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Politics v. The Cloister: Deciding When The Supreme Court Should Defer To Congressional Factfinding Under The Post-Civil War Amendments

Saul M. Pilchen*

"The Supreme Court has no right to make constitutional determinations based on unsound factual assumptions."

Introduction

Lawyers know that questions of law and questions of fact are important touchstones of sound constitutional policymaking. Marbury v. Madison\(^2\) teaches that the Supreme Court must ultimately determine the meaning of the law.\(^3\) But who should determine the facts? This article considers one aspect of that question by exploring whether or to what extent the Court should defer to (i.e., consider itself bound by) congressional determinations of fact when those facts are used to justify legislation "enforcing" the post-Civil War amendments.\(^4\)

In the past quarter century, the enforcement clauses of the thirteenth, fourteenth, and fifteenth amendments have been invoked by Congress, the Court, and litigants to support the constitutional validity of broad-based and controversial civil rights legislation, including

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1 The Supreme Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 25 (1968) (statement of Senator Sam Ervin).

2 5 U.S. (1 Cranch) 137 (1803).

3 Specifically, "the law" refers to the Constitution and the laws of the United States. Under its jurisdictional statute authorizing review of state court rulings, 28 U.S.C. § 1257, the Supreme Court must accept as final a state court’s interpretation of its own law. See Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630-33, 635 (1874). One commentator has stated that Marbury allows the Court to expound upon the law "in a universal sense, not merely as a rule of decision, and with definitiveness, not merely as an expositor coordinate with the other two branches of government." Hazard, The Supreme Court as a Legislature, 64 CORNELL L. REV. 1, 7 (1978).

4 Each of the post-Civil War constitutional amendments, 13th, 14th, and 15th, has a clause granting Congress the power to enforce its provisions by "appropriate legislation." E.g. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").
the Civil Rights Act of 1866, the Voting Rights Act of 1965 (as amended), the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (as amended), and the “minority business enterprise” section of the Public Works Employment Act of 1977. Because of the nature and impact of such legislation, contemporary use of the enforcement power almost inevitably entails either an alteration of traditional federal-state relations, or a reexamination of what constitutes proper treatment of disadvantaged minority groups by private individuals and government.

This article recognizes that Congress’ enforcement power is plenary. In ratifying enforcement legislation, however, the Court invariably emphasizes that Congress had before it, as a “factual predicate” to passage, evidence sufficient to isolate or rationally speculate as to the existence of unremedied violations of the substantive amendments. A “factfinding” theory of Congress’ enforcement power, resting on two assertions, has emerged from the cases. The first assertion posits that Congress has a primary legislative role under the enforcement clauses based upon its finding as a matter of fact actual or potential violations of the substantive amendments. The second assertion holds that this congressional preeminence is justifiable within our constitutional scheme because Congress has an institutional or structural advantage over the courts in finding and evaluating the facts. Proponents of the factfinding theory claim that under the post-Civil War amendments, congressional findings must be binding on the Supreme Court when the constitutionality of en-

5 Ch. 31, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1976)). The Civil Rights Act, as used to prevent private individuals from discriminating in the sale or lease of real property, was upheld as a valid enforcement of the 13th amendment in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968).


9 See, e.g., notes 54-56 infra and accompanying text.


11 See notes 16-162 infra and accompanying text for discussion of this doctrine.
enforcement legislation is considered. Currently, the factfinding theory is cited by proponents of the most recent enforcement legislation to be considered by Congress, the “human life” bill. This bill, now pending in the 98th Congress, is an attempt to overturn Roe v. Wade by affording unborn “persons” equal protection and due process of law under the fourteenth amendment. The legislation is predicated upon a determination by Congress that fetuses, very probably, constitute “actual human life.”

This article examines the factfinding theory in order to understand better the Supreme Court’s proper function when reviewing enforcement legislation. The article attempts to expose flaws in the factfinding theory by clearing away the rhetorical murkiness upon which it rests. First, the article traces the development of the enforcement power from a tool occasionally used to ratify judicial interpretations of the post-Civil War amendments’ mandates, to a fount of legislation exceeding judicial doctrine. This historical survey includes consideration of the several scholarly explications of the factfinding theory, including that which presaged the human life bill.

Second, the article criticizes the factfinding theory by pointing out that, as a general proposition, the institutional capabilities of Congress and the courts to find and use facts do not differ sufficiently to justify the realignment of power witnessed during the enforcement clauses’ modern period. After examining in detail factfinding proce-

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12 See Galebach, A Human Life Statute, HUM. LIFE REV., Winter 1981, at 5, 8. (“If Congress draws the line at conception, the courts have no independent basis on which to draw a [different] line, . . . .”). Cf. Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. REV. 199, 226 (1971) (“Today, one of the major questions of constitutional theory and practice is whether the congressional power to make binding determinations upon questions of fact and degree, acknowledged under the commerce clause, applies to legislation enacted by Congress ‘to enforce’ the fourteenth amendment.”).

13 See note 146 infra. The enforcement power may take on new importance as “pro-life” proponents turn to Congress for assistance. See Ending the Fight, Nat’l L.J., June 27, 1983, at 10, col. 1 (abortion issue “should be widely debated in Congress”; President Reagan quoted as saying issue “must be resolved by democratic process”). The impracticability of persuading the requisite two-thirds majority to ratify a “pro-life” constitutional amendment, U.S. CONST. art. V (amendment procedure); see Senate Sets Back Anti-Abortion Cause, Wash. Post, June 29, 1983 at A1, col. 2 (Senate rejected amendment 50-49 in floor vote), may enhance the desirability of legislation resembling the “human life” bill. For recent Court clarifications of state restrictions on abortion and affirmations of the basic right articulated in Roe v. Wade, 410 U.S. 113 (1973), see Simopoulos v. Virginia, 103 S. Ct. 2532 (1983); Planned Parenthood Ass’n of Kansas City v. Ashcroft, 103 S. Ct. 2517 (1983); City of Akron v. Akron Center for Reproductive Health Inc., 103 S. Ct. 2481 (1983).

14 Cf. note 144 infra (explaining theory behind bill).

15 Several days of hearings were held on the question of when human life begins. See generally The Human Life Bill: Hearings on S. 158, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981).
dure used by legislatures and courts, the section concludes that both branches of government possess certain institutional strengths and weaknesses with regard to ascertaining and evaluating facts. In order to determine which branch is superior in a particular case, one must look to the type of facts being found, or the type of matter being decided.

Third, the article continues the criticism of the factfinding theory by arguing more broadly that it is unhelpful to frame the enforcement power controversy in terms of factfinding ability. This is because the term "fact" has little meaning in and of itself. Labeling a matter one of "law" or "fact" is not a hard and fast jurisprudential characterization. The concepts lurking behind these terms historically have realigned themselves when it was determined, as a matter of some other policy, that certain functions should be performed by new or merely different institutions. This section then examines the development of three areas of the law (national economic legislation, administrative practice, and habeas corpus) in order to illustrate that an argument for a "law" or "fact" label may tell less about the proponent's analysis of the nature of the matter so characterized than about his opinion as to which branch of government should have the final say. Indeed, resolving the issue of which branch will have the last word regarding the "facts" often determines which branch will decide the underlying legal or political questions.

The third part of this article thus posits that users of the factfinding theory may characterize a certain matter as one of "fact" because they have made a value judgment that certain issues should be resolved through the political process. The article concludes, then, that the factfinding theory is ultimately conclusory and cannot be used by itself persuasively to justify a broad reading of congressional power under the enforcement clauses. What must first be debated each time that Congress seeks to use its enforcement power in a new way or in a new area is a different question, namely, whether the issue being raised should be resolved by Congress alone, effectively unhindered by the Supreme Court.

I. Facts in Constitutional Adjudication: The Enforcement Clauses And the Factfinding Theory of Enhanced Congressional Power

Congress often uses legislative facts to support controversial ex-

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16 Legislative facts are "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in
ercises of its power. Several modern cases show that where Congress forges a chain of facts between the statutory means and constitutional ends, the Supreme Court will ratify unprecedented legislation. For example, the National Labor Relations Act of 1935 and the Agricultural Adjustment Act of 1938 both used the commerce clause to regulate areas that previously had been held to be outside congressional authority. The legislative histories of these acts made the required nexus of a "substantial relation to interstate commerce" apparent to the Court. Another commonly cited ex-


Professor Davis illustrated the variations, strengths, and weaknesses of legislative facts by listing six scales upon which the certainty of such facts are measured:

1. from narrow and specific facts to broad and general facts,
2. from central or critical facts to background or peripheral facts,
3. from readily accepted assumptions or facts to controversial assumptions or facts,
4. from factual propositions that are almost entirely factual to somewhat factual propositions that are mixed with judgment, policy, or political preference,
5. from provable facts to facts that can be neither proved nor disproved and therefore must be found through legislating the facts, presuming them, imposing the burden on one party, or making an informed or uninformed guess, and
6. from facts about immediate parties or facts that are known only or mainly by them to facts having no relation to immediate parties.

Davis, Facts in Lawmaking, 80 Colum. L. Rev. 931, 932 (1980). These scales offer a useful guide when this article examines the use of the "fact" characterization as a surrogate for determining the proper allocation of power between branches of government. See notes 256-372 infra and accompanying text.

The general rule is that Congress need not rely on any factfinding to support legislation. Davis, supra note 16, at 932; cf. United States v. Caroene Prod. Co., 304 U.S. 144, 152 (1938) (court should presume existence of facts supporting "regulatory legislation"). In practice, however, this rule does not seem applicable to legislation passed pursuant to the enforcement power. See, e.g., Fulilove v. Klutznick, 448 U.S. at 477-78 (1980); see also EEOC v. Wyoming, 103 S. Ct. at 1064 n.18 (1983) (Court looks for "factual predicate" of enforcement legislation).


The test developed by the Supreme Court to determine whether a subject was properly regulated under the commerce power. See notes 267-79 infra and accompanying text.

See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1936); Wickard v. Filburn,
ample is the Civil Rights Act of 1964, in support of which testimony and data compiled by Congress established that segregation in privately-owned facilities open to the public affected the national economy. The Supreme Court upheld, as applied, these examples of labor, farm, and civil rights legislation, which were supported by congressional factfinding under the commerce clause.

Facts also are used by Congress to support legislation under the post-Civil War amendments. Prior to 1965, however, the enforcement power was not often invoked by Congress, perhaps because its scope had not been broadly construed by the Court. The history of the enforcement clauses is more controversial and less well-documented than that of the commerce clause.

27 See notes 18 and 23 supra (cases cited).
28 See, e.g., notes 36-60 infra and accompanying text (Voting Rights Act).
30 In the Civil Rights Cases, 109 U.S. 3, 11 (1883), the Court held that Congress was without power under the 14th amendment to proscribe private conduct independent of state action. The enforcement clause was not interpreted to give Congress power to legislate "upon subjects which are within the domain of state legislation . . . [or to] create a code of municipal law for the regulation of private rights." Id.
31 See note 4 supra.
32 It is long settled that the drafters of the commerce clause intended to place regulation of the economy in the hands of the federal government. In fact, the absence of a commerce clause in the Articles of Confederation was itself a prime reason for calling the constitutional convention. See Stern, That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335, 1337 (1934). Recently, however, a difference of opinion on this point has emerged on the Court. Compare EEOC v. Wyoming, 103 S.Ct. at 1064-68 (opinion of Stevens, J.) with id. at 1075-81 (opinion of Powell, J.).
On the other hand, the tumultuous history of the Reconstruction period and the contradictory legislative history of the post-Civil War amendments provide no clear answers as to their intended scope or purposes. Compare R. BERGER, GOVERNMENT BY JUDICIARY (1977), with Dimond, Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds, 80 MICH. L. REV. 462 (1982). Com-
civil rights legislation gained momentum, however, determining the modern reach of the enforcement power posed questions for the Supreme Court analogous to those presented by New Deal legislation under the commerce clause. Much like the commerce clause, the thirteenth, fourteenth, and fifteenth amendments purported to give the national government authority over matters which previously had been thought to lie exclusively within the states' police power.\(^3\)

In both areas, preexisting doctrine appeared to preclude expansive construction of the powers granted to Congress.\(^4\) Perhaps because of these similarities, and in view of its successful broadening of the commerce clause's reach in part through the use of legislative facts,\(^5\) Congress presented a detailed empirical case for its first unprecedented use of the post-Civil War amendments' enforcement power in modern times.

A. Using Facts to Identify Constitutional Violations
Under the Post-Civil War Amendments

In *South Carolina v. Katzenbach*,\(^36\) ("South Carolina") the Supreme Court unanimously\(^37\) upheld portions of the Voting Rights Act of 1965\(^38\) in an opinion which ratified a broad exercise of congressional power under the fifteenth amendment.\(^39\) The Act's legislative history contained both legislatively and judicially documented cases of vot-
ing discrimination supported by voluminous data. The data showed that far fewer blacks than whites were registered to vote in certain states and pointed towards blatant racial discrimination as the reason for this disparity. The record constructed by Congress was unimpeachable; in the South Carolina litigation, the facts were undisputed.

The Voting Rights Act was a controversial and unprecedented method of enforcing the fifteenth amendment because its sanctions were invoked prior to judicial determination of a constitutional violation. The act used data not merely to justify its link to the Constitution, but also to trigger its penalty provisions. By distilling threshold criteria from legislative facts, Congress created a scheme whereby probable racial discrimination in voting could be identified and eliminated. If the statute’s threshold criteria existed, the sanctions applied. The statutory “trigger” provided that a jurisdiction in which less than fifty percent of eligible voters were registered, and literacy tests or other preregistration devices were used, could not use such tests or devices for the next five years. Federal examiners were

States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

Prior to the South Carolina litigation, the Attorney General determined that literacy tests were the principal devices used by states to deny the franchise to blacks. 383 U.S. at 312. This was probably because a host of other stratagems had been declared illegal by the courts. See id. at 311-12. See note 49 infra and accompanying text for criteria used in § 4(b) of the Voting Rights Act to trigger sanctions.

The Attorney General and the Director of the Census were authorized to determine, respectively, whether literacy tests or similar devices were present, and if less than 50% of eligible voters were registered. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438 (current version at 42 U.S.C. § 1973b (1981 & Supp 1983)). These findings were not reviewable in any court and were final upon publication in the Federal Register. Id.

See note 51 infra and accompanying text (describing sanctions).
authorized to register voters and supervise elections in covered jurisdictions, and violators were required to preclear voting law amendments with either the Attorney General or a federal district court in Washington. South Carolina presented the question whether enactment of the sections of the Voting Rights Act "properly before the Court" constituted an appropriate exercise of "powers under the Fifteenth Amendment . . . with relation to the States."

The Court first held that the enforcement clause of the fifteenth amendment was analogous to the necessary and proper clause, and, therefore, the standard of review articulated by Chief Justice Marshall in McCulloch v. Maryland would be used to determine the Act's validity. As part of its review, the Court noted that the statute's trigger stemmed from Congress' possession of "reliable evidence of actual voting discrimination in a great majority of the States" covered by the Act. The trigger criteria, therefore, was "relevant to the problem of voting discrimination." After recognizing and referring repeatedly to this congressionally-forged link between the statute and the Constitution, the Court upheld the Act as an appropriate

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51 Id. § 5.
53 South Carolina v. Katzenbach, 383 U.S. at 324.
54 U.S. Const. art. I, § 8, cl. 18 provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [other congressional powers], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
55 17 U.S. (4 Wheat.) 316 (1819). In McCulloch, Chief Justice Marshall supported strong national authority by construing the necessary and proper clause broadly to allow Congress to incorporate the Bank of the United States. Id. at 400. Marshall established an extremely low standard of judicial review under the clause saying: "let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id. at 421. One commentator suggested that this deferential standard of review should be tightened in order to limit the breadth of Congress' enforcement power under the 14th amendment. See Note, Toward Limits on Congressional Enforcement Power Under the Civil War Amendments, 34 Stan. L. Rev. 453, 456-60 (1982).
56 South Carolina v. Katzenbach, 383 U.S. at 326.
57 Id. at 329.
58 Id.
59 See id at 309-15. Because no facts were at issue in South Carolina, id. at 307, it was significant that the Court devoted one full section of its opinion to a review of the legislative history which pointed to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." Id. at 309. See also Fullilove v. Klutznick, 448 U.S. at 478 (recitation of legislative facts).
enforcement of the fifteenth amendment.  

