12, at 103–09 (challenging the idea that the selection process for judges renders them significantly less reflective of national attitudes than members of Congress).

¹⁸⁸ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that the ADA's employment provisions were not appropriate enforcement legislation); *cf.* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–46 (1985) (refusing, in large part for institutional competence reasons, to accord heightened scrutiny to disability discrimination).

¹⁸⁹ See *supra* Part II.B.1 (discussing empirical findings and *Gonzales*); *supra* Part II.B.3 (discussing precisely targeted findings and *Gonzales*).

¹⁹⁰ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 161–67 (2007) (deferring to several findings in the PBABA, despite their lack of support and the existence of other statutory findings that were demonstrably incorrect); *Garrett*, 531 U.S. at 368–74 (giving very skeptical review of Congress's findings supporting the ADA).

FIGURE 2

	Authority	Competence
Empirical Facts	(2) (3) (6)	(1) (4) (5) (6)
Evaluative Facts	(2) (3) (6)	(6)
Value-Based Facts	(2) (3) (6)	(6)

For the reader's convenience, the Principles are reprinted here:

1. Courts should focus their scrutiny on empirical findings.
2. The more "legal" the finding, the less deference courts should accord.
3. The more precisely tailored the fact-findings are to the legal test, the less deference they merit.
4. If Congress has a track record of faulty fact-finding on the issue, its findings merit less deference.
5. If Congress has found conflicting empirical facts without explanation, the most recently found fact merits less deference.
6. If courts have encountered difficulty finding the relevant facts, then congressional fact-findings should enjoy more deference.

The first point to make about the completed grid is that it now illustrates the role substantive doctrine plays in explaining the six deference principles. The bold typeface marking Principles 2 and 3 in the left-hand boxes indicates that these principles are largely driven by judicial doctrine. In particular, those principles reflect the dynamic in which fact-findings that threaten judicially stated constitutional meaning trigger heightened judicial scrutiny.¹⁹¹

Consider an example discussed earlier.¹⁹² The Court's Commerce Clause doctrine in *Lopez* imposes limits on congressional power that in turn were threatened by VAWA's findings. Those findings about the effects that gender-motivated violence had on interstate commerce are not intrinsically different from other findings Congress often makes; thus, all things being equal, they should not trigger unusual scrutiny (or deference).¹⁹³ But *Lopez* transformed those findings into threats to judicial supremacy—in this case, the Court's supreme statement that Congress's Commerce Clause power was subject to

¹⁹¹ As noted in the discussions of these two principles, those threats can be direct (as with "legal" findings subject to Principle 2) or indirect (as with precisely targeted findings subject to Principle 3). See *supra* Part II.B.2–3 (explaining, respectively, the direct and indirect nature of the threats such findings pose to courts' authority to interpret law).

¹⁹² See *supra* text accompanying notes 84–87 (discussing *Morrison*'s relevance to the deference question).

¹⁹³ Cf. *supra* note 142 (citing the dissent in *Crowell v. Benson*, 285 U.S. 22, 65, 71–72 (1932) (Brandeis, J., dissenting), where Justice Brandeis argued that the constitutional facts the majority subjected to *de novo* judicial discovery were not intrinsically different from other administrative agency findings to which courts routinely deferred).

judicially imposed limits. VAWA's findings, if accepted, would have effectively changed that constitutional law doctrine, by allowing Congress to subvert judicially announced limits simply by making the right findings. Indeed, the threat was acute: The reality of our modern integrated economy means that Congress would not find it particularly difficult to make such findings anytime it wished, on any subject it wished to regulate. Thus, judicial doctrine—here, the Court's insistence on limits to the Commerce Power—created a situation in which otherwise run-of-the-mill findings became something else: threats to the Court's interpretive supremacy. As such, that doctrine created the conditions under which Principles 2 and 3 justify heightened judicial scrutiny of congressional findings.¹⁹⁴

Second, but closely related to the first point, Principles 2 and 3 reflect the Supreme Court's insistence on judicial supremacy in law interpretation. "Legal" fact-findings (addressed in Principle 2) and precisely targeted findings (addressed in Principle 3) both implicate that supremacy—"legal" findings do so directly, due to their very nature, and targeted findings do so indirectly, due to their determinative effect on the outcome of legal tests. According to Principles 2 and 3, both types of findings merit relatively less deference because Congress lacks the authority to dictate legal conclusions to courts, either directly or by finding facts that effectively do so. This conclusion applies regardless of the type of fact at issue: As explained in the discussion of Principle 2,¹⁹⁵ findings that dictate legal outcomes can be empirical, evaluative, or value-based. The applicability of these two principles across the spectrum of fact-types reminds us that even empirical findings, which intuitively suggest an expertise-based rationale for deference, can also implicate the authority rationale.

A third point focuses on Principle 6's recognition of the comparative nature of the deference inquiry, and its call for relatively more judicial deference when courts encounter problems with the given issue. Note that this Principle applies across the board, to all types of facts, and to both justifications for deference. This should be uncontroversial: All other things being equal, courts should defer to Congress more if they encounter difficulty finding a fact for whatever

¹⁹⁴ This explanation focuses on precisely targeted findings, such as those at issue in VAWA—or, for that matter, the medical-necessity finding in the PBABA, which posed a similar threat to the supremacy of the Court's abortion-rights jurisprudence. *See supra* note 139 and accompanying text (noting the practical effect of this finding on the Court's abortion jurisprudence). More explicitly "legal" findings pose this threat even more clearly. *See supra* Part II.B.2 (explaining the threat posed by such findings to judicial law-interpreting supremacy).

¹⁹⁵ *See supra* Part II.B.2 (discussing the principle of heightened scrutiny of legal findings).

reason—*i.e.*, regardless of the nature of the fact or the justification for Congress’s deference claim. Thus, Principle 6 appears in every box in the grid.

Fourth, the isolation of Principles 1, 4, and 5 in the upper-right box suggests that the expertise-based rationale for deference is largely restricted to empirical findings. Begin by considering the last two of these principles. Principle 4 calls for more searching judicial scrutiny when accompanying findings in a statute are proven faulty, while Principle 5 calls for such heightened scrutiny when Congress makes temporally inconsistent findings. These two principles reflect criteria (respectively, the overall quality of a statute’s findings and a given finding’s consistency) that speak to a concern about fact-finding accuracy. Such a concern necessarily implicates congressional expertise—here understood to include not just Congress’s capacity to find facts correctly, but its incentives to use that capacity to good effect.

Because of their grounding in expertise, these two Principles do not transfer across into the upper-left box, which reflects an authority-based rationale for deference. As discussed earlier, such a rationale does not depend on Congress’s likelihood to have gotten the answer right.¹⁹⁶ Similarly, these Principles do not fully transfer down to the middle-right and lower-right boxes.¹⁹⁷ It is perfectly appropriate to speak of Congress’s expertise to find empirical facts (the upper-right box), but it is less appropriate to speak of its expertise to find facts comprising an admixture of empirical observation and ideology (the middle-right box), and certainly inappropriate to speak of congressional competence to find pure value-based facts (the lower-right box).

Our completed grid reveals a fifth insight. Note the relative paucity of Principles relevant to the middle-right and lower-right boxes. According to those boxes, the only guideline governing competence-based claims for judicial deference to evaluative and value-based findings is Principle 6’s caution that congressional competence and authority are relative concepts which must be assessed with an eye to their judicial analogues. While a helpful reminder, that caution does not provide a substantive rule of deference. Moreover, Principle 6

¹⁹⁶ See *supra* note 47 and accompanying text (explaining this characteristic of the authority justification).

¹⁹⁷ The qualifier “fully” may be necessary in recognition of the fact (noted in the next sentence in the text) that evaluative findings, to the extent they include components derived from empirical investigation, are subject to at least some of the guidelines reflected in the upper-right box. See also *infra* text accompanying note 319 (noting the possibility that a reviewing court could disaggregate the components of an evaluative finding and review its empirical and ideological components separately).

applies to every box; it is, therefore, a general principle that does not reflect the particular conditions of any given deference claim.

Why is such a “weak” and general principle the only one fully¹⁹⁸ applicable to the middle-right and lower-right boxes? Perhaps those boxes’ relative emptiness reflects the emptiness of the categories. In other words, it may reflect the fact that it makes little sense to view deference claims for evaluative and value-based findings as fundamentally based on congressional expertise. Instead, such findings can only claim deference based on an authority rationale. Part I’s discussion of evaluative and value-based facts¹⁹⁹ made the affirmative argument for that proposition. The lack of substantive principles addressing expertise-based deference demands for such findings—*i.e.*, the near-emptiness of those two boxes—makes that same argument by negative implication.

Finally, these insights, taken together, suggest yet again the appropriateness of courts focusing their review on empirical findings rather than their evaluative or value-based companions.²⁰⁰ The completed grid suggests that courts should not engage in intensive judicial review of those latter types of facts unless they present a risk of Congress wresting law-interpretive authority away from the courts—the phenomenon reflected in Principles 2 and 3. Beyond those Principles, the only deference principle applicable to non-empirical facts is Principle 6’s general caution to courts about the inherently comparative nature of expertise and authority. Of course, Principles 2 and 3 provide courts with significant justification for careful scrutiny of many legislative findings.²⁰¹ But if they do not apply in a given situation, then little beyond Principle 6’s comparative caution justifies heightened judicial scrutiny of non-empirical findings.

III

APPLICATIONS: FACT-FINDING IN RIGHTS- ENFORCING AND RIGHTS-LIMITING LEGISLATION

A. *The Record of Congressional Action on Individual Rights*

The complex mix of factors identified in Part I and translated into the principles explained in Part II pose considerable difficulties when answering the deference question in the context of individual rights

¹⁹⁸ The earlier caveat about the partially empirical nature of evaluative findings (and thus their susceptibility to Principles 1, 4, and 5) applies here as well. *See supra* note 197 (explaining this caveat).

¹⁹⁹ *See supra* Part I.B.2–3 (discussing those fact types).

²⁰⁰ *See supra* Part II.B.1 (arguing for judicial focus on empirical facts).

²⁰¹ *See, e.g., infra* Part III.C.3 (relying on Principle 3 to argue for careful review of the PBABA’s medical necessity finding).

legislation. At a very general level, courts' special role in protecting individual rights cuts against any authority-based justification for deference to congressional findings supporting limitations on those rights. Scholars have relied on this argument to criticize judicial opinions in which courts deferred to legislative fact-findings that effectively justified cutbacks on the abortion right.²⁰²

One difficulty with this approach's singled-minded focus on courts' counter-majoritarian role is that it ignores the dual nature of some findings, which are critical to constitutional rights, but which also reflect a complex empirical reality and predictions about the future. For example, in *Turner Broadcasting v. FCC*,²⁰³ a plurality of the Court recognized congressional competence and authority to find facts about the future of broadcast television in light of the rise of cable television. It recognized that courts "must accord substantial deference to the predictive judgments of Congress,"²⁰⁴ even though those findings impacted free speech—perhaps the quintessential counter-majoritarian right. The Court has similarly deferred when Congress found complex facts relevant to other individual rights.²⁰⁵

Moreover, Congress's record on individual rights matters does not fully comport with a simplified picture in which courts stand as a bulwark against majoritarian attempts to limit rights. Congress may have enacted restrictions on partial-birth abortions, but it also enacted the Freedom of Access to Clinic Entrances Act (FACE Act).²⁰⁶ It may have codified the military's anti-gay policy, but in 2010 it reversed itself.²⁰⁷ In the last twenty years it has also enacted the Violence Against Women Act (VAWA),²⁰⁸ the Americans with Disabilities Act (ADA),²⁰⁹ and the Genetic Information Non-Discrimination Act

²⁰² See, e.g., Borgmann, *supra* note 24, at 35–40 (making the individual rights argument against deference); *id.* at 21–28 (reviewing and criticizing Congress's fact-finding process when considering the PBABA).

²⁰³ 512 U.S. 622 (1994).

²⁰⁴ *Id.* at 665.

²⁰⁵ See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) (deferring to congressional findings on the likely increased accuracy of more elaborate administrative procedures, a key factor in considering procedural due process claims). At times the Court has also deferred to similarly crucial findings made by state entities. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (deferring to a state university law school's conclusions about the level of racial diversity needed in the student body in order to ensure a valuable classroom experience).

²⁰⁶ 18 U.S.C. § 248 (2006). This statute provided for criminal and civil penalties for, among other conduct, obstructing access to abortion or family planning clinics.

²⁰⁷ Don't Ask, Don't Tell Repeal Act of 2010 ("Repeal Act"), Pub. L. No. 111-321, 124 Stat. 3515 (2010).

²⁰⁸ Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

²⁰⁹ 42 U.S.C. §§ 12101 *et seq.* (2006).

(GINA);²¹⁰ has extended the Voting Rights Act (VRA);²¹¹ and has come close to enacting the Employment Non-Discrimination Act (ENDA).²¹² Indeed, in something of a direct contradiction to the counter-majoritarian thesis, Congress has also amended civil rights statutes to overrule defendant-friendly judicial interpretations.²¹³

The explanations for this legislative record vary. Legislation such as GINA and the ADA enjoyed broad bipartisan support, possibly because they responded to discrimination that is perceived as randomly distributed, and thus a risk to the general population.²¹⁴ Conversely, the VRA extension succeeded perhaps because it reflects the intense preferences of a relatively small group of legislators deeply committed to civil rights.²¹⁵ The FACE Act may have resulted from a unique set of historical circumstances, including well-publicized attacks on and harassing picketing of abortion clinics,²¹⁶ an abortion-

²¹⁰ Pub. L. No. 110-233, 122 Stat. 1796 (2008) (codified in scattered sections of 42 U.S.C.).

²¹¹ Pub. L. No. 97-205, 96 Stat. 131 (1982).

²¹² A version of the Employment Non-Discrimination Act (ENDA) has been introduced in every Congress since 1994, with the sole exception of the 109th Congress. *See* S. 811, 112th Cong. (2011); H.R. 1397, 112th Cong. (2011); S. 1584, 111th Cong. (2009); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); H.R. 3685, 110th Cong. (2007); H.R. 2015, 110th Cong. (2007); H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003); H.R. 2692, 107th Cong. (2001); S. 1284, 107th Cong. (2001); H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997); S. 2056, 104th Cong. (1996); H.R. 1863, 104th Cong. (1995); S. 932, 104th Cong. (1995); H.R. 4636, 103d Cong. (1994); S. 2238, 103d Cong. (1994).

²¹³ *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overturning *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 § 2(2) (noting that the Act was intended to overrule the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which Congress found "weakened the scope and effectiveness of Federal civil rights protections").

²¹⁴ Commentators have suggested that GINA's success derived in part from the perceived unfairness of genetics discrimination, because of individuals' lack of control over their genes. *See, e.g.*, Roberts, *supra* note 178, at 475–80 (suggesting this argument in the context of GINA). While other characteristics, such as race and sex, are also considered immutable, *but see* *Watkins v. U.S. Army*, 847 F.2d 1329, 1347 (9th Cir. 1988) (noting the technical possibility of changing one's sex or even "passing" as a member of another race), possession of a particular genetic makeup may be perceived as particularly unfair because there are relatively undeveloped social communities based on genetic endowment, thus making such endowments appear particularly random. *See, e.g.*, Robert H. Jerry, II, *Health Insurers' Use of Genetic Information: A Missouri Perspective on a Changing Regulatory Landscape*, 64 MO. L. REV. 759, 762 n.9 (1999) (noting the "random distribution" of genetic endowments throughout society).

²¹⁵ *See, e.g.*, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION*, 1–3 (1965) (noting this dynamic).

²¹⁶ *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000) (evaluating a state law enacted in 1993 dealing with abortion clinic picketing); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (considering a series of state court injunctions from 1992 and 1993 restricting abortion clinic picketing).

rights movement mobilized by the threat of *Roe*'s imminent demise,²¹⁷ the increased visibility of female lawmakers,²¹⁸ and pent-up demand for abortion rights legislation after twelve years of inhospitable Republican administrations.²¹⁹ Just as important as the sheer number of these laws are the varied explanations for their success. Together, they suggest the incompleteness of any deference conclusions based on a simple story of rights-defending courts confronting a rights-limiting Congress.²²⁰

One response to this record is to call for deference only when Congress protects rights. But this approach lacks any coherent justification. If Congress's legislative process in the area of individual rights suffers from some systemic flaw depriving it of a claim for deference, then presumably that flaw exists both when it limits and when it expands rights, unless one simply decrees that rights-protecting legislation is by definition systemically sound.²²¹ In order to defeat this presumption, and conclude that findings supporting rights-limiting merit special skepticism, more precise justifications are needed.

An approach that limits judicial skepticism of congressional fact-findings to situations where Congress limits rights recalls the famous one-way ratchet Justice Brennan deployed in *Katzenbach v. Morgan* to justify judicial deference to Enforcement Clause legislation only when that legislation expanded Fourteenth Amendment rights.²²² Thus, this argument needs to answer the same compelling arguments

²¹⁷ See, e.g., Evelyn Figueroa & Mette Kurth, Madsen *and the FACE Act: Abortion Rights or Traffic Control?*, 5 UCLA WOMEN'S L.J. 247, 250–55 (1994) (examining what the authors called the “dual fronts” of “the courtroom and the clinic” in the battle over abortion rights).

²¹⁸ For example, the 1992 elections were touted as “The Year of the Woman.” See, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2075 (2000) (noting this description).

²¹⁹ The FACE statute was enacted on May 26, 1994, a little more than a year after President Clinton's first inauguration. Pub. L. No. 103-259, 108 Stat. 694 (1994).

²²⁰ Indeed, some scholars argue that a broad examination of American history suggests that Congress is *more* likely than courts to protect individual rights. See generally REBECCA E. ZEITLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006).

²²¹ *But see* Borgmann, *supra* note 24, at 38–39 (arguing that political dynamics render Congress's fact-finding process inherently sounder when it legislates to protect rights).

²²² Compare 384 U.S. 641, 648 (1966) (“A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.”), *with id.* at 666 (Harlan, J., dissenting) (critiquing this argument and noting “I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature”).

made against Justice Brennan's ratchet.²²³ Moreover, when Congress enacts rights-expanding laws that apply to states, any modern version of the one-way ratchet argument would require a theory explaining why Congress can be trusted to find facts expanding constitutional rights by altering the federal-state balance. In other words, the federalism implications of Enforcement Clause legislation raise yet more questions about the trustworthiness of congressional fact-finding. Commentators have suggested that no reason exists to assume that Congress can be trusted to find facts when legislating in areas affecting federalism.²²⁴ If Congress cannot be trusted when it expands rights (at least at the expense of state autonomy), and cannot be trusted when it contracts them, one is tempted to despair when attempting to construct a principled story about deference.