Later in the 1965 term, the Court in Katzenbach v. Morgan considered the constitutionality of enforcement legislation not directly supported by legislative fact. Section 4(e) of the Voting Rights Act provided that citizens educated through the sixth grade in “American-flag schools” in a language other than English could not be disenfranchised because of their inability to read or write English. The legislative history indicated that section 4(e) had been added to the act with the sole intent of enfranchising Puerto Rican citizens living in New York City. In effect, section 4(e) nullified a New York statute requiring voters to be literate in English.

Unlike the trigger at issue in South Carolina, neither Congress nor the courts possessed data suggesting that the New York literacy requirement had been or was currently being enforced in a discriminatory fashion. Justice Brennan, writing for all but two justices,
nevertheless upheld section 4(e) as appropriate legislation under the fourteenth amendment.68

As in South Carolina, the Morgan Court first held that the enforcement clause of the fourteenth amendment, like that of the fifteenth amendment, was analogous to the necessary and proper clause.69 The Court therefore was bound to review section 4(e) under McCulloch’s principles.70 Moving forward, the Court next established that finding a state statute void under the Constitution was not a necessary precursor to judicial ratification of enforcement legislation preempting the statute. In Morgan, the question for the Court was not “whether the judiciary would find that the Equal Protection Clause itself nullifies New York’s literacy requirement as . . . applied, [but rather whether] . . . Congress [could] prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment.”71 The Court decided that section 4(e) was appropriate legislation to enforce the equal protection clause.

Justice Brennan advanced two independent rationales for ratifying section 4(e), one based on the statute’s prophylactic purpose, the other emphasizing the Court’s proper deference to congressional factfinding. In the first he characterized the statute as a prophylactic
The right to vote “secure[d] for the Puerto Rican community residing in New York non-discriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.”73 Because the right to vote was “preservative of all rights,”74 Justice Brennan held that section 4(e) was appropriate legislation to insure equal treatment.75 Perhaps because discrimination in the provision of government services or benefits was “clearly within judicial construction” of the fourteenth amendment,76 it was unimportant that no direct evidence was presented showing state discrimination against Puerto Ricans.77

The prophylactic rationale was derived from South Carolina,78 although in Morgan there was no record evidence to support the federal statute. The findings attributed by the Court to Congress were, however, those reasonably subject to judicial notice:79 the group benefited by section 4(e) was a racial or ethnic minority80 without the right

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73 Katzenbach v. Morgan, 384 U.S. at 652.
74 Id. (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
75 384 U.S. at 652-53.
76 Burt, supra note 72, at 101-02. See also note 85 infra and accompanying text (discussing general legislative competence in area).
77 This reasoning allowed Congress to legislate to prevent violations of the amendments from occurring. The scope of Congress’ power was therefore broader than necessary to redress judicially-determined constitutional violations. Justice Brennan cited Houston, E. & W.T.R. Co. v. United States (The Shreveport Case), 234 U.S. 342 (1914), as analogous to this proposition. Shreveport established that Congress could, under its power to regulate interstate commerce, also regulate intrastate matters which affected interstate commerce. The analogy—although strained—illustrates that the necessary and proper clause is a positive grant of power to Congress.
78 383 U.S. at 301. See notes 36-60 supra and accompanying text. Oddly, however, this part of the Morgan opinion did not refer to South Carolina.
79 The point here is not that the Court judicially noticed the circumstances identified in the text. Rather, the findings attributed to Congress’s determination of the need for prophylactic legislation were similar in kind to facts judicially noticeable. The Federal Rules of Evidence allow judicial notice of the following types of facts:
A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
FED. R. EVID. 201. That New York’s Puerto Ricans were a disenfranchised racial or ethnic minority was a fact similar to those comprehended by Rule 201 as judicially noticeable. See Hernandez v. Texas, 347 U.S. 475, 479-80 (1954 ) (evidence shows that persons of Mexican descent separate class from whites). See also Fulilliove v. Klutznick, 448 U.S. 448, 501 (1980) (Powell, J. concurring) (Morgan based on Congress’ finding that “members of this minority group had suffered governmental discrimination”).
to vote. Enfranchising the minority was a rational way to prevent judicially-proscribed state discrimination from occurring. As in South Carolina, a constitutional violation in a particular case to which the statute applied did not first have to be judicially determined; sufficient circumstances were present to support the legitimacy of the legislation under the McCulloch test.

B. Facts Pointing to the Presence of Substantive Rights

Justice Brennan's second rationale in Morgan represented "a strikingly novel form of judicial deference to congressional power." The Court hypothesized that in passing section 4(e) of the Voting Rights Act, Congress legislated pursuant to its own judgment that denying the franchise to those educated through the sixth grade in American flag schools, notwithstanding their lack of English literacy, was a denial of equal protection. The enforcement power allowed Congress to legislate against a practice that it believed violated the Constitution, regardless of whether the Court would agree. Citing

81 Cf. id. (curtailing operation of political process).
82 Cox, supra note 71, at 106.
83 Katzenbach v. Morgan, 384 U.S. at 656.
84 Justice Brennan's identification of this definitional authority, by which Congress can both define a constitutional violation and then legislate against it under the enforcement power, caused Justice Harlan to write in dissent:

In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."

Katzenbach v. Morgan, 384 U.S. at 668 (Harlan, J., dissenting) (emphasis in original). Justice Brennan's opinion for the Court answered this objection in the now-famous footnote 10:

Contrary to the suggestion of the dissent . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes [which] . . . dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

Id. at 651-52 n.10.

As stated, it is not clear at first glance how to determine whether particular legislation serves the protective purposes of the 14th amendment. This is especially true when the congressional action touches upon issues involving rights in conflict, e.g., the "human life" bill. See notes 142-62 infra and accompanying text. The example of segregated educational systems, given in Morgan's footnote 10, suggests that the proper benchmark is to what the Court has interpreted the 14th amendment to require. This is because, contrary to Justice Brennan's assertion, the equal protection clause does not require anything "of its own force." See
South Carolina, the Morgan Court noted that the operation of literacy tests was one area to which Congress brought "a specially informed legislative competence." Because of this, Congress had a legitimate claim to "weigh the . . . competing considerations" underlying a conclusion that New York's literacy test was invidiously discriminatory in its application to the Puerto Rican population.

Justice Harlan, in an opinion joined by Justice Stewart, emphatically dissented. He felt that Morgan's holding, particularly when based upon its second rationale, altered the traditional functions of the judiciary and legislature by allowing Congress to determine as a substantive constitutional matter that the equal protection clause was violated by a state action which the Court had not declared unconstitutional. Under the scheme of the post-Civil War amendments, he argued, the threshold determination of unconstitutional state action belonged to the Court. Although Justice Harlan ad-

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Plessy v. Ferguson, 163 U.S. 537 (1896) ("separate but equal" does not violate 14th amendment). If the footnote's principle presents an effective limit on congressional enforcement power, reference must be made to the Court's interpretations of the 14th amendment. The Court has implicitly adopted this view. See Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3340-41 (1982). Read this way, Morgan presented a judicial limit to Congress' ability to both define and enforce substantive 14th amendment violations. This could pose a serious constitutional barrier to the "human life" bill. See notes 142-62 infra and accompanying text. The drafter of the bill did not address the problem beyond asserting that the bill would expand, and not dilute, 14th amendment rights. Galebach, supra note 12, at 13.

Katzenbach v. Morgan, 384 U.S. at 656. The "legislative competence" was presumably gained by Congress when it drafted other sections of the Voting Rights Act, because no findings in the Act's legislative history were specifically offered in support of § 4(e). The Court apparently believed that because Congress was, generally, informed about elections and discrimination, it could reasonably find that § 4(e) was needed to redress a constitutional violation. Cf. Fullilove v. Klutznick, 448 U.S. 448, 502-03 (Powell, J., concurring) (cumulative knowledge, gained from evidence gathered pursuant to prior legislative efforts, sufficient to support current legislation).

Id. at 666-68. Justice Harlan cited Ex parte Virginia and South Carolina for this proposition, but only the former supports his analysis. In Ex parte Virginia, 100 U.S. 339 (1879), the Court upheld a federal law that mandated: "No citizen, possessing all other qualifications. . . shall be disqualified for service as a grand or petit juror in any court of the United States, or of any state, on account of race, color or previous condition of servitude . . . ." Id. at 344. The Court stated, as a precursor to its holding, that "the 14th Amendment secures, . . . to colored men, when charged with criminal offenses against a State, an impartial jury trial by jurors indifferently selected . . . without discrimination against such jurors because of their color." Id. at 345 (citing Strauder v. West Virginia, 100 U.S. 303 (1879)). The federal statute thus prohibited action that was judicially determined to be unconstitutional, in keeping with Justice Harlan's analysis in Morgan. In South Carolina, however, the statutory sanctions came into effect when it was administratively determined that literacy tests were being used and that less than 50% of eligible voters were registered. See note 47 supra. This determination did not constitute a judicially determined violation of the 15th amendment. It was, rather, only a
mitted that "[d]ecisions on questions of equal protection . . . are based not on abstract logic, but on empirical foundations," he maintained that no facts had been presented in the Morgan litigation, or to Congress, establishing that the New York statute was used to discriminate in an unlawful fashion.

We have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing on the validity vel non of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

Because he concluded that New York's literacy requirement did not run afoul of the equal protection clause, Justice Harlan concluded that section 4(e) was an unsupportable exercise of the enforcement power.

C. A Rationale for Enhanced Congressional Power

Both branches of Morgan's holding generated much debate over the scope of the enforcement power. Professor Cox, in an important article written immediately after Morgan, stated that the judicial deference embodied in the opinion "follows logically from familiar principles of constitutional adjudication . . . . [I]t should prove a happy innovation, relieving pressures upon the Court." He pointed out that judicial deference to congressional policy choices, even in the absence of legislatively-determined facts, was in keeping with the presumption of constitutionality and "a long line of precedents holding . . . ."

statutory threshold that activated statutory sanctions. See notes 46-51 supra and accompanying text (explaining trigger criteria).

89 Katzenbach v. Morgan, 384 U.S. at 668.
90 Id. at 669.
91 Id. at 669-70.
92 Id. at 664.
93 Id. at 671.
94 Cox, supra note 71.
95 Id. at 106. Later commentators were less sanguine. See Burt, supra note 72; Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975); Gordon, The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court, 72 Nw. U.L. Rev. 656 (1977); Note, Toward Limits on Congressional Enforcement Power Under the Civil War Amendments, 34 Stan. L. Rev. 453 (1982).
ing that a statute must be judged constitutional if any set of facts which can reasonably be conceived would sustain it.96

Most importantly, Professor Cox justified Morgan's holding by stressing the relative superiority of Congress over the Court in finding and evaluating legislative facts.97 Morgan's "chief legal antecedents"98 were the modern commerce cases, in which holdings by the Court as to the propriety of state regulation affecting interstate commerce were superceded when Congress passed contrary legislation based upon different notions of how commerce should be regulated.99

[Morgan] logically permits the generalization that Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights.100

Professor Cox noted that the Court's "conclusory but qualifying" language of "reasonable relation" or "rational" was not present in the Morgan opinion,101 unlike the public accommodations (commerce clause)102 and voting rights cases.103 Quoting from the deferential language used in the opinion, he suggested that:

It is sufficient that the law "may be viewed" as a measure for securing equal protection and that the Court can "perceive a basis" upon which Congress might predicate its judgment . . . .

96 Cox, supra note 71, at 105.
97 Professor Cox noted: "Whether a state law denies equal protection depends to a large extent upon finding an appraisal of the practical importance of relevant facts . . . ." Id. at 106. In dissent in Morgan, Justice Harlan acknowledged, perhaps too readily, that "[d]ecisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations." 384 U.S. at 668. He maintained, however, that it was the Court's perogative to insure that congressional action, was indeed, rationally based upon the legislative facts. The Morgan record, according to Justice Harlan, did not contain any legislative facts. Id. at 670.
98 Id. supra note 71, at 107.
99 Id. Compare, e.g., United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (striking down discriminatory state taxation statute under the commerce clause in the absence of federal legislation), with Prudential Ins. Co. v. Benjamin Ins. Comm'r, 328 U.S. 408 (1946) (upholding discriminatory state taxation law passed after congressional statute authorized states to regulate subject matter as they saw fit).
100 Cox, supra note 71, at 107.
101 Id. at 104.
103 Cox, supra note 71, at 104 (citing South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)).
Evidently, the Court intends to validate any legislation under section 5—at least any legislation dealing with state action—without judging the substantiality of its relation to a permissible federal objective.\(^\text{104}\)

Professor Cox’s interpretation of *Morgan*, in which Congress’ readings of the fourteenth amendment—based upon its experience in finding facts—were used to support legislation preventing not-unconstitutional state action, justified a dramatic shift of power from the Court to Congress.\(^\text{105}\) This is because, as *Morgan* itself illustrated, the “broad, elastic language”\(^\text{106}\) of the fourteenth amendment effectively precluded principled judicial challenge to Congress’ interpretation. “Due process” and “equal protection” mean something to everyone; they cannot be defined with exactitude.\(^\text{107}\) As a result, they are sub-

\(^{104}\) *Id.* at 104.

\(^{105}\) Other commentators tried to limit the *Morgan* principle. Professor Cohen, for example, distinguished between Congress’ legislating in the areas of “liberty” and “federalism.” *See* Cohen, *supra* note 95, at 614. He allowed that Congress has plenary authority only in the latter area. *Id.* Such a division is not helpful, however, when a congressional statute affects both federal-state relations (e.g., the ability of the federal government to tell the states that they may once again regulate or prohibit abortion) and infringes upon individual rights (e.g., the woman’s privacy right), as does the “human life” bill. *Cf. also* Fulilove v. Klutznick, 448 U.S. 448, 479 (opinion of Burger, C.J.) (minority “set aside” affects private nonminority contractors and state’s use of federal funds).

Professor Gordon’s thesis approached *Morgan* differently. He allowed Congress to legislate so as to alter constitutional holdings only when the Court’s reading of the Constitution rested upon “empirical” bases, and not when the interpretations rested upon “normative” ones. Gordon, *supra* note 95, at 671. This analysis is too conclusory, however, because labeling a matter “empirical” (factual) or “normative” (judgmental) may only be a front for a policy conclusion as to which branch of government should decide the matter, and not a description of the intrinsic nature of the matter itself. *See* notes 256-372 *infra* and accompanying text. Moreover, if the matter is subject to empirical measurement, *see* note 262 *infra*, it is theoretically possible that Congress may “incorrectly” redetermine the Court’s findings—from judicial challenge—and thus possibly dilute rather than enforce the constitutional mandate. *See* notes 194-205 *infra* and accompanying text (institutional pressures in Congress leading to decisions made for reasons other than evaluation of merits). The theory thus comprehends a result contrary to *Morgan*.