These observations suggest that the most general conclusions about deference do not provide a fully satisfactory answer. Instead, the deference question requires careful attention to the criteria examined in Part I. Part II translated those criteria into six deference principles. Subparts *B* and *C* apply those principles to real-world examples of legislation both enforcing and restricting rights. Subpart *D* applies them to legislation, proposed in the past, that would restrict a right (abortion) based on a claim to be protecting other rights (those of unborn fetuses). Subpart *E* considers these principles in the context of the recent appellate court decision upholding the constitutionality of the Voting Rights Act.²²⁵ Subpart *F* concludes.

B. Fact-Finding in Enforcement Legislation

Enforcement Clause doctrine requires that enforcement legislation target with some precision the underlying Fourteenth Amendment violation. But this straightforward observation raises the question: What constitutes a Fourteenth Amendment violation? Much of the Court's Fourteenth Amendment doctrine—in particular, its equal protection doctrine—does not reflect authoritative constitutional meaning. Instead, it reflects an approximation of that meaning,

²²³ See, e.g., Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 697 n.438 (1996) (citing sources noting these critiques). *But see* William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TULANE L. REV. 517, 567–68 (2005) (suggesting a defense of the ratchet concept as an interpretation of core equal protection law, rather than in a way implicating the deference question).

²²⁴ See, e.g., Devins, *supra* note 24, at 1194–95 (noting lack of congressional incentives to consider federalism values); *supra* note 94 and accompanying text.

²²⁵ *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

reached through the use of judicially accessible decision rules.²²⁶ A prime example of such a rule is equal protection's tiered scrutiny structure. By pegging the level of judicial review to a group's ability to participate effectively in the legislative process, suspect class analysis aims to approximate the result an omniscient court would reach in determining whether the challenged classification satisfies the fundamental, if vague, requirement that likes be treated alike.

Decision rules such as suspect-class analysis are not themselves constitutional law to which congressional legislation must be congruent and proportional. This is especially true when the Court confesses that a given suspect class determination stems from a lack of judicial competence to either delineate the group with sufficient precision,²²⁷ distinguish it from other groups that might otherwise claim the same status,²²⁸ or apply heightened scrutiny with enough precision to distinguish between appropriate and inappropriate differential treatment.²²⁹ In terms of this Article's deference principles, courts suffer from incapacity to find the relevant facts.²³⁰ In such a case, Principle 6 suggests that courts' unique authority to state constitutional meaning should not block deference to congressional determinations supporting more aggressive enforcement legislation protecting non-suspect classes.

In *Board of Trustees v. Garrett*, the Court gave skeptical review to congressional findings purporting to support enforcement legislation benefiting non-suspect classes.²³¹ Commentators have criticized the Court's approach, arguing that such stringent review is unjustified even if one assumes the correctness of the judicial interpretive

²²⁶ See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51–60 (2004) (explaining the concept of decision rules).

²²⁷ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–43 (noting this concern in the context of the mentally retarded).

²²⁸ See *id.* at 445–46 (“[If] the . . . mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice . . .”); *United States v. Watson*, 483 F.3d 828, 831–33 (D.C. Cir. 2007) (making the same point with regard to the disabled); *United States v. Harris*, 197 F.3d 870, 875 (7th Cir. 1999) (same); see also *Brown v. City of Oneonta*, 235 F.3d 769, 786 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc) (“The problem is that the strict scrutiny criteria developed by the Supreme Court are much too blunt.”).

²²⁹ See, e.g., *Cleburne*, 473 U.S. at 442–43; see also *Autio v. AFSCME, Local 3139*, 140 F.3d 802, 806 (8th Cir. 1998) (making same point with regard to the disabled); *Coolbaugh v. Louisiana*, 136 F.3d 430, 436 (5th Cir. 1998) (same).

²³⁰ See *supra* Part II.B.6 (explaining this principle).

²³¹ 531 U.S. 356, 368–74 (2001); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–91 (2000) (expressing doubt about the factual record supporting the Enforcement Clause basis for the Age Discrimination in Employment Act).

supremacy implied by the congruence and proportionality standard.²³² Using this Article's terminology, no authority-based argument justifies such skeptical judicial scrutiny of the type of judgments the Court rejected in *Garrett*. *Garrett*'s mistake was to confuse its own decision rule for deciding equal protection cases (the *Carolene*-based suspect class structure) with underlying constitutional meaning (the Equal Protection Clause's prohibition on arbitrary or unfair classifications). Thus, when the Court concluded that Congress's findings did not establish the existence of discrimination that would fail the Court's rational basis test, it simply reviewed the facts against the wrong test—the rational basis standard, rather than the underlying constitutional requirement of fair and non-arbitrary laws.

But *Garrett* suffers from an additional flaw more directly related to the deference question. As explained earlier,²³³ Principle 6 holds that if courts are less capable than Congress of finding a particular type of fact, that relative incapacity militates in favor of judicial deference. In the case of the findings in *Garrett* the mismatch between judicial and congressional authority is clear. Under the Court's understanding of equal protection, it is crucial to ask whether treatment of a particular group is fundamentally fair.²³⁴ This type of value judgment is one for which Congress is far better suited than the courts, given Congress's institutional legitimacy to speak for the American people on matters that turn on values.²³⁵ Given that the Court has identified fairness and arbitrariness as the lodestars of the Equal Protection Clause, it seems only appropriate that Congress's findings on these issues should command significant respect.

One may object that this analysis essentially negates Principle 2's disfavoring of congressional findings that take the form of legal conclusions.²³⁶ It is certainly true that the question of a classification's fundamental fairness or arbitrariness is an ultimate constitutional question, in the sense that the answer determines the result in any equal protection case. But the inescapable truth is that the

²³² See generally Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L. REV. 1 (2003) (criticizing the Court's Enforcement Clause jurisprudence as overly restrictive of congressional discretion).

²³³ See *supra* Part II.B.6 (explaining the principle focusing on the comparative nature of expertise and authority).

²³⁴ See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1347 (9th Cir. 1988); see also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (noting "the basic concept of our system that legal burdens should bear some relationship to individual responsibility" (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))).

²³⁵ See *supra* Part II.B.1 (discussing Congress's legitimacy to find value-based facts).

²³⁶ See *supra* Part II.B.2 (explaining Principle 2).

fairness/arbitrariness question can only be answered by recourse to the social meaning of discrimination, a phenomenon Congress is clearly better suited than courts to instantiate into policy. For example, the only rationale that allows us to characterize a sex classification as either fair or arbitrary is our perception of the relevance of that characteristic for purposes of the context in which it is employed. Today, society believes that the sex characteristic has no relevance to the appropriateness of a person's being a lawyer; in 1873, a sizable percentage of society believed that it did.²³⁷ This change in social perceptions necessarily affects the result of the constitutional analysis.

The implication is that, at least in most equal protection cases,²³⁸ Congress should enjoy a significant role in determining the effective scope of the equal protection right.²³⁹ Some may find this latitude troubling. But this result logically follows from the Court's own doctrine—in particular, the Court's interpretation of the Equal Protection Clause in ways that render determinative insights that are fundamentally non-legal. It need not have embraced that interpretation. It could have limited the Clause to a discrete set of classifications (most notably, race²⁴⁰), or limited the set of rights to which it applied,²⁴¹ or

²³⁷ See *Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding state law prohibiting women from practicing law); *id.* at 139, 141 (Bradley, J., concurring) (relying on “the civil law, as well as nature herself,” as the basis for differences between the sexes which properly confine women to “the domestic sphere”). Of course it must be noted that exclusion from the political process influences political institutions' expressions of social meaning: A legislature elected only by men might be expected to have views about women's capabilities that do not accurately reflect the views of all members of society. This insight suggests the wisdom of *Carolene's* focus, not just on laws that burden “discrete and insular minorities,” but also those that block the political process. See 302 U.S. 144, 153 n.4 (1938) (intimating that laws burdening such groups or blocking the political process should receive heightened judicial review).

²³⁸ The caveat “most” is necessary because a different analysis may apply in the fundamental rights strand of equal protection. See, e.g., ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 685–92 (4th ed. 2011) (noting and explaining the differences between the fundamental rights and anti-classification strands of equal protection). Congress's role may be similarly cabined when the Court's equal protection doctrine provides more determinate meaning to equal protection. See *infra* text accompanying notes 245–46 (discussing an example where the more determinate meaning of the Court's equal protection doctrine justifies less deference to congressional findings that point in a different direction).

²³⁹ See, e.g., Frickey & Smith, *supra* note 23, at 1749 (arguing that “[b]ecause the Court has tied congressional power under Section 5 to remedying what the Court itself deems a pattern of unconstitutional state action,” congressional enforcement power triggers “endless, gauzy, unresolvable sociological disputes about what is happening in the real world of state government treatment of its own employees, disabled citizens, and so on,” and suggesting that “such disputes are the quintessential legislative, not judicial, questions”).

²⁴⁰ See *The Slaughter-House Cases*, 83 U.S. 36, 81 (1873) (expressing serious doubt “whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of” the Equal Protection Clause).

even limited its scope to group classifications.²⁴² It did none of these. By interpreting equal protection as a comprehensive guarantee of basic fairness, the Court embraced an approach that all but invites congressional findings on the relevant follow-on questions.

The Court's embrace of this comprehensive vision presents it with a stark choice about how much discretion Congress should enjoy to answer the questions posed by the Court's own doctrine. One option calls for the Court to retain for itself the supreme authority to make the value judgments its doctrine requires, despite its confessed inability to make those judgments competently and authoritatively, even if that independent judgment brings it into conflict with Congress's contrary judgment.²⁴³ Another option is to recognize that its own doctrine requires judgments that Congress is better suited to make, and defer to those congressional judgments. The first option leads to *Garrett*, with its second-guessing of the social reality Congress discerned in its fact-finding about disability discrimination. The second option leads to a constitutional world in which Congress enjoys significant authority to enforce equal protection by finding facts that effectively answer the questions the Court itself has identified as crucial to resolving equal protection cases.

Still, congressional authority is not limitless. Courts have a role in reviewing congressional findings about society's values regarding the type of discrimination at issue. But that review should focus on the proper question—whether Congress had a basis for its belief that society has in fact come to reject the fairness of the targeted discrimination. Thus, it would be appropriate for the Court to review the evidence indicating a societal consensus disfavoring the discrimination targeted by the enforcement statute. This discussion of the *type* of scrutiny the Court should perform, while relevant here and thus deserving of mention, is not central to our question of the appropriate *level* of scrutiny. However, it merits mention because it makes clear that that *type* of judicial review necessarily implies a relatively light *level* of review. The requirement of a light judicial touch ineluctably follows from the nature of the facts subject to review—facts that

²⁴¹ See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433–51 (1992) (arguing that the Equal Protection Clause is fundamentally concerned with requiring that government provide equality in the protection for rights, rather than in the rights themselves).

²⁴² See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (holding that an individual can allege an equal protection violation as a “class of one”).

²⁴³ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985) (confessing its incompetence to judge the appropriateness of many types of classifications states make, and thus refusing to hold, despite strong evidence to the contrary, that the mentally retarded are a suspect class).

legitimately fall within Congress's sphere of authority. At the same time, this review, even when appropriately deferential, ensures that the enforcement statute was not the product of a flawed legislative process that yielded an idiosyncratic victory for a group whose equality arguments have not yet succeeded with the rest of American society.

Importantly, however, other components of the Court's equal protection jurisprudence *do* enjoy the status of constitutional "law," such that congressional findings contradicting them do not merit the same type and level of deference discussed above. Most notably, the Court's race jurisprudence suggests that the Court understands the Equal Protection Clause to impose significant restrictions on government's ability to employ racial classifications.²⁴⁴ Such decisions appear to be based not on some mediating principle such as *Carolene*-style political process theory,²⁴⁵ but rather on the Court's own ultimate understanding of what equal protection means, either as a historical or moral matter.²⁴⁶ Whatever one thinks about the merits of that understanding, it constitutes a constitutional principle distinct from equal protection's general prohibition on unreasonable classification. To the extent this and other principles characterize true equal protection "law," and not just the results of the Court's application of a mediating principle, congressional findings pointing in the other direction should not receive deference, given Principles 2 and 3's disfavoring of congressional fact-findings that shade into legal conclusions.

1. *Federalism and Fact-Finding in Enforcement Legislation*

One may object that deference to congressional fact-finding in Enforcement Clause legislation ignores the Fourteenth Amendment's

²⁴⁴ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–35 (2007) (applying strict scrutiny to a school district's race-conscious pupil assignment program); *Adarand Constructors v. Peña, Inc.*, 515 U.S. 200, 227 (1995) (applying the same standard to a federal government set-aside); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to a city's racial set-aside); *but see Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring to the school on a variety of determinations relevant to the application of strict scrutiny while applying strict scrutiny to a state law school's race-conscious admissions policy).

²⁴⁵ See, e.g., *Croson*, 488 U.S. at 495–96 (providing only a cursory and unconvincing *Carolene*-type analysis of why affirmative action set-asides should receive strict scrutiny).

²⁴⁶ See, e.g., *Grutter*, 539 U.S. at 351–54 (Thomas, J., concurring) (explaining his understanding of equal protection without reference to political process theory); *Croson*, 488 U.S. at 521–23 (Scalia, J., concurring) (same). See also Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 309 (1991) (discerning in the Court's race jurisprudence of the 1980s "a more openly normative theory of 'relevance,' which banishes certain criteria from governmental decisionmaking on the ground that they should be irrelevant").

federalism component. On this argument, judicial hesitancy to subject state legislation to stringent equal protection review stems not just from judicial incapacity (which could be supplemented by findings in enforcement legislation as explained by Principle 6), but also from federalism concerns. Those concerns would apply just as much to enforcement legislation under Section 5 as to judicial doctrine under Section 1. Thus, the argument runs, allowing Congress generous latitude to find facts supporting aggressive enforcement legislation would allow Congress to use fact-finding to interfere with the federal-state balance, a value of constitutional stature.²⁴⁷

a. Fourteenth Amendment Doctrine and Congressional Enforcement Authority

Once again, however, the Court's own doctrine helps us understand the appropriate role for congressional fact-findings. That doctrine suggests that the federalism constraints on enforcement legislation are not as salient as they appear at first glance. The Court has contrasted the Fourteenth Amendment's impact on the federal-state balance with that of Congress's Article I powers, and strongly suggested that the former is greater. For example, the Court has rejected the argument that Congress's Article I powers worked the same reduction in state sovereign immunity as the Fourteenth Amendment.²⁴⁸ Moreover, it has understood the Commerce Clause as stopping short of authorizing Congress to "commandeer" state law enforcement and legislative processes.²⁴⁹ While not exactly analogous, the Voting Rights Act's interference with similarly core sovereign functions suggests that the Fourteenth Amendment (and therefore congressional enforcement power) digs a good deal deeper into the heart of state sovereignty.²⁵⁰ More generally—and perhaps speculatively—the preclusive effect of the Fourteenth Amendment on

²⁴⁷ The federalism implications of the Enforcement Clause also lead to concerns about Congress's fact-finding incentives based on its perceived incapacity to consider federalism concerns when engaging in fact-finding. A later subpart takes up this issue. *See infra* Part III.B.1.b (explaining how this dynamic should influence the deference analysis).

²⁴⁸ *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996). Indeed, one could argue that this rejection was apparent even in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), despite that case's ultimate holding that the Commerce Clause authorized Congress to abrogate state sovereign immunity. Recall that in *Union Gas*, Justice White, the fifth vote for that holding, nevertheless expressed disagreement with "much of" Justice Brennan's analysis—an analysis that explicitly compared the Fourteenth Amendment's effects on the federal-state balance with those of the Commerce Clause. *Id.* at 57.

²⁴⁹ *See* *Printz v. United States*, 521 U.S. 898 (1997) (law enforcement commandeering); *New York v. United States*, 505 U.S. 144 (1992) (legislative commandeering).

²⁵⁰ The Court has consistently held that, aside from the different subject matters, the scope of Congress's enforcement power is the same under the Fourteenth and the Fifteenth

particular types of state action contrasts with certain Justices' more hesitant embrace of a similar preclusive effect allegedly based on the Commerce Clause.²⁵¹

The upshot is that under Fourteenth Amendment doctrine, federalism-based concerns may flow not exclusively from the Amendment itself, but also from courts' concerns for their own institutional capacity to oversee state conduct. If underlying doctrine matters to the deference question,²⁵² then this conclusion should mean that deference to fact-findings in Enforcement Clause legislation does not necessarily trigger a conflict with underlying constitutional doctrine. Indeed, even as staunch a defender of federalism as Justice O'Connor, in an area as fraught with federalism concerns as federal court supervision of school desegregation, recognized that Congress enjoys more authority than courts when overseeing state action on that subject.²⁵³ When Congress enforces the Fourteenth Amendment, underlying constitutional doctrine does not limit congressional fact-finding discretion as much as one might think.

b. Federalism and the Trustworthiness of Congressional Fact-Finding

Nevertheless, one might still object that broad deference to congressional fact-findings in Enforcement Clause legislation ignores the possibility, mentioned earlier,²⁵⁴ that Congress lacks incentives for careful fact-finding when it legislates in ways altering the federal-state balance. Scholars and judges debate whether Congress does in fact respect federalism.²⁵⁵ For our purposes, however, we can assume the worst case—that it does not—and consider whether this assumption casts doubt on this Article's call for deference.

So posed, this question illustrates the problem that arises when different criteria suggest opposite answers to the deference question. In this case, the criteria consist of the underlying substantive law

Amendments. *See, e.g.*, *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) (citing caselaw in support of this proposition).

²⁵¹ *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610–20 (1997) (Thomas, J., dissenting) (joined by Rehnquist, C.J. and Scalia, J.) (criticizing the entire idea of a “dormant” Commerce Clause); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (expressing similar doubts).

²⁵² *See supra* Part I.C (arguing that it should); *supra* note 83 (citing scholars taking this position).

²⁵³ *See Missouri v. Jenkins*, 515 U.S. 70, 112–13 (1995) (O'Connor, J., concurring) (noting congressional power in this context).