\(^{107}\) At issue is the relative certainty of constitutional commands. The body of the Constitution contains language ranging from the extremely specific, *see*, e.g., U.S. CONST. art I, § 9, cl. 8 (no title of nobility shall be granted by United States), to the amorphous, *see*, e.g., art I, § 8, cl. 1 (Congress may spend money for “general welfare”). Similarly, the amendments vary in specificity. *Compare* amend. XXI (18th amendment “hereby repealed”) *with* amend. VIII (“cruel and unusual punishments” prohibited). *See also* Burt, *supra* note 72, at 89 (comparing “apparent specificity” of the 13th amendment with “great generality” of 14th amendment).

The 15th amendment’s proscription against racial discrimination in voting is more specific (or at least directed against a more particularized evil) than are the 14th amendment’s twin guarantees of due process and equal protection. *See* note 60 *supra*. This may be why commentators (other than Professor Cox) were troubled by unchecked congressional power under the 14th, but not the 15th amendment. *See*, e.g., articles cited in note 95 *supra*. The
ject to many reasonable interpretations, including those resulting from vicissitudes of the political process. Professor Cox’s enthusiastic interpretation of Morgan, based in part on congressional superiority in finding and using facts, admitted no limiting principle. Notwithstanding this, it resurfaced in the next major voting rights case to reach the Supreme Court.

D. The Rationale Advanced by the Justices

Oregon v. Mitchell considered several 1970 amendments to the Voting Rights Act. One of the amendments, in which Congress lowered the voting age to eighteen in both federal

108 The more amorphous a constitutional command, see note 107 supra, the more there can be reasonable differences of opinion about what constitutes appropriate legislation to enforce it. Compare South Carolina v. Katzenbach, 383 U.S. 301, 336 (15th amendment; § 6(b) of Voting Rights Act provides sufficient standards to guide Attorney General’s discretion) with Oregon v. Mitchell, 400 U.S. at 206 (Harlan, J., dissenting) (14th amendment; policy choice of Voting Rights Act amendments is one over which “men of good will can and do reasonably differ”). Cf. Schauer, An Essay on Constitutional Language, 29 U.C.L.A. L. Rev. 797, 821-32 (1982) (viewing general terms in the Constitution as “value laden,” and thus open to different interpretations). When there is a plethora of reasonable opinions, the legislative result is likely to be a result of political maneuvering. See notes 194-205 infra and accompanying text. The time and resources expended in thrashing out controversial policy solutions, often not on the merits anyway, prompted one student of Congress to suggest that the national legislature is at its best when dealing with relatively noncontroversial matters. See L. FROMAN, THE CONGRESSIONAL PROCESS 30 (1967).


The literacy test ban was upheld by a unanimous Court, Oregon v. Mitchell, 400 U.S. at 118, which deferred to Congress’ judgment expressed in the legislative history of the amendments that such tests could have a discriminatory effect. There was some disagreement between the justices over which amendment’s enforcement power was properly invoked by Congress in support of the legislation. See, e.g., id. at 132-34 (Black, J.; 14th and 15th amendments); id. at 135 (Douglas J.; 14th amendment). The residency and absentee provisions were upheld by all except Justice Harlan. Id. at 118-19. The eighteen year-old vote provision was upheld by a plurality of five, but only as applied to national elections. Id.; see note 140 infra.
and state elections,112 engendered sharp disagreement among the justices. The Court could not agree on a rationale for its holding that lowering the voting age in federal but not state elections113 was within Congress' enforcement power.114 Neither branch of the Morgan opinion gained a majority of the Oregon Court, but the joint opinion of Justices Brennan, White, and Marshall (the "Brennan coalition"), squarely presented a rationale based upon Congress' factfinding prowess. This was met in a dissent by Justice Harlan.

The Brennan coalition opened its opinion with the South Carolina and Morgan proposition that the Court on review must determine only whether the 1970 amendment appropriately enforced the equal protection clause;115 it need not decide whether the state age requirement violated the Constitution.116 Reflecting Professor Cox's explanation of Morgan,117 the opinion set the stage for its reliance upon Congress' factfinding ability to justify ratification of the eighteen year-old vote in both federal and state elections.118 The Brennan coalition began its analysis by stating that Congress—unlike the federal courts—was not bound to respect state factual determinations.119 Although federal courts must ratify state legislative classifications if "any state of facts reasonably may be conceived to justify [them],"120 this deference stemmed from the nature of judicial review and was not applicable to Congress when it acted to enforce the fourteenth amendment.121 Congress could make its own factual determinations that implicated equal protection values and could disregard those made by (or attributed to) the states. The functional justification for

112 See note 111 supra (citing statute).
113 Oregon v. Mitchell, 400 U.S. at 118.
114 Id.
115 Id.
116 Id. at 246.
117 See notes 94-104 supra and accompanying text.
118 See Oregon v. Mitchell, 400 U.S. at 246 (opinion of Brennan, White & Marshall, JJ.) ("[Q]uestions of constitutional power frequently turn in the last analysis on questions of fact.").
119 Id. at 247-48.
120 Id. at 247 (citing Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935)). The Brennan coalition noted that "the state of facts necessary to justify a legislative discrimination will of course vary with the nature of the discrimination involved." Id. at 247 n.30. Discrimination involving state regulation of business practices could be justified by administrative convenience, for example, id. (citing Williamson v. Lee Optical, 348 U.S. 483, 487, 488-89 (1955)), whereas discrimination denying or burdening the exercise of a fundamental constitutional right demands more pressing justification. Id.; cf. United States v. Carolene Prod. Co., 304 U.S. at 152-53 & n.4 (different standard of review for statutes which implicate fundamental values or discrete and insular minorities).
this difference between the authority of Congress and the courts was their relative ability to find and use facts:

The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication . . . . Limitations stemming from the nature of the judicial process, however, have no application to Congress . . . . Should Congress, pursuant to [its enforcement] power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determinations on the matter.\textsuperscript{122}

The opinion stated that Congress could reasonably have found facts to support its judgment that lowering the voting age to eighteen was an appropriate way to insure equal protection for the eighteen to twenty-one year-old cohort,\textsuperscript{123} notwithstanding the state’s judgment. There being “ample evidence” to support the appropriateness of Congress’ judgment, the Voting Rights Act amendment was held valid, and the state age requirement was nullified under the supremacy clause.\textsuperscript{124}

The Brennan coalition’s opinion did not rest expressly on Morgan’s second rationale—Congress’ deciding as a substantive matter that denying the vote to eighteen to twenty-one year-olds constituted a violation of the equal protection clause.\textsuperscript{125} Although the opinion did imply that the deprivation was indeed invidious,\textsuperscript{126} the argument for ratifying the congressional policy was closer to Morgan’s first prong: Congress could give eighteen to twenty-one year-olds the vote in order to prevent invidious discriminations, which the Court already had ruled unconstitutional,\textsuperscript{127} from occurring. This rationale

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} at 247-48.
  \item \textsuperscript{123} \textit{Id.} at 278-81; \textit{see id.} at 242-46.
  \item \textsuperscript{124} \textit{Id.} at 249. U.S. CONST. art. VI, cl. 2 states: “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land. . . .”
  \item \textsuperscript{125} \textit{See} notes 83-86 \textit{supra} and accompanying text.
  \item \textsuperscript{126} \textit{See} note 132 \textit{infra}.
  \item \textsuperscript{127} \textit{Id.} \textit{See} notes 72-81 \textit{supra} and accompanying text (discussing Morgan’s first prong). An interesting question thus implied was whether, by so reasoning, the Brennan coalition indicated that it believed that eighteen to twenty-one year-olds are a discrete and insular minority. \textit{Cf.} note 79 \textit{supra} (explaining Morgan on discrete and insular minority grounds).
\end{itemize}
was echoed by Justice Douglas in his separate concurrence.\textsuperscript{128}

The Brennan coalition’s opinion obscured the distinction between ability to find facts and ability to decide as a matter of legislative policy that facts should be found, and (once found) to determine what weight should be assigned to them. Congress did not discover new facts to support its replacement of state voting requirements with the 1970 amendment. The Brennan coalition disingenuously implied that state legislatures did not know, for example, that eighteen year-olds are treated as adults in most state criminal proceedings,\textsuperscript{129} or that every state allows eighteen year-olds to marry.\textsuperscript{130} The issue simply was not relative factfinding ability; *Oregon* concerned conflicting policies regarding whether eighteen year-olds should vote.\textsuperscript{131} Few if any states had set their voting age at twenty-one out of ignorance; they simply did not think that, as a policy matter, the right to vote should be based upon the same criteria as other legal rights and responsibilities. The Brennan coalition did not, because it could not, allege that the states’ policy was founded upon an unreasonable judgment.\textsuperscript{132}

In dissent, Justice Harlan took a different approach. He focused upon whether the states’ or Congress’ policy choice should be preeminent under federalism principles, rather than examining Congress’ ability to find and use facts. Justice Harlan’s opinion\textsuperscript{133} incorporated his historical analysis of the fourteenth amendment, from which he concluded that the framers never intended the amendment to “restrict the authority of the states to allocate their political power as they see fit and therefore [the amendment] does not authorize Congress to set voter qualifications, in either state or federal elections.”\textsuperscript{134} For Justice Harlan, the intention of the framers was dispos-

\textsuperscript{128} Oregon v. Mitchell, 400 U.S. at 135-52 (opinion of Douglas, J.).

\textsuperscript{129} Id. at 243 (opinion of Brennan, White & Marshall, JJ.).

\textsuperscript{130} Id. at 244.

\textsuperscript{131} This, of course, was Justice Harlan’s view of the matter. See id. at 208-09 (Brennan coalition prepared to set aside “unwise” state voting qualifications).

\textsuperscript{132} But see id. at 240, 241-46 (suggesting that statute granting franchise to “citizens 21 and over while denying it to those between the ages of 18 and 21” might violate equal protection clause regardless of reasonableness of state judgment).

\textsuperscript{133} Justice Harlan’s answer to the plurality’s view was partially unsatisfactory because it was colored by an initial refusal to concede that the equal protection clause applied to nonracial legislative classifications. Id. at 200 (Harlan, J., dissenting) (equal protection clause not applicable to discriminatory voter qualifications). But see id. at 150-52 (Douglas, J., appendix to opinion) (citing cases in which state statutes not involving racial discrimination were invalidated on equal protection grounds).

\textsuperscript{134} Id. at 154. Both Justice Harlan’s and the Brennan coalition’s opinions contained historical reviews, which tried to ascertain the framers’ intent regarding the proper scope of
In response to the factfinding rationale set forth by the plurality, he countered:

When my Brothers refer to "complex factual questions"... they call to mind disputes about primary, objective facts dealing with such issues as the number of persons between the ages of 18 and 21, the extent of their education, and so forth. The briefs of the four States in these cases take no issue with respect to any of the facts of this nature presented to Congress and relied on by [the plurality].... The disagreement in these cases revolves around the evaluation of this largely uncontested factual material.\textsuperscript{136}

Whether education, maturity, and experience lead to a more intelligent exercise of the franchise, thus justifying the states' selection of twenty-one as the minimum voting age, was not to Justice Harlan a question merely of fact:

Whether or not this judgment is characterized as "factual," it calls for striking a balance between incommensurate interests. Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ.\textsuperscript{137}

He concluded that the fourteenth amendment was not intended to be a congressional tool for altering state or federal voting requirements,\textsuperscript{138} notwithstanding the assertion that Congress' factfinding competence was superior to that of state legislatures or the courts.\textsuperscript{139}

Although Morgan's rationales did not receive the Court's impetratur in \textit{Oregon},\textsuperscript{140} the principle allowing Congress to determine for

\begin{footnotes}
\item 135 Oregon v. Mitchell, 400 U.S. at 155-200.
\item 136 Id. at 206.
\item 137 Id.
\item 138 Id. at 207. See note 133 \textit{supra} and accompanying text (Justice Harlan claiming equal protection clause does not cover state voting regulations).
\item 139 \textit{But see id.} at 206-07 (opinion of Harlan, J.) (acknowledging weighing of policies underlying state election requirements not for Court (citing Baker v. Carr, 369 U.S. 186, 226-330 (1962) (Frankfurter, J., dissenting)).
\item 140 The Brennan coalition and Justice Douglas found that pursuant to its enforcement power, Congress could have determined that lowering the voting age in state and federal elections was a proper way to insure equal protection for eighteen to twenty-one year olds, \textit{id.} at 144, 280-81. Chief Justice Burger and Justices Harlan, Stewart, and Blackmun refused to adopt this rationale. They found that Congress was without authority to alter states' election qualifications in state or federal elections, \textit{id.} at 211-21, 288-89. Justice Black provided the
\end{footnotes}
itself whether violations of the Constitution exist has never been re-
jected by the Court. The first rationale of Morgan, which allowed
Congress to legislate based upon its findings and evaluations of fact
in order to prevent constitutional violations from occurring or con-
tinuing, has resurfaced from time to time in recent cases.\footnote{141}

E. Applying the Factfinding Theory: Protecting the Fetus
   By Determining When Human Life Begins

Stephen H. Galebach recently hypothesized\footnote{142} that Congress
was empowered under the fourteenth amendment to overturn Roe v.
Wade\footnote{143} ("Roe") by appropriate legislation.\footnote{144} Essentially, he sug-
gested that Congress could do this by determining as a matter of fact
that human life begins at conception.\footnote{145} Galebach drafted a "human
life" bill incorporating this finding, a form of which is currently
pending in the 98th Congress.\footnote{146}

Beginning with the proposition that the Constitution may afford
due process protection for the unborn depending "on how life is de-
fined,"\footnote{147} Galebach noted that the Roe Court "refused to decide

\footnote{141} See Fullilove v. Klutznick, 448 U.S. at 462-63 (Congress concluded that a minority "set
aside" was necessary to prevent and eliminate disproportionate minority participation in
public contracting); City of Rome v. United States, 446 U.S. 156, 177-78 (1980) (Congress
may prohibit not-unconstitutional voting practices in order to prevent states from usurping
15th amendment's guarantee.).

\footnote{142} Galebach, \textit{supra} note 12, at 5.

\footnote{143} 410 U.S. 113 (1973).

\footnote{144} Although Galebach provided several arguments explaining how the "human life" bill
could supersede Roe v. Wade, the Senate bill which he drafted embodies the specific argu-
ment that, by including fetal life within the 14th amendment's purview, Congress will have
established a "compelling state interest" in the unborn sufficient to override the mother's
privacy right if the states should decide to do so. \textit{See} 129 CONG. REC. S225, 229 (daily ed.
Jan. 26, 1983) (statement of Senator Jesse Helms). Congress' power to do this, in any context,
has been expressly rejected by one former justice of the Supreme Court. \textit{See} Oregon v. Mitch-
ell, 400 U.S. at 295 (Stewart, J., dissenting). See note 146 \textit{infra} for text and current legislative
history of the "human life" bill.

\footnote{145} Galebach, \textit{supra} note 12, at 6-8.

"human life" bill was originally introduced into the 97th Congress by Senator Helms, but it
did not reach the floor for a vote. S. 158, 97th Cong., 1st Sess., 127 CONG. REC. S287 (daily
day scientific evidence indicates a significant likelihood that actual human life exists from
conception . . . [F]or the purpose of enforcing the obligation of the States under the 14th
amendment not to deprive persons of life without due process of law, human life shall be
deemed to exist from conception . . .; and for this purpose 'person' shall include all human
life as defined herein." \textit{Id}.

\footnote{147} Galebach, \textit{supra} note 12, at 6.
when human life begins and whether unborn children are human life," and concluded that this refusal was predicated upon the judiciary's institutional inability to determine the facts.

On the beginnings of life, the Court observed [in Roe], there is a "wide divergence of thinking." The question is "sensitive and difficult." For such questions the judiciary has no suitable evidentiary standards to determine an answer. A judge could only "speculate" on this difficult question. In short, the question stands outside the scope of judicial competence. . . .

Galebach posited that the judiciary's institutional inability to decide when human life begins explained why the Roe Court held that the unborn were not persons under the fourteenth amendment. He reasoned that Congress, under the enforcement clause, is the "most appropriate" branch of government to decide as a matter of fact that life begins at conception. If Congress did find after appropriate investigation that a fetus probably was "actual human life," then under the enforcement power of the fourteenth amendment Congress could decide that the fetus was entitled to due process before its life was extinguished.

Galebach relied upon the voting rights cases as precedent for Congress' ability to include the unborn in the class of persons protected by the fourteenth amendment from even "constitutionally proper state action." Relying on both rationales of Morgan, he concluded that, given the institutional incompetence of the Court to discover independently when human life begins, a congressional definition of "human life," and thereby of "persons," under section 5 of the fourteenth amendment, must be binding on the Court. He

148 Id.
149 Id. at 7 (quoting Roe v. Wade; footnotes omitted).
150 Id.
151 The argument stated:
   The political department most appropriate to decide when life begins is Congress. The enforcement clause of the Fourteenth Amendment expressly grants power to Congress. When a term of the Fourteenth Amendment cannot be defined by the judiciary in concrete application to a category of beings—here the unborn—then the definition of that term by Congress is appropriate legislation to enforce the Amendment.
   Id. at 9.
154 Id. at 15-18.
asserted that "the Court's prior definition of 'person' in Roe v. Wade poses no greater barrier to congressional enforcement action than the Lassiter [v. Northampton County Board of Elections] holding posed to Congress' nationwide prohibition of literacy tests."5

Galebach characterized the dissenting opinions in Morgan156 and Oregon157 as seeking to reserve for the Court authority to determine the Constitution's substantive content.158 This obstacle did not preclude "human life" legislation, however, because the matter properly fell into the category of situations in which Congress could supplement the Court's reading of the Constitution—where the constitutional interpretation rested upon the evaluation of legislative facts.159

155 Id. at 18. In Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), the Court held that literacy tests were not per se violative of either the 14th or the 15th amendments. Lassiter's impact was modified by the Voting Rights Act of 1965, see note 38 supra, which provided for the suspension of tests if certain trigger criteria were satisfied. See note 46 supra and accompanying text. The Act was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). Literacy tests were banned nationwide for a five year period by the Voting Rights Act amendments of 1970, see note 11 supra. This provision was upheld in Oregon v. Mitchell 400 U.S. 112 (1970). The legislative history of the Act and its amendments suggested that Congress eventually banned the tests because it felt that the tests could be, and were historically and currently, used to discriminate.

Galebach used these cases together as an example of Congress overruling one of the Supreme Court's holdings by statute. Galebach, supra note 12, at 10-15. His use of the term "overrule," however, is misleading because it is based upon an overbroad reading of Lassiter. Congress, in the Voting Rights Act and its 1970 amendment, did not instruct the Court that, as a matter of constitutional interpretation, Lassiter was decided incorrectly. In Lassiter, the Court judged merely the constitutionality of literacy tests that were both neutral on their face and were not alleged to be used in a discriminatory fashion. 360 U.S. at 53. The Lassiter Court expressed no opinion of whether Congress could find a danger that literacy tests either were being or could be used to discriminate racially in affording the franchise, and thereafter ban their use. In upholding the Voting Rights Act in South Carolina and Morgan, the Court held that Congress rationally decided that the danger existed and, therefore, could prohibit the use of tests by statute. These cases did not ratify Congress' "overruling" of Lassiter. See City of Rome v. United States, 446 U.S. at 175 (The Court in South Carolina saw no need to overrule Lassiter.). Rather, South Carolina and Morgan decided only that in matters of racial discrimination in voting, the "locus of power" to make policy based upon factfinding was situated in Congress. Cf. Schrock & Welsh, Reconsidering The Constitutional Common Law, 91 HARV. L. REV. 1117 (1978) (describing Congress' power under commerce clause to decide independently of the Court whether states can regulate in ways that burden interstate commerce).

156 Katzenbach v. Morgan, 384 U.S. at 659 (Harlan, J., dissenting).
157 400 U.S. at 152 (opinion of Harlan, J.). See id. at 281 (opinion of Stewart, J.).
158 See Galebach, supra note 12, at 10.
159 Galebach noted: "To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect." Id. at 10 (quoting Katzenbach v. Morgan, 384 U.S. at 668 (Harlan, J., dissenting)). This, however, did not properly take into account the subsequent limitation of this statement by Justice Harlan in Oregon v. Mitchell. See notes 136-37 supra and accompanying text (discussing evaluation of facts and balancing of policy).
Galebach referred to Justice Harlan's statement in *Morgan* that equal protection of the laws was "based not on abstract logic, but on empirical foundations," to support his conclusion that the Court should give dispositive effect to a congressional finding that life begins at conception, regardless of congressional certainty about the matter.

II. Institutional Capacity to Find Facts

This section begins the critical examination of the factfinding theory by surveying the institutional mechanisms used by legislatures (primarily Congress) and federal courts to find and evaluate facts. It establishes that, based upon currently available procedures for finding and evaluating facts, neither branch of government has an absolute claim to factfinding superiority. While legislatures have unique structural capabilities for conducting far-reaching investigations that are not possessed by courts, political pressures often inhibit impartial evaluations of factual merits. On the other hand, although federal courts have different factfinding tools than legislatures (including some not usually available in legislatures), these tools are not inferior. Moreover, because federal courts are relatively insulated from political hurly-burly, they may more readily use their factfinding procedures to make decisions based upon the merits. As a result, abstract claims of Congress' factfinding superiority alone cannot justify the broad interpretation given to the enforcement power outlined in the previous section. Other variables may change the result.

A. Facts in Congress

*Morgan*’s two rationales, elaborated by Professor Cox, adopted by a plurality of justices in *Oregon*, and most recently used by Galebach, are based upon the presumption that legislatures (more specifically Congress) are institutionally better able than

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160 Katzenbach v. Morgan, 384 U.S. at 668, quoted in Galebach, supra note 12, at 10.
161 Galebach, supra note 12, at 10-11.
162 Id. at 12. The author focused on language in the enforcement clause cases that Congress may prohibit states from conduct which poses a “danger” to 14th or 15th amendment rights or presents a “likelihood” of infringement. Id. at 12. This is the prophylactic rationale discussed in notes 72-81 supra and accompanying text.
163 384 U.S. at 652-56. See notes 72-93 supra and accompanying text.
164 See Cox, supra note 71, at 102-08; Cox, supra note 12, at 228-31; notes 95-105 supra and accompanying text.
165 See Oregon v. Mitchell, 400 U.S. at 229; notes 115-28 supra and accompanying text.
166 See notes 142-62 supra and accompanying text.
courts to determine, organize, and comprehend facts. A survey of the procedures by which legislatures and courts find facts, however, argues strongly that there are only nominal differences in their factfinding capacities.

Although legislators normally can vote for or against legislation merely upon their hunches, ideally they should study the facts underpinning their work. Consequently, although not enumerated in article I, Congress has been understood to have plenary power to investigate. The power springs from the necessary and proper clause's grant of authority needed "to make the express powers effective" and from the article I, section 1, grant of "legislative Powers." The power to investigate includes, for example, the court-like authority to subpoena witnesses and compel their attendance. By 1857 Congress made a witness's refusal to testify before congressional committees a federal offense.

The Supreme Court has imposed few substantive limitations on Congress' power to investigate, even though the authority has sometimes been abused. The requirement that congressional in-

168 See generally Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 HARV. L. REV. 153 (1926). The author recounts situations in which legislators requested facts to assist them in deciding upon the wisdom of proposed legislation. Id. at 177-78.
173 In Kilbourn v. Thompson, 103 U.S. 168 (1881), the Court held that Congress could not investigate a matter pending concurrently before a federal court because this made the matter judicial and not legislative. Id. at 194-96. However, in Sinclair v. United States, 279 U.S. 263 (1929), the Court limited (if not implicitly overruled) Kilbourn when it stated that merely using information in pending law suits did not place the matters beyond Congress' investigative power. Id. at 295. Congress may not, however, use its investigative power to aid the prosecution of a particular case. Id. See generally L. TRIBE, supra note 171, at 298 (separation of powers presents limitation to Congress' investigative power).
174 See Jacobs, Extracurricular Activities of the McClellan Committee, 51 CAL. L. REV. 296 (1963) (Justice Department's use of Senate Select Committee on Improper Activities in the
vestigations be conducted pursuant to the exercise of its legislative power is no barrier to investigating an array of matters ranging from the loyalty of citizens to the beginnings of life. It is well established that Congress can investigate whether or not it is contemplating new legislation or deciding whether to retain existing law. Although Professor Tribe has suggested that there is no congressional power to investigate solely in order to publicize, this restriction probably has force only when Congress assumes a defacto prosecutorial role. Since one of Congress' functions is to educate the public, broader substantive strictures placed upon its investigative power could frustrate this purpose.

Some procedural limitations, however, operate to restrict Congress' investigative power. The fifth amendment privilege against self-incrimination and the fourth amendment limit both the scope and intrusiveness of congressional investigations. In addition, due process requires that procedures promulgated to guide the conduct of investigations be followed. Some procedural constraints are self-

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175 See L. Tribe, supra note 171, at 298.
179 See L. Tribe, supra note 171, at 298.
180 See note 175 supra.
181 One well-known commentator noted: "Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion . . . ." W. Wilson, Congressional Government 297 (1901). "The informing function of Congress should be preferred even to its legislative function." Id. at 303.
182 A broader proscription might invite courts to examine frequently the legislature's motives for conducting an investigation. This spectre could chill Congress' exercise of the investigative power, and courts are reluctant to assess legislative purpose in this context. L. Tribe, supra note 171, at 298 (citing Watkins v. United States, 354 U.S. 178, 200 (1957)). Cf. United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (court reluctant to assess congressional motive in passing statute).
183 See generally L. Tribe, supra note 171, at 299.
184 Id. Due process also requires an investigating committee to state its formal mandate. Watkins v. United States, 354 U.S. 178, 208-15 (1957). But see A. Barth, Government by Investigation 85 (1955) (describing Senator Eastland's "one-man" Internal Security Subcommittee) (The senator admonished witnesses' counsel, "I will decide [the ground rules] as we go along and announce them when I desire.").
imposed, as, from time to time, Congress passes statutes establishing investigative procedures. 185

Because of its enormous and complex legislative task, Congress increasingly relies upon its committees to conduct investigations. The committee system, a structure peculiar to legislatures and not possessed by courts, enables Congress to acquire extensive knowledge in a myriad of areas. 186 Repeated investigation of a particular subject area often leads a committee or subcommittee to develop substantial expertise, which may well be deferred to by the whole Congress when considering proposed legislation. 187 In addition, a public hearing conducted in committee "focuses public attention, mobilizes interest groups for and against, and provides an occasion for the airing of a proposal's technical justifications." 188

Congress' use of its accumulated expertise, and its general ability to compile detailed records, as noted above, 189 has undoubtedly made it easier for the Court to sustain unprecedented legislation. For example, detailed evidence established an indisputable link between the state of labor relations in American industry and interstate commerce, and the Court repeatedly referred to this evidence in upholding the National Labor Relations Act in NLRB v. Jones & Laughlin Steel Corp. 190 Similarly, in upholding provisions of the Civil Rights


186 Professor Choper noted: "The committees were conceived to investigate and determine the need for legislation, study the alternatives, shape proposals for presentation to the whole body, and make recommendations . . . the strength of many committees in determining crucial questions respecting the detail and timing of legislation has become enormous." Choper, supra note 168, at 822-23.

187 See R. Fenno, Congressmen in Committees xiii (1973) ("[S]tapes of committee commentary hold" that committees are "repositor[es] of legislative expertise within . . . [their] jurisdiction[s].").

Committees perform important functions aside from accumulating expertise. For example, a committee, through its staff, may serve as a special link facilitating the flow of information and feedback concerning legislative proposals from the Hill to either the executive branch or interest groups. Manley, Congressional Staff and Public Policymaking: The Joint Committee on Internal Revenue Taxation, in CONGRESSIONAL BEHAVIOR 42, 49 (Polsby ed. 1971).

188 Polsby, Strengthening Congress in National Policymaking, in CONGRESSIONAL BEHAVIOR 3, 8 (Polsby ed. 1971).

189 See notes 19-27 supra and accompanying text.

190 301 U.S. 1 (1937). See also United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act). As noted above, the Court has not always been predisposed to uphold legislation passed under the commerce power or to rely on congressional findings in so doing. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936). It appears from these cases that the determination of whether congressional findings are relevant to a constitutional decision is reserved for the Court as a matter of federal law. See text accompanying note 374 infra.
Act of 1964 under the commerce clause, the Court referred to the voluminous record compiled by Congress establishing that racial segregation in public accommodations substantially affected interstate commerce. The Voting Rights Act, as noted, also was supported by evidence of racial discrimination by the states in affording some persons but not others the franchise.

The fact that Congress has broad investigative power and a history replete with examples of its effective use does not guarantee that the power will be responsibly exercised in every context, however. For while Congress has an excellent institutional capacity to discover and use facts, there is a primary limitation upon its ability to be straightforward in its investigations. Congress is a political institution; its constitutional function is to be representative, not objective.

The tool of investigation may be wielded not to provide legislators with a sound basis for selecting one legislative program over another, but rather to mollify constituents' demands that some action...

192 Katzenbach v. McClung, 379 U.S. at 296-98, 299-301. In holding the Civil Rights Act unconstitutional as applied, the trial court did not refer to Congress' fact-heavy record supporting the legislation. The district court noted, however, that no supporting facts were present in the legislation itself. 233 F. Supp. 815, 823 (N.D. Ala. 1964). It quoted at length from United States v. Butler, 297 U.S. 1, 62-63 (1936), for the proposition that all a court need do when assessing the constitutionality of legislation is to "lay the article of the constitution beside the statute and . . . decide whether the latter squares with the former." 233 F. Supp. at 824. The trial court did not think the Act withstood this scrutiny. In reversing the trial court, Justice Clark referred to the congressional findings several times, although he simultaneously maintained that they were not necessary to the Court's finding the Act constitutional as applied. 379 U.S. at 299.
193 See South Carolina v. Katzenbach, 383 U.S. 301, 309-15 (1966) (House and Senate Reports frequently cited). Although it may not have been the sine qua non of the result in South Carolina, the Court noted that many of the facts found by Congress supporting the need for the Voting Rights Act were confirmed by judicial factfinding. Id. at 309 n.5.
194 Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) (Powell, J., concurring). One commentator noted that "[p]olitical conciliation and accommodation characterize the legislative . . . process . . . , as well as the competition for votes." Auerbach, The Reapportionment Cases: One Person, One Vote — One Vote, One Value, 1964 Sup. Ct. Rev. 1, 52. Cf. Burt, supra note 72, at 112 (Congress "less burdened by principled restraints under which courts labor").