²⁵⁴ *See supra* text accompanying notes 35 & 93–94 (noting lack of incentives for careful congressional fact-finding in legislation impacting the federal-state balance).

²⁵⁵ *See, e.g., supra* notes 93–94.

(here, Fourteenth Amendment law) and relative congressional and judicial competence and authority when finding the relevant facts. Up to this point the argument has cut in favor of broad congressional fact-finding power. First, it has established that Fourteenth Amendment law identifies as relevant the types of questions that Congress possesses superior authority to answer.²⁵⁶ Second, substantive Fourteenth Amendment doctrine also suggests relatively less concern about state prerogatives, and hence less concern about congressional findings justifying encroachments on state autonomy.²⁵⁷

Nevertheless, federalism still matters in Fourteenth Amendment law. While scholars heatedly debate the Amendment's historical record, that record establishes at least that the Fourteenth Amendment was not intended to completely centralize our government.²⁵⁸ Thus, it still matters if, as we assume for purposes of argument, congresspersons do not particularly care about the federal-state balance when legislating. That assumed lack of concern introduces a discordant note into an otherwise unambiguous argument favoring broad judicial deference to enforcement legislation fact-finding.

This conflict unavoidably muddies our analysis of the deference question in Enforcement Clause cases. The presumed lack of incentives for Congress to act with care when affecting the federal-state balance requires some countervailing judicial review. However, in considering the proper vehicle for such judicial scrutiny, it helps to recall Principle 6's idea of relative judicial and congressional competencies.²⁵⁹ While that Principle concerns itself with relative competencies when dealing with fact-findings, its underlying insight—that the branches should focus on what they are best at—has broader application.

In our situation, this insight suggests that courts may better police congressional overreach by reading enforcement legislation narrowly, in a way analogous to its clear-statement approach to construing federal legislation enacted under Congress's Article I powers. The theory

²⁵⁶ See *supra* Part III.B.1.a.

²⁵⁷ *Id.*

²⁵⁸ See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 114 (1988) (noting that both Democrats and Republicans in the Congress enacting the Fourteenth Amendment feared centralized power and did not intend for the Amendment to accomplish that result); see also Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 *STAN. L. REV.* 1259, 1307 (2001) (“[I]n light of the Fourteenth Amendment’s continued commitment of the nation to a federal form of government, there is sound reason to conclude that its provisions were not intended fully to nationalize and centralize government authority.”).

²⁵⁹ See *supra* Part II.B.6 (explaining the deference principle based on the relative nature of congressional and judicial expertise and authority).

here is that courts are better at statutory interpretation—even instrumentally motivated interpretation²⁶⁰—than they are at reviewing certain types of fact-finding. This analogy is not perfect. The Enforcement Clause by definition only authorizes legislation that targets state government conduct; thus, it fits uneasily with an interpretive approach that requires a clear statement before a statute is held to apply to state actors.²⁶¹ But one could adjust this rule to account for the different context of the Enforcement Clause. For example, the Court could require clear statements before enforcement legislation imposes significant burdens on states, such as unusually burdensome liability or remedial provisions.

Other options, more focused on fact-finding review, also exist for courts to protect federalism when reviewing enforcement legislation. First, this Article has already suggested ways in which courts can appropriately review the value-based facts that are often critical components of enforcement legislation.²⁶² Second, courts could review findings more stringently by adhering to Principle 4, and according more stringent review when other facts in the statute have proven faulty.²⁶³ Third, Principles 2 and 3 provide tools for courts to cabin extravagant congressional findings that shade unacceptably into the realm of legal conclusions.²⁶⁴

The basic point here is straightforward: If Congress's fact-finding cannot be trusted when it supports legislation that recalibrates the federal-state balance, the difficult truth is that, for different reasons,²⁶⁵ courts may not do much better. In such a case, courts should review Congress's handiwork through approaches more within the judicial ken, rather than simply larding their own incapacities on top of Congress's.

²⁶⁰ See, e.g., Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994) (noting the tension between textualist interpretive methodologies, which attempt to discern the meaning of statutory language, and clear statement rules, which “erect potential barriers to the straightforward effectuation of legislative intent”).

²⁶¹ *E.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (requiring a clear statement before an Article I–based law is held to abrogate state sovereign immunity).

²⁶² See *supra* text accompanying notes 243–44 (suggesting an appropriate focus for judicial review of such fact-finding).

²⁶³ See *supra* Part II.B.4 (explaining this deference principle).

²⁶⁴ See *supra* Part II.B.2–3 (explaining deference principles that restrict congressional latitude to find facts that constitute or shade into legal findings).

²⁶⁵ See *supra* Part III.B.1 (explaining those reasons).

C. Fact-Finding in the Partial-Birth Abortion Ban Act

The criteria set forth in Part I, as translated into Part II's deference principles, make out a relatively weak case for judicial deference to some of the congressional findings in the PBABA. As an initial matter, one can note that the authority rationale cuts against such deference, given the counter-majoritarian nature of the abortion right. But one can also reach deeper insights.

1. The PBABA's Findings

In enacting the PBABA, Congress made a wide-ranging and detailed set of findings, from empirical facts about the medical necessity of partial-birth abortion and its place in the medical-school curriculum,²⁶⁶ to evaluative facts about the procedure's impact on public perceptions of the medical profession,²⁶⁷ to moral evaluations of the procedure²⁶⁸ and its effects on society, to legal findings about the appropriate role for congressional findings in constitutional litigation.²⁶⁹ The breadth of these findings is unsurprising when one realizes that Congress was acting against the backdrop of the Court's decision in *Stenberg v. Carhart*,²⁷⁰ which struck down Nebraska's partial-birth abortion ban in part because of its lack of a women's health exception.²⁷¹ In particular, the PBABA's findings aimed to preempt any judicial insistence on a medical exception, by finding (several times) that the procedure "is never medically necessary."²⁷²

The statute also addressed topics beyond the applicability of *Stenberg's* health exception requirement. Taking a further cue from the Court's abortion-rights jurisprudence, the PBABA also found that partial-birth abortions pose risks to women's health; indeed, it went so far as to conclude that its ban on that procedure would "advance the

²⁶⁶ See Partial Birth Abortion Ban Act of 2003, Pub. L. 108-105, 117 Stat. 1201 § 2(14)(B) (making this finding).

²⁶⁷ See *id.* § 2(14)(K) ("[P]artial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process . . .").

²⁶⁸ See *id.* § 2(1) ("A moral [and] ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure.").

²⁶⁹ See *id.* § 2(8)–(12) (making various findings about congressional power to find facts under Supreme Court precedent, all indicating that judicial precedent suggested significant congressional latitude subject only to deferential judicial review).

²⁷⁰ 530 U.S. 914 (2000).

²⁷¹ See *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007) (noting that the PBABA was a response to *Stenberg*); see also M. Katherine Burgess, *Gonzales v. Carhart: No Limits to What Congress May Now "Find,"* 8 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 327, 342 (2008) ("Congress passed the Partial Birth Abortion Ban Act of 2003 in direct response to the Court's 2000 decision in *Stenberg v. Carhart*.").

²⁷² Pub. L. No. 108-105, §§ 2(1), (2), (5), (13), (14)(E). See also *id.* § 14(O) (procedure is "never medically indicated").

health interests of pregnant women.”²⁷³ It also found that the ban would “promote[] respect for human life.”²⁷⁴ These two findings relate closely to the interests the plurality in *Planned Parenthood v. Casey*²⁷⁵ found sufficient to justify abortion restrictions at all stages of pregnancy.²⁷⁶

Finally, it is unsurprising that the PBABA made several findings about the appropriate role for congressional findings themselves.²⁷⁷ As noted above and explained in more detail below, the fate of the PBABA turned largely on whether the Court would accept Congress’s findings about partial-birth abortions. Congress’s findings about the level of deference due statutory findings makes the centrality of the deference question even clearer. So understood, the PBABA raises several issues addressed by Part II’s deference principles.

2. Moral Judgments and Abortion-Rights Doctrine

The PBABA features findings that can only be described as moral judgments. The findings describe a “moral . . . and ethical consensus” that partial-birth abortion is “a gruesome and inhumane procedure,”²⁷⁸ whose banning “promotes respect for human life.”²⁷⁹ Such moral judgments are not rendered inappropriate by some supposed prohibition on legislatures expressing moral beliefs in legislation,²⁸⁰ or by women’s ultimate right to choose to have an abortion. Indeed, abortion-rights doctrine expressly makes room for the state to express these beliefs, as long as they accommodate the woman’s ultimate right.²⁸¹

However, because abortion-rights doctrine does recognize women’s ultimate right to undergo a pre-viability abortion, the Constitution, as interpreted by the Court, stands in the way of

²⁷³ *Id.* § 2(14)(F).

²⁷⁴ *Id.* § 2(14)(G).

²⁷⁵ 505 U.S. 833 (1992).

²⁷⁶ *Cf. Roe v. Wade*, 410 U.S. 113, 163 (1973) (concluding that the interest in women’s health became compelling, and thus justified state regulation, only after the first trimester, and that the state’s interest in protecting the potentiality of life in the fetus became compelling, and thus justified regulation only after viability, which was normally thought to be at the end of the second trimester).

²⁷⁷ *See supra* note 269.

²⁷⁸ PBABA, Pub. L. 108-105, § 2(1); *see also id.* § 14(N) (“brutal and inhumane procedure”).