I am not arguing here that the Constitution always requires that Congress be objective or impartial, although I think it does sometimes. See note 205 infra. Nor do I mean to imply in the next few paragraphs of the text that courts are always more evenhanded in their assessments of data than Congress. Cf. note 206 infra (both institutions face constraints). What I am establishing throughout this section is that arguments directed to institutional competence to find facts focus unduly upon a small variable relevant to determining the proper scope of Congress' or the Court's power. Also important, for example, is identifying the institutional constraints that are placed upon each branch's abilities to gather and use facts. This determination must be done on an ad hoc basis, depending on the subject matter in issue.
be taken on particularly controversial issues. Surveys consistently show that members of Congress are especially sensitive to their constituents' opinions on controversial matters. In order to avoid sensitive policy choices, hearings may be purposefully designed to drag on almost interminably in the hope that "enraged" public demand for legislative action will wane. Further, the facts found at hearings may be of no practical significance to Congress' eventual action (or inaction). Perfunctory hearings, in which witnesses recite from carefully drafted texts and committee members feign interest, are not uncommon. Although there are some committees that structure their proceedings to allow conflicting viewpoints to be heard fully, one congressional observer stated that:

The traditional format for questioning witnesses in the House and Senate does not lend itself to opportunities for extended exchanges between members and witnesses, analysis of different points of view, or in-depth probing of one witness's views by another.

Although the author suggested that this was changing, no evidence suggests that it has.

In legislatures, political considerations sometimes inhibit the construction of a full record. Many strategies exist to frustrate the search for facts. For example, committee chairmen can "pack" their subcommittees for or against certain legislation. Additionally, a chairman can determine both the precise scope of a committee's investigation and whether hearings will be held at all. He can also selectively schedule witnesses who are expected to testify in a manner that produces the desired record. The structure and composition

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196 See Choper, supra note 168, at 836.
197 C. CLAPP, supra note 195, at 265-69. See also L. FROMAN, supra note 108, at 42.
199 Id. at 67.
200 Id.
201 L. FROMAN, supra note 108, at 42.

During periods of reform, Congress has worked to decrease the once absolute power wielded by committee chairmen. For example, Senate procedure once allowed committee members of the minority party to call witnesses as a matter of right. 2 U.S.C. § 190a-1(e) (1976), repealed by, S. Res. 274, 96th Cong., 1st Sess., 125 CONG. REC. S32254-75 (Nov. 14, 1979). The repeal notwithstanding, "pro-choice" minority party members of the Senate Separation of Powers Subcommittee pressured it into calling "pro-choice" witnesses to testify about the human life bill, S. 158. See Choper, supra note 168, at 841-43 for a list of other attempted—and short-lived—procedural reforms.
of specialized committees may lead to factfinding that merely ratifies prejudices or other legislative proclivities.\textsuperscript{203} Even if a committee does construct a weighty record in support of a legislative proposal, political considerations may affect the way in which the record is revealed to the whole Congress.\textsuperscript{204} Fairness in the compilation and presentation of the record is not always the ultimate goal.\textsuperscript{205}

It is, therefore, not enough to assert generally that "Congress has . . . a special ability to develop and consider the factual basis of a problem."\textsuperscript{206} Certainly, in the abstract, Congress has an institutional

\textsuperscript{203} One commentator recently wrote that policy in Congress is made by "staff technocrats . . . whose knowledge of the world is limited to what they learned in school or from other participants in the specialized Washington issue networks." M. Malbin, Unelected Representatives 247 (1980).

\textsuperscript{204} See, e.g., Choper, supra note 168, at 823 (House Committee on Appropriations "rarely releases its reports before the day on which debate is held . . . ") (citing N. Polsby, Congress and the Presidency 124, 146 (2d ed. 1971)). Congress as a whole does not spend a great deal of time debating the merits of a bill. It is rare for discussion of a bill to last longer than one day. L. Froman, supra note 108, at 10. The Civil Rights Act of 1964 was debated for nine days. Id.

\textsuperscript{205} Of course, Congress need not be "fair" for its work product to be held constitutional by the Court. For example, Congress' use of the commerce power in the Civil Rights Act of 1964 was ratified despite the fact that, aside from testimony and data collected to support the proposition that racial discrimination adversely affected interstate commerce, little information was compiled concerning the negative effect desegregation might have on commerce. Under the commerce clause, such selectivity of congressional investigation is immaterial to any question of the resultant legislation's constitutionality. This is because congressional legislation need not facilitate commercial intercourse. Congress may properly pass laws that cause commercial relations to cease altogether. See, e.g., Champion v. Ames, 188 U.S. 321 (1903) (Harlan, J.); Caminetti v. United States, 242 U.S. 470 (1917). Cf. In re Rahrer, 140 U.S. 545 (1891) (state legislation authorized by Congress); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (same).

Congress does not have the flexibility stemming from selective investigations under other constitutional grants of power. See Katzenbach v. Morgan, 384 U.S. at 651 n.10 (Congress, under 14th amendment, may only legislate to enforce, not to "restrict, abrogate, or dilute," the guarantees of equal protection and due process). One commentator argued that the different amounts of legislative flexibility allowed under the commerce and enforcement power derived from the language of the constitutional mandates: "regulate" and "enforce" respectively. Note, Congressional Power to Enforce Due Process Rights, 80 Colum. L. Rev. 1265, 1275 n.54 (1980). Cf. notes 107-08 supra (discussing relativity of constitutional terms).

The point here is that, because of the need to be more straightforward in investigations conducted pursuant to passage of enforcement legislation, judicial deference to congressional factfinding under the 14th amendment should not be as great as it is when the facts are found under the commerce power. This point is not addressed by proponents of the "human life" bill. Galebach, for example, relying on the commerce cases, states that the "human life" legislation would be constitutional regardless of the strength (or presumably the source) of its supporting facts. Galebach, supra note 12, at 8. In this context, consider the different variations, strengths, and weaknesses of legislative fact listed at note 16 supra.

capacity to find facts. But in some situations, it also has institutional incentives to ignore or distort them. Nor does the platitude of Congress' institutional competence argue that the legislature is better able than the courts to find facts in any particular case. More information is required to complete the analysis: Who are the personalities involved? What political constraints attend the issue? What is the effect of public opinion? The factfinding theory, while praising Congress' investigative apparatus, addresses neither these specific questions nor the impact their answers might have upon the nature of the facts found and used by Congress in a particular context.

B. Facts in Courts

As this section demonstrates, courts, like legislatures, possess significant ability to find and evaluate facts through their regularized procedures. Because courts—relative to legislatures—are sheltered from politics, their factfinding ability in a particular case may exceed that of the political branch.

Several theories discuss the essentials of proper judicial decision-making. The realist view, for example, supports an instrumental approach to constitutional adjudication; it encourages results that work—"presumably at a reasonable social cost." Such utilitarian determinations must be based upon facts surrounding the controversy.

Professor Wechsler took a more general, less ad hoc, approach.

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207 This argument refers specifically to federal constitutional courts, whose judges are protected from political overbearance by the strictures of article III. Professor Wellington, for example, wrote that the Supreme Court "is not directly responsible to the people; Justices are not elected. The Court is designed to be unresponsive to the pressure and play of interest group politics; Justices are insulated from such pressures." Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 266 (1973). Although article III courts may be subject to some indirect political pressures, see Choper, supra note 168, at 849-54, they are clearly less politically accountable than Congress. Id. at 848.

208 Realists may bristle at this proposition, although such reaction is unwarranted. I am not arguing here that courts, unlike Congress, enjoy complete immunity from political pressures and result orientations. However, as note 207 supra and many commentators suggest, there is at least a qualitative difference between the types of pressures weighing upon each branch. The truth of this proposition depends in part upon whether a broad or narrow definition of "politics" is used. I am using a narrow definition, one that recognizes that electoral pressures have an effect upon resulting policy. Article III judges not subject to election do not work under this pressure, although they may be subject to other external constraints. See Tushnet, supra note 32, at 808 (justices constrained by the norm of "compromise and cooperation"); Greenawalt, The Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982, 1007-08 (1978) (Court faces institutional pressure to produce majority opinions).


He argued that in order for judicial review to be an intellectually persuasive doctrine, courts must strive to base decisions upon "neutral principles." A principled decision "rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Distinct from the realist view, Professor Wechsler's position was that the development of doctrine by the courts must be different in kind from the ad hoc, instrumental use to which principles are put by political institutions, which "trim and shape their speech and votes [according to] sentiment at any given time."

It is telling that neither the realist nor the neutral principles theory has achieved unqualified acceptance by the Court. Perhaps this is because the theories are not necessarily mutually exclusive. Indeed, like the search for a pragmatic result, the search for neutral principles allows judges to use facts when deciding specific controversies. The delicate examination and balancing of competing interests required by constitutional adjudication cannot be based solely

211 Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). I am not unaware of some legal scholars' attempts to discredit this notion. See, e.g., Tushnet, supra note 32, at 804-24. However, it is significant that at least one contemporary scholar who advocates a modern approach to judicial analysis does not reject the need for principled judicial decisionmaking. See M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 25 (1982) (recognizing importance, in a democracy, of framing judicial decisions within principles). This supports the later statement, see text accompanying note 214 infra, that realism and neutral principles theories are not mutually exclusive.

212 Wechsler, supra note 211, at 19.

213 Id. at 14-15.

214 The Court recently acknowledged its departure from a previously settled principle, and apologized "to all" for the infraction. Illinois v. Gates, 103 S. Ct. 2317 (1983) (regretting asking for additional briefs and argument on issue not previously ruled upon by state court). Additionally, dissenting justices do not hesitate to excoriate objectionable decisions of the Court as departing from supposedly settled or otherwise "neutral" principles. See, e.g., City of Akron v. Akron Ctr. For Reproductive Health, 103 S. Ct. 2481 (1983) (O'Connor, J., dissenting) (criticizing Court's departure from "sound constitutional theory [and] our need to decide cases based on the application of neutral principles"); Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (Court's equal protection decisions characterized as "endless tinkering with legislative judgments").

Dissenters also object to the Court's ignoring the realities surrounding a particular ruling. See, e.g., Maher v. Roe, 432 U.S. 464, 483 (1977) (Brennan, J., dissenting) (Court shows "a distressing insensitivity to the plight of impoverished pregnant women"). Cf. National League of Cities v. Usery, 426 U.S. 833, 867 (1976) (Brennan, J., dissenting) (decision striking down federal labor regulations applied to states termed an "ill-conceived abstraction").

215 See Karst, Legislative Facts in Constitutional Litigation, in 1960 SUP. CT. REV. 75, 111 ("[A] a court will do a better job of deciding if it has been adequately informed as to the factual links between the challenged governmental action and the neutral principles involved."). Cf. Wechsler, supra note 211, at 23 (attributing demise of pre-1937 commerce clause doctrine in part to "simple facts of life").
"on logical deduction from abstract legal principles," even if it is based in part upon such deduction. In modern times, when courts routinely decide matters having broad impact upon the entire nation, facts must be collected, marshalled, and presented in an effective manner to insure that judges have an accurate picture of the society upon which they impose rules of law. One criticism of the now-discredited decisions of the economic substantive due process era, for example, was that the Court improperly refused to use facts presented by the litigants in support of state and national economic legislation. Whatever theory of judicial decisionmaking one relies upon, facts are necessary to provide the judge with a concrete basis for making a decision; they educate the judge as to the probable effects of a particular outcome.

Throughout the course of litigation, therefore, facts flow into courts through many channels. Just as legislatures rely on interest groups and individual witnesses to testify before investigative committees, courts depend on litigants (including intervenors) to


217 Cf. M. Perry, supra note 211, at 25 (use of principle necessary to legitimize Court decisions).

218 See Karst, supra note 215, at 109, 111.

219 See City of Akron v. Akron Ctr. for Reproductive Health, 103 S. Ct. 2481 (1983) (Court examining medical data to determine whether city's abortion ordinance relates to maternal health). See also United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting) ("It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.").

220 See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 436-52 (2d ed. 1983). A detailed analysis of the interaction between the New York legislature and court of appeals during this period can be found in Lindgren, Beyond Cases: Reconsidering Judicial Review, 1983 Wis. L. Rev. 583, 593-635. The author points out that as due process doctrine developed into a justification for judicial evaluation of the factual bases of statutes, laws previously held unconstitutional were "reinforced and repassed after additional factual inquiry." Id. at 612 (footnote omitted).

221 Professor Tribe reported that many justices of the Lochner era saw data as "manipulable and thus unreliable." L. Tribe, note 171, supra at 436. "For example, when Chief Justice White was confronted with a Brandeis brief in Adams v. Tanner, 244 U.S. 590 (1917), he reportedly responded 'I could compile a brief twice as thick to prove that the legal profession ought to be abolished.'" Id. at 436 n.3 (citing L. Pfeffer, This Honorable Court 259 (1965)). See also Adkins v. Children's Hosp., 261 U.S. 525, 559-60 (1923) (facts found "interesting but only mildly persuasive."). Cf. Karst, supra note 215, at 105 (experts' grinding "professional axes" implies unreliable testimony).

222 Karst, supra note 215, at 81. But see Hazard, The Supreme Court as a Legislature, 64 Cornell L. Rev. 1, 12 (1978) (The Court should not focus solely on "facts before it" when determining consequences of constitutional decision as those facts are merely "a prologue.").

223 See notes 171-88 supra and accompanying text.
provide them with the facts needed for responsible decisions.\textsuperscript{225}

The judicial branch does not lack regularized factfinding procedures. Pretrial discovery in federal civil cases\textsuperscript{226} allows the parties to gain knowledge of evidence which their opponents possess and permits litigants to use the evidence in their adversary's possession. The broad discovery rules were specifically designed to insure that "civil trials in the federal courts no longer [would] be carried on in the dark."\textsuperscript{227} This full disclosure policy generates pressure on the parties to produce complete factual records. Once the records are assembled, then, courts "seem . . . reasonably well equipped to undertake competent assessments"\textsuperscript{228} of even the most complex data.

Soliciting the testimony of witnesses is a crucial way of presenting facts to courts. For example, expert testimony can be used to educate judges in the same way it is used to educate legislators. Although the factfinder may decide that the expert's testimony is not highly probative,\textsuperscript{229} the parties can present the evidence in court subject to applicable rules.\textsuperscript{230} Importantly, exclusionary rules of evidence have less application when experts testify,\textsuperscript{231} thus allowing education to proceed relatively unhindered by formality.

Cross-examination is another well-known tool used in American
courts to ferret out facts. Cross-examination is constitutionally re-
quired in many civil and all criminal cases.\footnote{See, e.g., Green v. McElroy, 360 U.S. 474 (1959) (security clearance procedure); Smith v. Illinois, 390 U.S. 129 (1966) (criminal case).} This procedure is so important that the decision whether or not to present testimony at all may be based in part upon the costs and benefits of cross-
examination.\footnote{Karst, supra note 215, at 101.}

Cross-examination serves both to call into question the credibil-
ity of testimony, and to elicit additional facts that are related to those
brought out on direct or (if not so related) are necessary to place
other issues in proper perspective.\footnote{C. MCCORMICK, supra note 16, § 29 (2d ed. 1972).} The Supreme Court stated that
cross-examination is an important way to “expos[e] falsehood and
[bring] . . . out the truth.”\footnote{Smith v. Illinois, 390 U.S. at 131 (citing Pointer v. Texas, 380 U.S. 400, 404 (1965)).} The nature of the facts to be proved
does not diminish its value as a truth-determining mechanism. For
example, cross-examination is useful in examining an expert’s testi-
mony, notwithstanding the fact that the testimony might “rest . . .
on a chain of debatable inferences based on standards of the expert’s
own selection.”\footnote{Karst, supra note 215, at 102.} Even if a witness is not successfully impeached by
cross-examination, it remains an effective truth-screening device for
his testimony. Finally, the scope of cross-examination is necessarily
broad. Although Federal Rule of Evidence 611(b) limits the scope of
cross-examination to “the subject matter of the direct examination
and matters affecting the credibility of the witness,” the rule goes on
to allow the court, in its discretion, to “permit inquiry into additional
matters as if on direct examination.”\footnote{Fed. R. Evid. 611(b).} Unfortunately, cross-exam-
nation is usually unavailable in congressional hearings.\footnote{Generally, cross-examination is not permitted or even thought to be appropriate at legislative hearings. It may, however, be available because of particular committee rules or types of investigation undertaken. While it has been asserted that legislators’ questions fre-
quently serve to “represent the contesting interests,” no right to cross-examine witnesses usu-
ally exists in legislative hearings. Karst, supra note 215, at 101 n.97.}

In appellate litigation, briefs filed by litigants\footnote{See Fed. R. App. P. 28.} and amicus cu-
riae\footnote{Id. Rule 29.} serve an indispensable educative function. The Brandeis brief,
in which the attorney blends extensive factual material and tradi-
tional legal research relevant to the resolution of difficult policy ques-
tions, has long been used to persuade judges, albeit with varying
degrees of success. The assumption underlying the factual brief is that judges, although able to interpret the law, cannot put their decisions into proper factual perspective until they have been properly educated. But given that this educating is going on in modern courtrooms, it does not follow that courts suffer from an inability to discover and evaluate facts relative to legislatures.

Lawyers' briefs do not come only from the litigants. Appellate
courts accept briefs filed by amici curiae who present additional facts from a perspective different from that of the parties, or who highlight important issues tangential to the litigation. The Supreme Court occasionally recognizes the need for "outside aid" and requests submission of amicus briefs as it did, for example, in South Carolina. In a sense, the statements of fact, law, and policy in amicus briefs serve a function analogous to that of lobbyists in legislatures.

Although there are other devices used by courts to find and evaluate facts, plenary examination of them is not warranted here because the conclusion is well supported that courts, like legislatures, have several well-defined and often-used methods for constructing and using fact-heavy records. It seems clear that both legislative and judicial factfinding procedures have their own strengths and weaknesses, their own biases and distortions, and their own special incentives for discovering "truth."

While the political process may produce one result and the arguments of courtroom adversaries another, proponents of the factfinding theory misleadingly interpret this to mean that courts are inherently or institutionally less able than legislatures to find and use facts. Consider, however, Professor Wellington's statement:

broadly applicable, i.e., those applicable to more than the immediate controversy between the parties before the court. See generally M. Rebell & A. Block, supra note 225.

244 Karst, supra note 215, at 106.


Recently, in an interesting twist of amicus curiae procedure, the Court appointed a prominent attorney (former Secretary of Transportation William Coleman) to argue a tax case in which the Justice Department had withdrawn its support for the Internal Revenue Service and adopted petitioners' cause. See Court Bars 2 Schools' Tax Break, Wash. Post, May 25, 1983 at A1, 9, col. 1. Mr. Coleman argued for the government's previously held position, which prevailed in Court in an 8-1 decision. See Bob Jones University v. United States, 103 S. Ct. 2017 (1983).

246 Karst, supra note 215, at 106. See M. Rebell & A. Block, supra note 225, at 207.


248 See generally M. Rebell & A. Block, supra note 225, at 11-14.

While there can be no question that the fact-finding facilities available to legislatures through committee hearings and investigations are frequently helpful and are facilities that a court cannot command, this advantage is less than meets the eye. On many issues more than enough factual information is generated without hearings; legislative facts abound and for every expert there is his equal and opposite member.\textsuperscript{250}

Why, in light of comments such as this, does the notion that legislatures are somehow inherently better able than courts to "see, hear, and investigate actual conditions"\textsuperscript{251} stubbornly persist, especially in the form of the factfinding theory with its drastic ramifications concerning the relative powers of Congress and the courts? The Supreme Court recently referred to the asserted institutional superiority of legislatures to find facts as a partial rationale for upholding both federal\textsuperscript{252} and state\textsuperscript{253} legislation, even though nothing suggested that the legislatures' investigative apparatus was, in each particular instance, better suited to compile and correctly analyze facts than the adjudicative (trial and appellate) process.

The stakes must be greater than institutional capacity to find facts. The issue, rhetorically cast in terms of facts and factfinding competence, is really whether a political majority or the Supreme Court should have the last word in establishing a particular policy.\textsuperscript{254} Arguments like those presented in the factfinding theory serve to

\textsuperscript{250} Wellington, supra note 207, at 240.
\textsuperscript{251} Note, The Presentation of Facts Underlying the Constitutionality of Statutes, 49 HARV. L. REV. 631, 633 (1936).
\textsuperscript{254} Consider Professor Cox, who wrote immediately after Katzenbach v. Morgan was decided:

Congressional supremacy over the judiciary in the areas of legislative factfinding and evaluation and over the state legislatures under the supremacy clause in any area within federal power, would seem to be a wiser touchstone, more consonant with the predominant themes of our constitutional history, than judicially-defined areas of primary and secondary state and federal competence.

Cox, supra note 71, at 107 (emphasis added). Professor Cox's interest in congressional superiority probably stemmed from the Court's being an anti-majoritarian institution and from his perception that each state legislature represents but a small fraction of the national community. See Cox, supra note 12, at 210. Cf. Burt, supra note 72, at 109-10 (recognizing that different constituencies of national and state legislatures produce different perceptions of
mask their proponents' value preference that Congress have the primary if not sole responsibility for formulating national policy under the post-Civil War amendments.

In support of this conclusion, the next section identifies some value judgments implicit in labeling a matter one of "fact." The next section, unlike the one just completed, does not presume that the terms "law" and "fact" have a static definition or content. It turns away from studying institutional capacity to find and use facts, and instead questions what the terms "law" and "fact" actually denote. To illustrate the omnipresence of value undercurrents, historical and contemporary definitions of "law" and "fact" are examined in three legal contexts: economic legislation, administrative practice, and habeas corpus. After examining these areas of the law, the section concludes that definitions of law and fact are elastic. Whether a question properly comes within the rubric of "law" or "fact" depends less upon what "facts" philosophically may be than upon a policy determination of which branch should have the final say. Labeling a matter "factual," therefore, is more a conclusion than a characterization. Defining a finding as one of "fact" conveys less about its intrinsic nature (i.e., is it a "fact"?) than it does a conclusion about the proper institution for deciding the underlying policy issues. For example, is the question of when human life begins one of "fact," thereby allowing Congress to legislate under the fourteenth amendment pursuant to its finding? Or are the limits of Congress' authority to curtail the right to privacy, as applied in Roe v. Wade, a question of law? Arising thus in the human life context, the factfinding theory, as used by Galebach and Senator Helms, seems to serve as a screen for their value-based conclusion that abortion policy should once again be set through the legislative process.

III. Making Laws and Finding Facts

Although scholars acknowledge the difficulty of articulating clear and precise distinctions between questions of law and fact, the task is important because the characterization often dictates which branch of government will be charged with a question's resolution. Marbury v. Madison classically stated that "[i]t is emphati-

255 410 U.S. 113 (1973) "[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. 153.
256 See, e.g., the sources cited in Note, supra note 205, at 1271 n.39.
257 Judge Friendly stated that "perhaps about the only satisfactory criterion for distin-
ally the province and duty of the judicial department to say what the law is.\textsuperscript{259} The factfinding theory, in turn, is based upon Congress' alleged superiority over the courts in finding and using facts.\textsuperscript{260}

\textit{Marbury}’s barest interpretation holds that deciding the constitutionality of statutes is a question of law reserved for the Supreme Court.\textsuperscript{261} On the other hand, the function most clearly reserved for the finder of fact is ascertaining the existence of or measuring tangible phenomena. Facts are thought of as empirical,\textsuperscript{262} evidentiary, and as capable of being determined with a degree of detached certainty (e.g., who is the murder weapon currently registered to?).

guishing 'law' from 'fact' is ascertaining "what a court can determine better than a jury.” United States v. J.B. Williams Co., 498 F.2d 414, 431 (2d Cir. 1974).

258 5 U.S. (1 Cranch) 137 (1803).

259 Id. at 177. \textit{See} Cooper v. Aaron, 358 U.S. 1, 18 (1958) (federal judiciary “supreme in the exposition of the law of the Constitution”).


261 Professor Cox, for example, did not contend that the Supreme Court should abdicate its responsibility to decide the constitutionality of statutes passed by Congress. \textit{See Cox, supra note 12, at 253 (Court should carefully scrutinize congressional legislation); Cox, Congress v. The Supreme Court, 33 Mercer L. Rev. at 701, 711 (1982). Rather, he argued that the Court’s level of review should be very deferential when the challenged legislation was supported by facts and enhanced individual rights. Cox, supra note 12, at 252. This rationale was adopted by a plurality of justices in Oregon v. Mitchell, 400 U.S. 112, 240, 248 (1970) (opinion of Brennan, White & Marshall, JJ.).

262 A discussion of whether something can ever justifiably be labeled “empirical” is beyond the scope of this article. I assume here that certain phenomena are measured or otherwise ascertained “empirically” because society has reached a consensus regarding how they should be measured or otherwise thought about. \textit{See EEOC v. Wyoming, 103 S. Ct. at 1058 (data relating to job performance of older workers referred to as “empirical evidence”). Cf. Tushnet, supra note 32, at 807 (“Legitimate actions are those that are accepted by the relevant public.”).}

Defining “empirical” in this way will be unsatisfying for some, perhaps for two reasons. First, consensuses change with the passage of time and the acquisition of new knowledge. Empiricism based upon such shifting sands looks very subjective. \textit{See, e.g., Cook, “Facts” and “Statements of Fact,” 4 U. Chi. L. Rev. 233, 239 (1936-37) (describing evolution of scientific methods used in chemistry to weigh elements).}

Secondly, a claim of empiricism requiring a social consensus does not properly recognize the instances in which the Court itself may prevent such a consensus from ever forming. When the Court invalidates the government’s exercise of power to legislate in a particular area, the factfinding underpinning the legislation may be discouraged and thus effectively prevented. \textit{Cf. Lindgren, supra note 220, at 626 (“When the courts declared . . . statutes [restricting entry into occupations] unconstitutional, they destroyed the factual assumptions on which the legislature’s initial choice had been made."}). For example, when Roe v. Wade held that the states were prevented from adopting “one theory of life”, 410 U.S. at 162, it provided a practical disincentive for the states to ever again consider the question of when human life begins. Why investigate if no legislation can result? \textit{See also City of Akron v. Akron Ctr. For Reproductive Health, 103 S. Ct. 2489 & n.5 (striking down ordinance requir-
Facts are distinguished from opinions or value preferences. Facts can be historical; that is, they may detail prior occurrences (e.g., did X shoot Y on the night in question?), utterances (e.g., did X warn Y prior to the shots?), or intents (e.g., did X shoot Y with malice aforethought?). Justice Frankfurter discussed "fact" in the sense of a "recital of external events and the credibility of their narrators." This comports with traditional and commonsense understanding of the term.

Under a commonsense analysis, it would seem simple to determine whether something is a question of law or a question of fact. However, an examination of three different areas of the law reveals

The problem with my definition of empiricism in this context is that it allows the Court (or others) to bootstrap a fact-based (or rather, lack-of-fact-based) rationale for invalidating legislation. Although the Roe v. Wade Court pointed out that there was no consensus on when human life begins, 410 U.S. at 159, the judicial preemption resulting from the case helped to preclude society (or at least state legislatures) from ever reaching a consensus on the matter. Whether an "empirical" case (in the sense used here) could have been made at the state level as to when human life begins (and whether such a consensus would have altered the result in Roe v. Wade) is now, partly because of the Court, conjectural. In Roe v. Wade, the Court itself helped to insure the very subjectivity—that there was no consensus on when human life begins—it fingered in its analysis. Therefore, it seems improperly simple for contemporary Roe v. Wade supporters to criticize facts offered, in support of abortion restrictions today as biased or subjective. (Interestingly, similar claims of bias also permeated the economic substantive due process era, see note 220 supra, when the Court also precluded governmental action in certain areas. See note 221 supra. See also Lindgren, supra note 220, at 626-30).

Despite these problems, I believe that my definition of "empirical" is sufficient to illustrate the essence of what we usually think of as "fact." (It should be noted that the constitutionality of the "human life" bill, based upon congressional factfinding, is not foreclosed by the Roe v. Wade holding because Roe v. Wade does not answer the question of whether Congress under the enforcement power—as compared with the states under their police power—can adopt one theory of life.)

263 See Professor Cox's description of the difference between questions of fact and degree:

If Congress enacts a law regulating the amount of wheat a farmer may grow on his home farm to feed his own pigs, the first question is purely factual—what is in fact the relation between the volume of wheat grown for home consumption and the national movement of commodities? The next question is one of degree—is that practical relation close enough to interstate commerce to justify federal regulation?


264 See Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.) ("the external events that occurred"). Cf. M. REBELL & A. BLOCK, supra note 225, at 12 (describing differences between "historical" and "social" facts). But see Tushnet, supra note 32, at 800 (asserting that "[t]he past . . . is in its essence indeterminate").


266 Brown v. Allen, 344 U.S. at 506 (opinion of Frankfurter, J.).
that definitions of law and fact are slippery. Historically, the definitions have both excluded empirical determinations and included opinions and value judgments, depending upon policy-laden evaluations of a particular institution's proper functions. The following discussion surveys national economic legislation under the commerce clause, administrative practice, and habeas corpus, to highlight the policy issues underlying the shifting allocations of power in these areas, which have been justified in part by strategic uses of the terms law and fact. The conclusion to be drawn is that one cannot usefully label a matter one of law or fact until these types of policy issues are acknowledged, sorted out, and balanced.

A. Economic Legislation

In the early commerce clause cases, congressional findings were occasionally set forth in the economic legislation under review to establish a nexus between the matter being regulated and its relation to or impact upon interstate commerce. Although the Supreme Court sometimes took note of these findings, their presence did not compel judicial ratification of the legislation. The findings' nondispositive character stemmed from the Court's refusal to allow Congress to make a binding assertion that, as a matter of fact, an activity being regulated had an impact on interstate commerce. There was in every case a de novo judicial determination of the question.

Such was the situation when the Supreme Court first reviewed the antitrust legislation. In 1890, Congress passed the Sherman Antitrust Act. The Act's legislative history documented Congress' careful consideration of both the impact of monopolization on the national economy and the proper reach of congressional power under the commerce clause (and, impliedly, the intended scope of the statute). In United States v. E. C. Knight Co., however, the Supreme

267 See, e.g., Chicago Bd. of Trade v. Olsen, 262 U.S. 1, 4-5, (1923) (In § 3 of the Grain Futures Act of 1922 "Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce.").


269 See Chicago Bd. of Trade v. Olsen, 262 U.S. at 38 (implying that the question of whether manipulation of grain market is detrimental to public is different from asking whether such manipulation is "too remote in its effect on interstate commerce.").


Court ignored the legislative history and considered de novo whether the acquisition of "nearly complete control of the manufacture of refined sugar within the United States" could properly be prevented by an act of Congress. The Court reserved for itself as a matter of law the question whether the manufacturing process was a part of or sufficiently related to interstate commerce. It held, without reference to any congressional findings, that

Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce . . . is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.274

The Court did not indicate when such a situation might exist.