²⁷⁹ *Id.* § 2(14)(G).

²⁸⁰ *Compare* *Lawrence v. Texas*, 539 U.S. 558, 599 (2004) (Scalia, J., dissenting) (arguing that the majority’s analysis means that morality is never a legitimate reason for legislation), *with Casey*, 505 U.S. at 877 (explaining that the government has the right to show its “profound respect for the life of the unborn”).

²⁸¹ *See Casey*, 505 U.S. at 877 (allowing states to regulate abortion in support of their respect for fetal life, as long as the regulation does not constitute an undue burden).

Congress's authority-based claim to deference when it makes these moral judgments. As with enforcement legislation, underlying abortion-rights doctrine acts as a circuit breaker that prevents the full application of otherwise appropriate deference claims.²⁸² Here, the deference claim rests on Congress's authority to speak for the nation's moral sense. But because abortion-rights doctrine prevents Congress from instantiating an anti-abortion moral judgment into a law that constitutes an undue burden, that judgment can justify abortion restrictions only up to the point of the undue burden line. Just as with the Jim Crow example discussed earlier,²⁸³ Congress has the authority to make findings reflecting the moral judgment of the American people, but only up to the point that We the People have made a conflicting moral judgment.

3. *Abortion Doctrine, Purpose Inquiry, and Deference*

a. The Precisely Targeted Nature of the "Medical Necessity" Finding

Abortion doctrine plays an additional role in the deference inquiry. That doctrine requires that abortion laws include an exception for the health of the pregnant woman, even for post-viability abortion restrictions. When the PBABA found that partial-birth abortions were never medically necessary, it essentially pushed the button triggering the escape hatch from this limitation. Thus, Principle 3,²⁸⁴ which calls for heightened scrutiny of findings that precisely target a right, suggests that courts had good reason to question the medical necessity finding.

The equal protection analogy explained earlier²⁸⁵ applies here. Hypothesize a plaintiff who alleges an equal protection violation in a statute that imposes a severely racially disparate burden. In response, the government-defendant argues that the law lacks discriminatory intent. In such a case the court properly examines the statute's context more carefully to determine the legislature's true motive.²⁸⁶ So too

²⁸² See *supra* note 238 and text accompanying *supra* notes 244–46 (discussing the role of doctrine).

²⁸³ See *supra* text accompanying note 116 (discussing this example).

²⁸⁴ See *supra* Part II.B.3 (discussing that principle).

²⁸⁵ See *supra* text accompanying notes 144–47 (explaining that analogy).

²⁸⁶ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (setting forth the factors and the process for determining whether a statute purposely discriminates, and noting that disparate impact is "an important starting point" for the inquiry); see also *Hernandez v. New York*, 500 U.S. 352, 377–78 (1991) (Stevens, J., dissenting) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened, including evidence of disparate impact. The line between discriminatory purpose and discriminatory impact is neither as bright nor as critical as the

with abortion: Given the right's importance, it behooves a court not to defer to the statute's stated purpose, buttressed by purported findings, but to investigate more carefully, especially when such "disparate impact" exists. Part of that investigation must include a closer-than-normal look at the findings allegedly supporting the legislature's asserted legitimate interests.

b. Objections

One might object that this analysis is inconsistent with the previous Subpart's more generous attitude toward Congress's fact-finding when it enacts Enforcement Clause legislation such as the ADA and GINA.²⁸⁷ According to this objection, if suspicion is justified when Congress just so happens to find that partial-birth abortions are never medically necessary, then why isn't suspicion also justified when Congress just so happens to find that disability or genetics discrimination is fundamentally unfair?

But there is a difference, and it lies in the nature of the fact and Congress's appropriate role in finding it. The type of fact-finding at issue in the ADA and GINA has nothing to do with Congress's use of expertise and everything to do with the simple but powerful fact that federal legislation constitutes the most accurate governmental expression of our nation's values. In a very real sense, Congress employs its authority to express such values by enacting into law the views of its constituents, the American people. To overstate the case by paraphrasing Justice Jackson, when identifying the fundamental values of the American people, Congress is not representative because its findings are right, but its findings are right because it is representative.²⁸⁸

By contrast, findings about the medical appropriateness of a certain abortion method have nothing to do with values, and everything to do with the current state of medical practice. As suggested by Principle 1,²⁸⁹ such empirical facts are particularly appropriate for judicial scrutiny. This is not to say that Congress lacks expertise to find empirical facts. However, that expertise is latent: It has to be consciously (and conscientiously) employed by Congress in the process of

Court appears to believe." (internal quotations and citations omitted)); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 281 (1979) (Stevens, J., concurring) (suggesting that the disparate impact and discriminatory intent questions are even more closely related than suggested by the Court's doctrine).

²⁸⁷ See *supra* Part III.A (analyzing the deference owed congressional findings in GINA and the ADA).

²⁸⁸ See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

²⁸⁹ See *supra* Part II.B.1 (explaining that principle).

making a good-faith inquiry into the empirical question. When its empirical findings just so happen to land precisely on the button that triggers the legal doctrine's escape hatch, Principle 3²⁹⁰ counsels skepticism whether Congress has really used its expertise, or whether its actual intent was simply to land on that button, with its findings serving merely as a tool to ensure a precise landing.

A second difference lies in how substantive abortion doctrine treats questions of legislative purpose. Current doctrine requires courts to investigate the government's purpose in limiting access to abortion.²⁹¹ Of course, in some sense courts must always engage in a purpose inquiry—judicial review of even a non-controversial law still entails consideration of whether the law was motivated by an illegitimate purpose. But abortion doctrine is unusual in that it provides significant protection for the individual right while also allowing significant state regulation undertaken for particular purposes. *Casey's* undue burden standard attempts to reflect this balance, in part by focusing on the government's purpose in regulating abortion.²⁹²

This doctrinal framework elevates purpose inquiry to a critical position. The importance of motivation—not just formally, but practically, given *Casey's* recognition of both the importance of the right and the legitimacy of certain government motivations in curbing that right—opens the door for Congress to use findings to disguise an abortion law's real motivation. Given a doctrine where government's motivation matters so much, and thus where legislators feel great temptation to disguise their purpose, precisely targeted findings that establish a legitimate motivation are appropriately subject to heightened judicial scrutiny. In such a case it is harder to presume legislative good faith, and easier to suspect that the real purpose is to impede women's exercise of their rights.²⁹³ In the case of the PBABA, the finding that partial-birth abortions are never medically necessary

²⁹⁰ See *supra* Part II.B.3 (discussing targeted findings).

²⁹¹ See *Casey*, 505 U.S. at 878 (holding that an “undue burden” on the abortion right is one where the “purpose or effect” of a law “is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability”).

²⁹² See *id.* (noting the role of purpose in abortion-rights doctrine).

²⁹³ There is at least a slight irony in the fact that *Casey's* recognition of significant state interests throughout the pregnancy effectively requires heightened judicial scrutiny of legislative fact-findings. However, this irony disappears when one realizes that the existence of those interests creates a convenient hiding place behind which a legislature can obscure more nefarious motives for legislation restricting abortion. Thus, after *Casey*, government may have legitimate interests in legislation that effectively limits the abortion right, but this increased freedom of action requires more careful attention to the government's actual motivations, to determine whether the legislature is in fact staying within the bounds of permissible goals.

precisely targets the right, as it supports the argument that the PBABA is designed to protect women's health by banning a procedure that is at best useless and at worst dangerous.²⁹⁴

Without doubt, such deference questions pose difficult challenges. A healthy dialogic process between courts and legislatures includes the latter using their fact-finding capability to answer the empirical questions courts have held to be constitutionally relevant. But even to state the argument this way reveals again the danger that legislatures may use that capability to subvert, rather than apply, courts' constitutional judgments. Heightened judicial scrutiny of findings that raise this risk therefore becomes quite reasonable. This is true at least where, as with the medical necessity finding in the PBABA, the finding does not implicate an authority-based justification for deference, and where the finding's foundation in Congressional expertise is called into doubt by its suspicious proximity to the very fact required to justify impairing the right. At the very least, when other factors cut in favor of heightened scrutiny, an unusually tight fit between judicial doctrine and legislative findings augments the argument against deference.

Such review is no more disrespectful of Congress than considering, in the equal protection context, discriminatory impact as probative to the discriminatory intent inquiry. If a law imposes a significantly disparate burden on Blacks and Whites, nobody should be offended if a court investigates more carefully whether something constitutionally suspect is afoot.²⁹⁵ So too with fact-finding: If a finding significantly impacts the exercise of a constitutional right, nobody should be offended if a court investigates the finding more carefully. Given the unworkability of more direct review of the legislature's process, this indirect method of judicial review may be the best mechanism reasonably available to ensure that Congress uses its fact-finding tools conscientiously.

4. Principle 4: Faulty Fact-Findings

The PBABA example also exemplifies Principle 4's call for less deference when related fact-findings have been discredited. In *Gonzales*, the Court noted that Congress was simply wrong in finding that certain abortion methods were not taught in American medical schools.²⁹⁶ However, the Court essentially brushed off that misfire

²⁹⁴ See PBABA, Pub. L. No. 108-105, §§ 2(5), (13), (14)(A), (14)(O) (finding the procedure to be risky for women).

²⁹⁵ See *supra* note 286 and accompanying text (noting the importance of disparate impact in triggering closer judicial scrutiny of a law for illegitimate intent).

²⁹⁶ See *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007) (noting this erroneous finding).

without letting it affect the deference it accorded the statute's other findings.

This was a mistake. The existence of one bad finding—especially one that is not reasonably open to dispute—should cast doubt on Congress's credibility. Indeed, in the sometimes-desperate search for standards by which to determine if Congress has done its work well,²⁹⁷ surely a confident conclusion that one finding is defective constitutes unusually persuasive evidence of generally inaccurate legislative fact-finding. As noted in the discussion of Principle 4,²⁹⁸ citing other findings' flaws as a reason for more careful review of the remaining ones also incentivizes legislators both to be more judicious about including poorly supported findings and more careful about supporting the findings they do include.²⁹⁹

D. *A Fact-Finding Hybrid: A "Human Life" Finding*

The previous two Subparts have considered congressional fact-findings in, respectively, rights-enforcing and rights-limiting legislation. This Subpart focuses on legislation that combines these two characteristics—legislation that restricts abortion but is founded on the platform of rights-enforcement. In particular, it considers how the deference analysis should play out if Congress seeks to protect the Fourteenth Amendment rights of the unborn by finding that the unborn constitute human life, who require enforcement legislation in order to protect their Fourteenth Amendment rights. This is not a purely hypothetical exercise; Congress has considered such legislation before.³⁰⁰ Considering how this Article's deference principles would play out in this difficult example yields further insights about the deference question.

A finding that the unborn constitute human life would have several characteristics relevant to the analysis so far. First, this finding

²⁹⁷ Cf. Borgmann, *supra* note 24, at 40 (arguing that legislators are apt to find mistaken facts when legislating on "hot button" issues).

²⁹⁸ See *supra* Part II.B.4 (discussing Principle 4).

²⁹⁹ Even application of this straightforward Principle is not entirely free of ambiguity. For example, it seems inappropriate to apply Principle 4 when the flawed finding in question consists of a moral judgment, such as Congress's moral evaluation of partial-birth abortions. Even if such a finding might not be given controlling weight, for example, if it conflicts with a judgment embedded in the Constitution that abortion is important enough to be protected, *see supra* Part III.C.2, this type of "mistake" is not of the sort that should trigger skepticism of other statutory findings. The "mistakes" that under Principle 4 appropriately justify heightened scrutiny of other findings are best understood as mistakes dealing with empirical findings. Only such mistakes suggest the lack of legislative care that justifies Principle 4's rule.

³⁰⁰ See, e.g., H.R. 1096, 112th Cong., 1st Session (2011); H.R. 2533, 111th Cong., 1st Session (2009); H.R. 227, 111th Cong., 1st Session (2009) (examples of such legislation).

must be described as predominantly value-based rather than empirical. Just as finding eighteen-year-olds' educational levels as an empirical matter does not obviate a need to make a value judgment in determining whether they have the maturity or intelligence to vote,³⁰¹ so too finding biological facts about fetal development does not obviate the need to make a normative judgment when determining when personhood begins. Other things being equal, this conclusion would presumably mandate considerable deference to Congress.

But other things would not be equal. First, this finding has the result of directly targeting the abortion right, by fundamentally altering the balance that the Court has struck ever since *Roe* between the woman's right to terminate and the state's interest in regulating abortion. Of course, the finding would achieve this result by altering the input into the balancing, rather than dictating the balancing itself. But, nevertheless, the finding would have the inevitable effect of defeating the woman's right.

Thus, the situation would be one in which a moral judgment made by Congress would have as its inevitable effect the complete destruction of a Court-announced right. So understood, this situation is analogous to the Jim Crow example set forth earlier.³⁰² Just as in that case "We the People's" decision to make a normative judgment in favor of racial equality trumps any subsequent moral judgment made at the statutory level, so too here any subsequent moral judgment that effectively destroys the abortion right cannot supersede that right, which the Court has determined to exist within "We the People's" grant of rights in the Fifth and Fourteenth Amendments.

This is not to deny the deeply held values of those who would favor such a law exactly because they believe it would protect human life. But if the Court is in fact supreme in stating constitutional meaning, and if that meaning includes recognition of an abortion right, then a legislative finding of fetal life simply could not coexist with the Constitution as currently interpreted by the Court.

E. The Voting Rights Act

Befitting its centrality to the fate of individual rights legislation, the deference question plays a major role in the most important current issue involving federal legislation affecting individual rights: the fate of the preclearance requirements of the Voting Rights Act

³⁰¹ See *supra* text accompanying note 79 (noting the need for value judgments in that situation).

³⁰² See *supra* text accompanying note 120 (discussing that example).

(VRA).³⁰³ It is no overstatement to describe the VRA as a foundational civil rights law,³⁰⁴ and the preclearance requirements as its heart.³⁰⁵ Yet the law rests on a shaky constitutional foundation; in 2009 the Court barely avoided having to rule on the question whether it exceeds Congress's power to enforce the Reconstruction Amendments.³⁰⁶

Litigation since that 2009 case continues to raise this question. On May 18, 2012, in *Shelby County v. Holder*, a panel of the D.C. Circuit issued a split decision upholding the constitutionality of the 2006 extension of the VRA's preclearance provisions.³⁰⁷ The *Shelby County* court considered several important legal issues about the VRA's constitutionality. For our purposes, however, the case is important for its consideration of the deference question in the context of a foundational civil rights law that nevertheless raises serious constitutional issues. As such, the case presents both a timely and an important case study of the deference principles this Article offers.

As with all enforcement legislation, the constitutional question the VRA presents is whether the statute constitutes an appropriate response to the constitutional violations it targets. The violation the VRA targets is racial discrimination in voting. When Congress enacted the original VRA in 1965, it amassed a voluminous record demonstrating that the jurisdictions covered by the preclearance provisions had long engaged in a variety of stratagems designed to frustrate minority voting rights.³⁰⁸ By the time *Shelby County* reached the D.C. Circuit, the question had become whether the VRA had so

³⁰³ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)). The preclearance requirements are codified at 42 U.S.C. § 1973c.

³⁰⁴ See, e.g., Luis Fuentes-Rohwer, *Is This the Beginning of the End of the Second Reconstruction?*, 59 FED. LAWYER 54, 54 (2012) ("The Voting Rights Act (VRA) of 1965 is, without question, the most important and effective civil rights statute in U.S. history.").

³⁰⁵ See, e.g., William Colbert Keady & George Colvin Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741, 755-56 (1981) (describing one form of the preclearance provisions as "the most important segment of the Voting Rights Act").

³⁰⁶ See *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (ruling for the plaintiff governmental unit without reaching the plaintiff's argument that the VRA's preclearance requirements exceed Congress's power).

³⁰⁷ 679 F.3d 848 (D.C. Cir. 2012). In brief, those provisions, found in Section 5 of the original statute, require covered jurisdictions to obtain federal approval ("preclearance") before changing state election procedures. On review, federal authorities determine whether those proposed changes have the purpose or effect of denying or abridging minorities' voting rights. See *id.* at 854-55 (explaining the preclearance provisions). Unless the context indicates otherwise, this Article sometimes refers to the VRA's preclearance provisions as simply "the VRA."

³⁰⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (describing the record as "voluminous," and demonstrating "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution").

successfully frustrated those stratagems that its undeniable and unequal³⁰⁹ intrusion into state sovereignty was no longer justified by the need to safeguard those rights.

Strikingly, neither the majority nor the dissent found significant fault with Congress's empirics. For example, neither side questioned findings about the number of VRA lawsuits brought by the Justice Department, or the number of administrative requests for preclearance that the Justice Department rejected as violating minorities' voting rights.³¹⁰ Rather, the judges sparred over the conclusions to be drawn from those findings. In particular, the majority and dissent disagreed about what those facts implied about the continued special prevalence of discrimination in the covered jurisdictions, and the corresponding need for special federal oversight.³¹¹

Translated into this Article's terminology, the dispute in *Shelby County* concerned deference to Congress's evaluative or predictive judgments. Indeed, at several points the majority described the types of judgments at issue as predictive,³¹² even citing as authority for the appropriate level of deference the Supreme Court's decision in *Turner Broadcasting*, discussed earlier in this Article as exemplifying review of such judgments.³¹³ This heavy focus on predictive judgments should not be surprising, especially in enforcement legislation. The doctrinal test for enforcement legislation requires that Congress adjudge whether a particular enforcement provision is necessary to vindicate the Fourteenth Amendment right at issue.³¹⁴ Of course, Congress may still stumble in finding the actual empirical facts. But given the doctrine's requirement that Congress assess the need for particular legislation, when courts then confront the deference question, much of the action will turn, as it turned in *Shelby County*, on the accuracy of Congress's predictive judgments.

³⁰⁹ An important component of the argument against the VRA was that the preclearance provisions applied only to some states and local jurisdictions. 679 F.3d at 858–59.

³¹⁰ *But see* 679 F.3d at 877–78 (expressing concern about data on successful cases alleging violations of another VRA provision).

³¹¹ *Compare, e.g.*, 679 F.3d at 862 (“Congress considered . . . evidence that, in its judgment, showed that attempts to discriminate persist and evolve, and that [preclearance] is still needed to protect minority voters in the future” (internal quotations and brackets omitted)), *with id.* at 898 (Williams, J., dissenting) (finding this inferred deference insufficient to justify Congress's action).