During this era, the linchpin of the Court's doctrine was its determination of whether the regulated activity "directly" or "indirectly" affected interstate commerce.275 The question was reserved to the Court as a matter of law,276 and was often resolved without regard to congressional findings on the point.277 The direct/indirect affect test rested upon history (including the common law)278 and rigid platitude,279 rather than empiricism.

272 156 U.S. 1 (1895).
273 Id. at 9.
274 Id. at 12.
277 The Carter Court stated:

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. . . . The distinction . . . turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. . . . It is quite true that rules of law are sometimes qualified by considerations of degree. . . . But the matter of degree has no bearing upon the question here. . . .

Id. at 307-08.
278 See, e.g., id. at 308-09 (common law).
279 See, e.g., United States v. E.C. Knight Co., 156 U.S. at 13 (It is better to suffer from "acknowledged evils" than risk "more serious consequences by resort to expedients of even doubtful constitutionality.").

Because of its reliance upon bromides rather than analyses based upon congressional findings, the Supreme Court's early commerce decisions are difficult to reconcile. In Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), for example, the Court held that the Sherman Act could constitutionally be applied to defendant suppliers of pipe who con-
Judicial notice of both the deepening depression and deteriorating labor-management relations in critical industries probably contributed to the Court's abandonment in 1937 of its wooden application of the direct/indirect affect test. In that year the Court decided, in *NLRB v. Jones & Laughlin Steel Corp.*, that the propriety of national economic legislation "is necessarily [a question] of degree." The Court continued:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.

This theoretical framework thus justified the Court's delegation to Congress, as a question of fact or degree, the duty to decide whether industrial strife presented a sufficient nexus with interstate commerce to justify the exercise of power embodied in the National Labor Relations Act. The detailed congressional findings set forth in section one of the Act became immediately relevant to the Court, as did previous legislative investigations concerning the causes and effects of labor unrest. Rejecting dogma, the Court observed: "We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." The statute, as applied, was upheld.

In *Jones & Laughlin*, the Court was not persuaded to change the definition of interstate commerce, which still connoted movement of goods interstate. Rather, it decided that Congress must be free to

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280 See note 79 supra (text of FED. R. EVID. 201).
281 301 U.S. 1 (1937).
282 Id. at 37.
283 Id. (quoting Stafford v. Wallace, 258 U.S. 495 (1922)) (emphasis added).
285 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 23 n.2.
286 See id. at 41-43 & nn.8-9.
287 Id. at 41-42 (citing no cases).
288 Id. at 49.
investigate and thereafter decide, checked primarily by political considerations, whether a regulated activity sufficiently affected inter-state commerce. This holding reflected earlier doctrine (including the interpretation in *McCulloch* of the necessary and proper clause) that established Congress' plenary power over commerce. In cases following *Jones & Laughlin*, the Court established that, because Congress needs the power to judge the propriety of economic regulations in a modern national economy, legislative findings are relevant to judicial ratification *vel non* of Congress' judgment. The "affecting commerce" standard judicially evolved from a question of law to one of fact. Professor Cox described the practical necessity for this:

For a short time the Court sought to reserve judicial power over the ultimate question of degree, saying that federal regulation cannot be extended to "effects upon interstate commerce so indirect [as to] . . . create a completely centralized government." It soon became apparent, however, that no court was capable of drawing such a line in terms appropriate for continuing judicial administration.

The degree to which a regulated subject affects commerce is characterized today as a question of fact not because it is in some tangible sense a "fact," but because the modern Court appreciates the subject matter's political nature.

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289 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *see note 55 supra* (standard of appropriateness in *McCulloch*).


291 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

292 *See FERC v. Mississippi*, 456 U.S. 742, 755 (1982). *See also* note 190 supra (Whether legislative facts are relevant to a constitutional question is a matter of federal law reserved for Court).

293 Cox, *supra* note 12, at 225 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

294 The Court will not decide on the merits a question that it deems "political" in nature. *See, e.g.*, Coleman v. Miller, 307 U.S. 433, 454 (1939) (whether state ratification of constitutional amendment is valid is question for Congress). In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court delineated situations in which political questions would be found:

[If there is] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The notion that the political question doctrine properly applied to situations where no legal standards were judicially ascertainable was criticized in *Scharpf*, *Judicial Review and the...*
Congress' current power to resolve in binding fashion questions of degree under the commerce clause is based more upon necessities of social and economic life than upon transcending constitutional principles determining which branch is best able to make law or find fact. The legal collapse of economic substantive due process was directly related to a belated recognition by the Supreme Court that the social and economic order in the United States was “more chosen than given.” Today, the need for experimentation and doctrinal flexibility in matters of economic and social policy is openly acknowledged by the Court, and its recognition of that need is often accompanied by a snub directed at the older, discredited doctrine. It has

Political Question: A Functional Analysis, 75 Yale L.J. 517, 555-60 (1966). Under Scharpf's “functional” analysis, emphasis is placed on the Court's inability to apply existing legal principles to the policy in issue.


Moreover, the Roe Court pointed out that when life “begins” is not relevant to its constitutional holding regarding the legal status of the unborn. Roe v. Wade, 410 U.S. at 158-59. But cf. id. at 156 (if personhood established, “appellant’s case . . . collapses”). At no time did the Court imply that personhood status under the 14th amendment is a question of fact for legislative determination, cf. id. at 162 (“[W]e do not agree that, by adopting one theory of life, [the state] may override the rights of the pregnant woman that are at stake.”); City of Akron v. Akron Ctr. For Reproductive Health, 103 S. Ct. 2481 (1983) (same).

Cf. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 945 (1973) (Constitutional terms are “more or less suitable pegs on which judicial policy choices are hung.”) (quoting Linde, supra note 210, at 254).

L. Tribe, supra note 171, at 447 (emphasis and footnote omitted).

been accepted as a matter of policy in this area that the political process affords individuals sufficient protection against arbitrary exercises of legislative power.\textsuperscript{298}

B. \textit{Administrative Practice}

Commerce clause jurisprudence illustrates that the practical need for experimentation or flexibility in forming policy may lead to the characterization of evaluative judgments (i.e., those of degree) as findings of fact. Another reason why judgments are sometimes characterized as facts, and thus as fit for nonjudicial resolution, is because the decisionmaker possesses particular expertise in the subject matter area. Judicial deference to determinations born of expertise, and the consequent characterization of such judgments as "facts," may be seen in the relationship between the courts and administrative agencies.

Distinguishing between law and fact is critical in administrative practice. The labels have important ramifications concerning the power of a reviewing court over decisions made by an administrative agency.\textsuperscript{299} As a term of art, the definition of "basic facts" comports with traditional and commonsense understanding\textsuperscript{300} of what facts are: "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to its legal effect. It can, for example, be made by a person who is ignorant of the applicable law."\textsuperscript{301} Judicial review of agency factfinding is very deferential.\textsuperscript{302} But agency interpretations of law are subject to de novo review.\textsuperscript{303} The law and fact labels were and are used by courts to justify levels of review consistent with their notions of agency expertise.

In early administrative law cases, reviewing courts attempted to exert judicial control over agency policymaking by importing a "jurisdictional"\textsuperscript{304} or "constitutional"\textsuperscript{305} element into otherwise basic
facts, in order to justify the de novo review thought to be required by article III. Underlying the jurisdictional and constitutional fact doctrines was evidently a judicial distrust of decisionmaking by indirectly accountable administrative agencies. Today, distrust of the administrative process has waned, and the trend is in the other direction. As administrative practice becomes more prevalent, regularized, and necessary, reviewing courts are increasingly predisposed not only to accept agency findings of basic fact, but also to ratify almost summarily agency applications of law to the facts. The courts sometimes characterize agency applications of law to the basic facts as findings of "ultimate fact."

These ultimate facts are inferential rather than empirical and are determined by holding evidence up against a statutory standard. Findings of ultimate fact therefore encompass agencies' interpretations of law. The policy reason for allowing agencies this latitude, however, has great force. In their daily exposure to and discovery of basic facts occurring in myriad cases arising under the authorizing statute, agencies develop expertise in characterizing evidence or assessing behavior against the statutory standard. In addition, the nature of the basic facts found may preclude reviewing courts from questioning the agencies' application of law to the basic facts that jeopardizes constitutional liberty or property interest is subject to de novo review.

308 For an early example, see NLRB v. Hearst Pub., Inc., 332 U.S. 111, 131 (1944) (Board's application of statutory term "employee" affirmed). See also Griggs v. Duke Power, 401 U.S. 424, 433-34 (1971) (Court deferred to agency's application of statutory term "professionally developed ability test.").
310 See United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 532-33 (1946) (ICC applying § 207(a) of Interstate Commerce Act, 49 U.S.C. § 305(a), to determine as an ultimate fact whether license applicant is "fit, willing, and able properly to perform the service proposed"); Saginaw Broadcasting Co. v. FCC, 96 F.2d 554, 559 (D.C. Cir. 1938) (finding of ultimate fact "usually in the language of the statute"), cert. denied, 305 U.S. 613 (1938).
facts. Accordingly, agencies' ultimate determinations of statutory applications to basic facts should be, and often are, given great weight by reviewing courts.

Because the ultimate fact doctrine is used instrumentally by courts to facilitate policy regarding the proper scope of judicial review, it has been rejected when its application would prevent rather than justify judicial deference to an expert factfinder's decision. Pullman-Standard v. Swint presents a sufficiently analogous context in which to illustrate this point, even though it concerns appellate review of a trial court's findings rather than an agency's. In Pullman-Standard, the Supreme Court dealt with the question of whether, under Title VII of the Civil Rights Act, a trial court's finding of discriminatory intent was one of fact, and therefore subject to review under the clearly erroneous standard. The court of appeals ruled that the trial court's finding of no intent could be reversed under a

312 See Korematsu v. United States, 323 U.S. 214, 218-19 (1944) (Courts cannot challenge Congressional and military finding that "unascertained number of disloyal" citizens justified relocation of those of Japanese origin. Executive Order 9066 authorized Secretary of War and military commander to "prescribe military areas in such places . . . as he . . . may determine, from which any or all persons may be excluded" in order to provide "every possible protection against espionage and against sabotage.") (citing Hirabayashi v. United States, 320 U.S. 81, 85-86 (1943)).

313 A reviewing court will not, without some independent analysis, defer to an agency's interpretation of law. Pierce & Shapiro, note 168 supra, at 1183. My point is that, partly through the use of the ultimate fact doctrine, a court can justify an extremely deferential stance towards an agency's legal application and, more often than not, ratify it.

Usually the courts' deferential standard of review is expressed in terms of the rational basis test. Pierce & Shapiro, note 168 supra, at 1183. The authors listed five policy reasons why a reviewing court may choose to defer to agency interpretation of law:

First, the [Administrative Procedure Act] arguably does not compel de novo review of all questions of law. . . . Second, agency interpretations of statutory provisions are often so inextricably bound to factual and policy issues that de novo review would constitute undue interference in the agency's factfinding or policymaking process. Third, the agency is often best suited to understand how it is supposed to pursue the congressional purposes underlying a statute. Fourth, uniformity should be enhanced by deferring to reasonable agency interpretations of regulatory statutes. Fifth, in some circumstances, deference to agency statutory interpretations may help protect the reliance interests of parties affected by the statute at issue.

Id. at 1183 n.35 (citations omitted).

It is not clear whether an agency, when reciting the facts underlying its decision, must do more than state the ultimate facts. Compare ICC v. Parker, 326 U.S. 60, reh'g denied, 326 U.S. 803 (1945) (finding of "public interest, convenience, and necessity" insufficient alone to support agency ruling), with United States v. Pierce Auto Freight Lines, Inc., 327 U.S. at 533 (Failure to state clearly basic findings is not fatal where finding exists but is "inartistically drawn.").


316 Pullman-Standard v. Swint, 102 S. Ct. at 1791-92 (citing Fed. R. Civ. P. 52(a)).
standard "free from the strictures of rule 52" because intent is an "ultimate fact." The characterization superficially made sense because the statute expressly required a finding of "an intention to discriminate."

The Supreme Court rejected this position. It ruled in effect that the trial court's finding of no intent was a basic fact, therefore subject to reversal only if clearly erroneous. The Court noted that treatment of "issues of intent as a factual matter for the trier of fact is commonplace," thus implying that trial courts are most adept at ascertaining questions of intent in the first instance. The Court held that the trial court's finding should be deferred to by the reviewing court under the clearly erroneous standard, regardless of whether the finding of intent under the statute was characterized as a basic or ultimate fact. The policy of encouraging deference to a department of government with expertise to make a reliable decision was thus preserved not by use of the ultimate fact doctrine, but by carving out an exception to it.

C. Habeas Corpus

The writ of habeas corpus, which allows those imprisoned in violation of the Constitution or laws of the United States to be released or at least retried, has been called both a "great constitutional privilege" and the "basic safeguard of freedom in the Anglo-American world." The Constitution expressly protects against the writ's suspension, and Congress always has provided some form of habeas jurisdiction in article III courts.

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317 Id. at 1785-87.
320 Id. at 1790.
321 Id. at 1792.
322 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).
324 U.S. CONST. art. I, § 9, cl. 2, states that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." The Court does not base its holdings concerning the scope or availability of habeas on the suspension clause, however. It prefers instead to interpret Congress' statutory grant of the writ. To the chagrin of those of all political persuasions, the Court has demonstrated a "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." Wainwright v. Sykes, 433 U.S. 72, 81 (1977).
Not until 1867, however, did Congress grant to those in state custody the right to seek habeas relief.\textsuperscript{326} The flip side of this right was the power given to federal district and appellate courts to invalidate state judgments of conviction.\textsuperscript{327} This was a significant incursion into the traditional "hands off" relationship previously maintained between the lower federal and state judiciaries. For over one hundred years, the Supreme Court has balanced and rebalanced the policies stemming from this development. Two important and sometimes mutually exclusive policies are always at stake: vindication of the federal rights of state prisoners, and states' independent administration of their own criminal laws and procedures. The decisions of the Court present a dynamic body of habeas jurisprudence, which swings like a pendulum across time to favor first one policy and then the other.\textsuperscript{328} The distinction between questions of law and fact plays a critical role in this development.

A mainstay of habeas doctrine is that habeas courts are not bound by prior state court determinations of federal law.\textsuperscript{329} However, the level of deference accorded state court determinations of fact was, until recently, unclear. In \textit{Brown v. Allen},\textsuperscript{330} the Court initially suggested that "where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue."\textsuperscript{331} However, this permissive deference to state factfinding did

\begin{footnotesize}
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\item[\textsuperscript{327}] Fay v. Noia, 372 U.S. 391, 469 (1963) (Harlan, J., dissenting).
\item[\textsuperscript{328}] It is not necessary to review here the complex development of habeas doctrine from its inception. See, however, the excellent compendium in P. BATOR, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1424-514 (2d ed. 1973 & Supp. 1981). For an example of the Court's switch in emphasis from federal protection of federal rights to protection of state autonomy, compare Fay v. Noia, 372 U.S. 391 (1963) (writ available as of right despite state procedural default absent petitioner's "deliberate bypass") with Wainwright v. Sykes, 433 U.S. 72 (1977) (Procedural default bars grant of writ unless petitioner establishes "cause" for default and "actual prejudice" resulting therefrom.).
\item[\textsuperscript{329}] Brown v. Allen, 344 U.S. at 506 (opinion of Frankfurter, J.). The apparent reason for this is that federal courts are deemed to have more expertise in determining questions of federal law, and because state judges may not be able to resist "popular pressures not experienced by federal judges given lifetime tenure." Stone v. Powell, 428 U.S. 465, 525 (1976) (Brennan, J., dissenting).
\item[\textsuperscript{330}] 344 U.S. 443 (1953).
\item[\textsuperscript{331}] \textit{Id.} at 458. Accord Fay v. Noia, 372 U.S. at 422.
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not apply when "the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts." \(^{332}\)

In *Townsend v. Sain*, \(^{333}\) the Court set forth circumstances\(^ {334}\) under which the habeas court must redetermine the material facts by holding a full evidentiary hearing.\(^ {335}\) Congress responded by grafting on to the habeas statute\(^ {336}\) a near codification of *Townsend*'s criteria.\(^ {337}\)

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\(^{332}\) Brown v. Allen, 344 U.S. at 507 (opinion of Frankfurter, J.). Justice Frankfurter spoke for a majority of the Court on this point.