³¹² *See* 679 F.3d at 871–73; *see also id.* at 857–58 (emphasizing the predictive nature of Congress's claims).

³¹³ *See, e.g.*, 679 F.3d at 861, 868, 871–73 (citing *Turner*); *supra* text accompanying notes 74–77 (discussing *Turner*).

³¹⁴ *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment” (internal quotation and brackets omitted)).

As explained both in Part I.B's discussion of the different types of facts Congress finds and in Principle 1,³¹⁵ predictive judgments usually demand relatively greater judicial deference. This is true in part because such judgments often require ideological or value-based judgments, which Congress has more authority to make than courts. In the VRA, extrapolating from the (empirically findable) number of successful lawsuits alleging violations of other parts of the statute to conclude that the preclearance provisions remain necessary to protect minority rights entails a judgment that such successful lawsuits reveal persistent discrimination that requires strong countermeasures.³¹⁶ Even more value-based was Congress's conclusion that the VRA's preclearance provisions "deterred covered jurisdictions from even attempting to enact discriminatory voting changes."³¹⁷ Concluding that a regulation deters undesirable conduct involves more than mere empirics; it requires judgment and a particular set of beliefs about the world, similar to a conclusion that market regulations correct misconduct that would not be subject to self-correction in an unregulated market.³¹⁸ As befitting the intermediate status of predictive judgments as midway between empirical facts and pure value choices, such judgments partake of both empirics and values.

In theory it may be appropriate for a reviewing court to "pick apart" such judgments, separating their components and applying a more searching review to their empirical parts. Indeed, the dissenting judge in *Shelby County* did this when he questioned, as a matter of logic, the probative value of the actual number of successful VRA lawsuits.³¹⁹ But at a certain point such judgments are not susceptible to dissection. The dissenting judge's skeptical, independent review of such empirical facts' probative value crossed the line into second-guessing Congress's own judgment about those facts' deeper meaning.³²⁰ In essence, logic often shades into values or ideology.³²¹ To the extent that deeper meaning can only be accessed through

³¹⁵ See *supra* Part II.B.1 (discussing Principle 1).

³¹⁶ See 679 F.3d at 869; see also *id.* at 867–68 (according to Congress the leeway to determine "that the absolute number of [Justice Department] objections [to state preclearance requests] represented the better indicator of the extent of discrimination in covered jurisdictions" than the decline in the Department's rate of objections).

³¹⁷ H.R. Rep. No. 109-478, at 24.

³¹⁸ See *supra* note 71 (providing an example of the ideological nature of evaluative findings).

³¹⁹ 679 F.3d at 895–99.

³²⁰ See, e.g., 679 F.3d at 882 (critiquing the dissent's "speculat[ion]" about the significance of the low rate at which jurisdictions have "bailed out" of the preclearance provisions).

³²¹ See *supra* note 71 (providing an example of how ideology affects the rational process of empirically based prediction).

application of a decisionmaker's own understanding of the world—an understanding informed by values as much as by logic—a judge deciding the deference question will have to decide whose values govern: hers, or Congress's.³²²

F. Coda: The Centrality of Doctrine

The examples analyzed above all demonstrate the inevitable centrality of doctrine to the deference question. In Enforcement Clause legislation, the Court's embrace of an all-encompassing but extremely vague equal protection doctrine necessarily suggests congressional authority to fill in the blanks via its enforcement power. Similarly, its adoption of an abortion-rights doctrine that recognizes legitimate government interests in regulating abortion, but leaves the ultimate choice to the woman, necessarily requires the Court to scrutinize findings carefully to distinguish between those that support appropriate exercises of state regulatory power and those that raise suspicion of an unconstitutional purpose.

For its part, the finding supporting the hypothetical human-life legislation, by supporting enforcement of one set of individual rights at the expense of another, collides with Supreme Court doctrine recognizing the latter right. As such, the substantial deference that finding merits as a moral judgment does not outweigh the moral judgment "We the People" made when we enacted the constitutional provisions the Court has interpreted as bestowing women's competing and irreconcilable right. Finally, Enforcement Clause doctrine required the judges in *Shelby County* to decide whether to apply their own or Congress's understanding of what the empirical facts meant about deeper truths that supported or undermined the statute's necessity.³²³ Such a decision cannot be made in the abstract, without a doctrinal thumb on one side of the scale or the other—in the case of the VRA, either a presumption that Congress could more easily demonstrate the statute's necessity, given that it targeted racial

³²² Cf. 679 F.3d at 898 (Williams, J., dissenting) (casting doubt on the deterrence argument for the preclearance provisions, on the ground that "it is plainly unquantifiable" and, if credited, would allow their indefinite extension). See also *id.* at 871 (majority opinion) (conceding that "the claimed [deterrence] effect is hard to measure empirically and even harder to consider judicially").

³²³ See 679 F.3d at 873 ("The point at which [S]ection 5's strong medicine becomes unnecessary and therefore no longer congruent and proportional turns on several critical considerations, including . . . the continued need for [S]ection 5's deterrent . . . effect; and the adequacy of [S]ection 2 litigation.").

discrimination, or the opposite presumption, given its deep intrusion into state sovereignty.³²⁴

The centrality of doctrine in all these examples reveals the wisdom of those scholars who have focused on doctrine as a crucial component in the deference inquiry.³²⁵ But centrality is not exclusivity. This Article has revealed how the authority and expertise bases for deference claims and the nature of the facts for which deference is claimed also influence the calculus. They influence the deference analysis by operating on what we might describe as the default deference level that is dictated by doctrine. Thus, for example, the empirical nature of Congress's finding in the PBABA about the lack of medical necessity for partial-birth abortions justifies reduced judicial deference even beyond the baseline skepticism that should apply given the nature of the abortion right.³²⁶ By contrast, the moral nature of some of the most important findings supporting equal protection enforcement legislation justifies deference that reinforces the doctrine's basic choice in favor of congressional power. The moral nature of the human life finding discussed above³²⁷ would normally merit similar deference, were it not for abortion-rights doctrine's insistence that, when all is said and done, the Constitution requires that the woman have the ultimate choice to terminate a pregnancy before viability. Finally, the inherently value-based component of the predictive judgments underlying the VRA pushes the proper tenor of judicial review toward deference, despite the statute's deep intrusion into state sovereignty.

Adding into the deference calculus these extra-doctrinal considerations, as well as the others identified in Part II, helps sketch out principled and more complete justifications for deference to congressional fact-finding. As long as the Court reserves for itself ultimate law-interpreting power, finding space for such fact-finding is critical. That space must be cabined, lest the fact-finding power morph into a *de facto* congressional power to interpret the Constitution. But failure

³²⁴ Compare 679 F.3d at 860–61 (majority opinion) (relying on the presumptive unconstitutionality of racial discrimination to shift the burden of proof), *with id.* at 885 (Williams, J., dissenting) (noting the burdensomeness of the preclearance requirement and mandating a tighter fit in order for such requirements to satisfy constitutional strictures). With regard to the VRA's intrusion on state sovereignty, however, it bears repeating that judicial doctrine construing the Reconstruction Amendments suggests that such intrusions may be legitimate, or at least more legitimate than similar intrusions based on Congress's Article I powers. See *supra* Part III.B.1.a.

³²⁵ See, e.g., FAIGMAN, *supra* note 24 (noting the importance of doctrine to the deference question); McGinnis & Mulaney, *supra* note 12, at 74 (same).

³²⁶ See *supra* Part II.B.1 (arguing for reduced deference for empirical claims).

³²⁷ See *supra* Part III.D (discussing "human life" legislation).

to allow any such space threatens to squelch any meaningful Court-Congress dialogue on constitutional meaning, and, by extension, any direct role for the People in participating in the process of constitutional construction.

CONCLUSION

The previous paragraph restates the core problem presented by the deference issue: As encapsulated by the epigram starting this Article, if one controls the facts in a case, one likely controls the result, and, for all practical purposes, the law.³²⁸ This Article has identified the considerations that should properly influence the inquiry into how much deference Congress should enjoy in finding those facts. It has canvassed the main criteria, synthesized them into several common-sense, workable principles, and applied those principles to real-world examples.

This Article is not offered as an authoritative resolution of the deference question. Instead, it aspires to contribute to other scholars' attempts to explain how authority, expertise, doctrine, and the nature of facts all interact to allocate fact-finding authority between Congress and the courts. More generally, it is intended to contribute to the important work scholars have done in delineating the proper scope of congressional and judicial authority in the project of constitutional interpretation and implementation.

Much useful work remains to be done to amplify this Article's analysis and apply it to other contexts. The aridity and inconsistency of the Court's statements on this issue, and its importance to actual constitutional outcomes, make this follow-on work critical. Only then can scholars hope to clarify the appropriate division of labor between Congress and the courts in the project of constructing and applying constitutional meaning. This Article has built on past scholarship to create an analytical template on which this subsequent work can be based. But it is surely not the last word.

³²⁸ This same fundamental truth is captured in another epigram, attributed to Chief Justice Hughes: "Let me find the facts for the people of my country, and I care little who lays down the general principles." Remark attributed to Chief Justice Hughes, *quoted in* *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942) (Frank, J.); *see also* *NLRB v. Curtin-Matheson Scientific*, 494 U.S. 775, 818 (1990) (Scalia, J., dissenting).