As an example of a "mixed" question of law and fact, Justice Frankfurter referred to "the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary . . . " Brown v. Allen, 344 U.S. at 507. Used in this fashion, mixed questions of law and fact are analogous to the "ultimate facts" described in the preceding section. See notes 309-13 supra and accompanying text.


\(^{334}\) Id. at 312-13. In his typical quasi-statutory fashion, cf. Miranda v. Arizona, 384 U.S. 436, 479 (1966), Chief Justice Warren listed the circumstantial defects in state factfinding procedure that mandated an evidentiary hearing on habeas:

We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. 372 U.S. at 313. The common denominator linking these circumstances was that in none did "the state-court trier of fact . . . after a full hearing[,] reliably [find] the relevant facts." Id. Cf. Moore v. Dempsey, 261 U.S. 86, 91-92 (1923) (Habeas court may redetermine facts of whether state trial was mob-dominated.).

\(^{335}\) Townsend v. Sain, 372 U.S. at 313.


\(^{337}\) Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104, 1105 (codified at 28 U.S.C. § 2254(d) (1976)). The section provides that:

In any proceeding instituted in a Federal court by an applicant for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his
Section 2254(d) currently provides that, in the absence of any statutory criteria authorizing de novo factfinding by the habeas court, the state court's factfinding "shall be presumed to be correct." This contrasted with Townsend's precatory holding on the point.\textsuperscript{338}

This history, culminating in congressional passage of section 2254(d), sets the stage upon which the characterization as law or fact of state court findings takes on crucial significance in habeas jurisprudence. The habeas court may dismiss the former \textit{ab initio}, while the latter is binding absent direct application of a precise statutory exception.

\textit{Sumner v. Mata}\textsuperscript{339} ("\textit{Mata I}") illustrates how the Supreme Court constitutional right, failed to appoint counsel to represent him in the State court proceeding; 
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or 
(7) that the applicant was otherwise denied due process of law in the State court proceeding; 
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

338 \textit{Townsend} set forth circumstances mandating an evidentiary hearing on habeas. \textit{See} note 334 \textit{supra}. It did not preclude the federal judge from holding a hearing in the exercise of sound discretion, 372 U.S. at 318, even if the petitioner was afforded a "full and fair hearing by the state court." \textit{Id. Cf.} \textit{Fay v. Noia}, 372 U.S. at 438 (district judge has discretion to deny writ to petitioner who deliberately bypassed state procedures.). 

The \textit{Townsend} Court stated that the district judge "ordinarily should" accept state court factfindings made in the context of adequate procedures. 372 U.S. at 318. This was sound policy apart from federalism concerns. 

\[F\]actfindings are efforts to ascertain what actually happened . . . fact finders are deferred to because they are closer to the truth . . . [B]ecause of the uncertainties of fact-finding, often compounded in habeas corpus by delay, it simply is not practicable [for federal courts] to review the facts as broadly as the law.

\textit{Wright & Sofaer, Federal Habeas Corpus For State Prisoners: The Allocation of Fact-Finding Responsibility}, 75 YALE L.J. 895, 920 n.67 (1966). The authors concluded: "If cooperation from the states is expected, they are entitled to reasons, and to good reasons, every time their records or findings are deemed inadequate." \textit{Id.} at 922 (footnote omitted).

uses the law and fact labels instrumentally in its habeas jurisdiction to further current federalism policy. In Mata I, the Supreme Court first held that under section 2254(d) habeas courts must presume that the state court's findings of fact are correct, whether they are found in the first instance by the state trial or appellate court. If the habeas court concludes that a statutory criterion is present to negate this presumption, or that the state court's findings are otherwise "not supported by the record," the habeas court must specifically set forth the reasoning leading to its conclusion.

The Mata I Court then proceeded to determine whether the habeas court had complied with this interpretation of section 2254(d). In the case, the California Court of Appeal had found that a challenged pretrial photo identification procedure conducted by the police did not violate the defendant's due process rights. The


340 Mata I, 449 U.S. at 546-47. The Court noted that § 2254(d) applied to state court "determination[s] after a hearing on the merits of a factual issue," and that the statute "makes no distinction between the factual determinations of a state trial court and those of a state appellate court." Id. at 546. The Court held that, in Mata's case, the state appellate court conducted a "hearing" that met the requirements of § 2254(d). Id. at 546. This holding was not challenged by the dissenters.

The Mata I opinion reasoned that federal deference to all state court findings of fact was required because of the "interest in federalism recognized by Congress in enacting § 2254(d)." Id. at 547. Deference to state appellate court findings of fact based solely upon examination of the trial record does not otherwise seem justifiable, however. For example, the reasons advanced by Wright & Sofaer, note 338 supra, at 920 n.67, in support of federal courts' deference to state trial courts' findings of fact, are not applicable when the findings are not based upon evaluations of live testimony. Functionally, there is no difference between a state appellate or federal appellate court's parsing the trial record to ascertain the facts.

341 Section § 2254(d) allows the habeas court to determine the facts de novo, even though a more narrow statutory criterion is absent, if the habeas applicant establishes by "convincing evidence" that the record does not "fairly" support the state court's findings of fact. 28 U.S.C. § 2254(d) (1976).

342 Mata I, 449 U.S. at 551. Cf. Fed. R. Civ. P. 52 (At civil bench trial, court must state facts specially.); Fed. R. Crim. P. 23(c) (At criminal bench trial, defendant can have judge state special findings.).

343 Mata I, 449 U.S. at 542. Mata was convicted of first degree murder for the stabbing death of a fellow inmate at a California prison. On appeal, he raised for the first time a due process objection to a pretrial photo identification procedure used by police to secure an eyewitness identification at trial. See Simmons v. United States, 390 U.S. 377, 384 (1968) (Due process is violated if a photo procedure is "impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification."). Because the objection to the eyewitness' identification was not timely made, see 449 U.S. at 541-42, the California Court of Appeal was not obligated to consider the issue. Id. at 547 (citing Souza v. Howard, 488 F.2d 462 (1st Cir. 1973)). But cf. Henry v. Mississippi, 379 U.S. 443, 448-49 (1965) (Procedural default does not bar Supreme Court on direct review if interests served by state's procedure
state appellate court recited findings to support its holding:

Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers[;] that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.344

On a habeas petition, the Court of Appeals for the Ninth Circuit reviewed the same record as the state appellate court and applied the same legal standard to it.345 Finding that the photo identification procedure violated Mata's due process rights, the Ninth Circuit reversed his conviction based upon its findings that:

(1) the circumstances surrounding the witnesses' observation of the crime were such that there was a grave likelihood of misidentification; (2) the witnesses had failed to give sufficiently detailed descriptions of the assailant; and (3) considerable pressure from both prison officials and prison factions had been brought to bear on the witnesses.346

The Mata I Court held that because the circuit court did not refer to section 2254(d) in its opinion and accord the "factual determination" of the state appeals court a presumption of correctness,347 its judgment must be vacated and remanded.348

Justice Brennan dissented,349 criticizing the majority's reliance...
upon section 2254(d). He could not find any demonstrated disagreement between the state appellate and federal circuit court over the “basic, primary, or historical fact[s]” in the record. Justice Brennan did not view the state appellate court’s findings as factual, thereby falling within the restriction of section 2254(d), because the findings were stated sparsely, in conclusory fashion, and did not include detailed references to the specific underlying historical circumstances of the case. Moreover, it was undisputed that the circuit court did not conduct its own evidentiary hearing. Rather, it relied upon the same record used by the state appellate court. Justice Brennan concluded that the disparate state appellate and circuit court findings were their respective legal conclusions of whether the circumstances surrounding the photo identification satisfied due process requirements. The conflicting findings, he asserted, were made pursuant to “questions of law, or at least mixed questions of fact and law.” The state appellate and circuit courts disagreed about “the constitutional significance of the facts of the case, and not over the facts themselves.” Consequently, it was “obvious” that

350 Justice Brennan first objected to the the Court’s use of § 2254(d) because the statute was not cited in a timely fashion by the state on appeal. Id. at 554. He noted that § 2254(d) was not mentioned in the briefs filed with the Court of Appeals for the Ninth Circuit, and that “except in exceptional circumstances, a court need not search the universe of legal argument and discuss every contention that might have been—but was not—made by the losing party.” Id. at 554. Moreover, he argued that the Court’s required statement of why § 2254(d) did not prevent a de novo determination of the facts on habeas “is... likely to be seen as an invitation to lower federal courts to ‘insert[t] a boilerplate paragraph’ in their opinions acknowledging their awareness of § 2254(d).” Id.

351 Id. at 555-56.
352 Id. at 556-57.
353 Id. at 556.
354 Id. at 557.
355 Id. Justice Brennan added that § 2254(d) did not prevent habeas courts from exercising their “well-established duty” to apply independently principles of federal law to state court factfindings. Id. at 558-59 (citing Townsend v. Sain, 372 U.S. at 318).

356 Id. at 556-57. Justice Brennan supported his conclusion by briefly discussing Neil v. Biggers, 409 U.S. 188 (1972). Biggers involved the propriety under the due process clause of a station house showup procedure used by police to obtain a rape victim’s identification of a suspect. Both the federal district and appellate courts ruled on habeas that, applying the “totality of the circumstances” test, the procedure was “so suggestive as to violate due process.” Id. at 190. The Supreme Court reversed and remanded, id. at 201, despite the dissent’s argument that “findings of fact concurred in by two lower courts” should not be lightly reversed. Id. at 202 (Brennan, J., dissenting). The majority found the lower courts’ factual findings clearly erroneous, id. at 200, but more importantly stated that the dispute was “not so much over the elemental facts as over the constitutional significance to be attached to them.” Id. at 193 n.3.

Although Justice Brennan’s Mata I dissent overstated the matter by saying that the Biggers Court “rejected the dissenters’ argument on the basis of its conclusion that application of
section 2254(d) was inapplicable to the case.\(^{357}\)

On remand, the Ninth Circuit adopted Justice Brennan's conclusion that section 2254(d) was not relevant to its decision.\(^{358}\) It characterized the state appellate court's finding that no circumstances pointed toward impermissible suggestiveness as a mixed question of fact and law,\(^{359}\) and therefore did not consider itself bound under section 2254(d) by the state appellate court's determination.\(^{360}\) The circuit court majority\(^{361}\) readopted its previous findings in toto.\(^{362}\) The Supreme Court granted certiorari, and in \textit{Sumner v. Mata}\(^{363}\) ("\textit{Mata II}") summarily vacated the circuit court's judgment and remanded once again.\(^{364}\) The brief per curiam opinion conceded that the ultimate constitutionality of Mata's photo identification was a mixed question of law and fact\(^{365}\) but admonished the circuit court that the "questions of fact that underlie this conclusion are governed by § 2254(d)."\(^{366}\) The mandate sent back to the circuit court was to face up to any disagreement as to the facts and defer to the state appellate court findings,\(^{367}\) or to explain, through the use of section 2254(d)'s criteria, why the statutory presumption should not apply.\(^{368}\)

\(^{357}\) \textit{Id.} at 559.

\(^{358}\) \textit{See} \textit{Mata v. Sumner}, 649 F.2d 713, 715-16 (9th Cir. 1981).

\(^{359}\) \textit{Id.} at 716-17.

\(^{360}\) \textit{Id.} at 717.

\(^{361}\) For the second time, Circuit Judge Sneed dissented "respectfully, and to some degree sorrowfully." \textit{Id.} at 717.

\(^{362}\) \textit{Id.} at 714. Indeed, the only new recognition made by the circuit court was that § 2254(d) "is not in this case." \textit{Id.} at 716.


\(^{364}\) \textit{Id.} at 548.

\(^{365}\) \textit{Id.} at 597.

\(^{366}\) \textit{Id.} at 1307 (emphasis in original). The Court acknowledged that "the distinction between law and fact is not always easily drawn," but expressly stated that § 2254(d) applied to questions of "historical fact" (mentioning \textit{Biggers} factors for evaluating likelihood of misidentification listed in note 345 \textit{supra}). Justices Brennan, Marshall, and Stevens dissented. 445 U.S. at 599.

\(^{367}\) \textit{Mata II}, 455 U.S. at 598.

\(^{368}\) \textit{Id.} On remand, the circuit court did exactly that. It first read \textit{Mata II} to hold that § 2254(d) was indeed applicable to the state appellate court findings, some of which were "considerably at odds with" the findings made on habeas. \textit{Mata v. Sumner}, 696 F.2d 1244, 1250-51 (9th Cir. 1983) (citing \textit{Mata II}). Then, after a painstaking consideration of the trial record and the state court findings in light of § 2254(d)'s presumption of correctness, the circuit court concluded that "some of the [state appeals court] findings are not fairly supported by the record." \textit{Id.} at 1251. \textit{See Mata II}, 455 U.S. at 597 (suggesting this option to
Plainly, the quarrel between the majority and dissenters in *Mata I* and *Mata II* was not over whether the presence or absence of circumstances establishing impermissible suggestiveness posed a question of law or fact. The issue was whether the matter should be decided in binding fashion by federal or state courts. The underlying federalism policy at stake cannot be ignored when attempting to understand why the Supreme Court held that the presence or absence of such circumstances was properly a factual determination. Justice Rehnquist's opinion for the *Mata I* Court derived largely from federalism concerns "recognized by Congress," inherent in the "friction" caused by federal habeas review of state court judgments. The dissenters stressed the "duty" of federal courts to review independently the federal questions presented on habeas. The opinions did not delve into the intrinsic nature of the matter in issue (i.e., is that a "fact"?), but merely used the terms "law" and "fact" as shorthand to justify policy conclusions concerning the proper allocation of judicial power to federal and state courts under section 2254(d).

D. Summary

These trends in national economic legislation, administrative practice, and habeas corpus illustrate that characterizing a matter as one of law or a fact is no more than a conclusion, based upon an
evaluation of pertinent policies, that one branch of government rather than another should make the decision in question. In these areas of the law, functional or ideological judgments, colored with rhetorical distinctions between law and fact, are made concerning the Court's proper relationship with Congress, agencies, appellate and trial courts, and the states. The rhetorical characterizations do not truly reflect whether the matters in question are intrinsically "law" or "fact." In short, there is more to the characterizations than the rhetoric admits.

In its modern examinations of the rationality of enforcement legislation under the post-Civil War amendments, the Supreme Court has checked to see that Congress was aware of facts establishing a need for legislative action. For without such need, the legislation would not rationally relate to the substantive amendment. The cases permit the inference that the Court is not likely to find the legislation unconstitutional if it finds that sufficient supporting facts exist. It necessarily follows, then, as in the three areas of law just surveyed, that characterizing legislative findings as "facts" will more often than not determine the outcome in enforcement clause cases.

Proponents of the factfinding theory do not acknowledge this point. Because of the binding effect of characterizing findings as "facts," the mere assertion that a finding is factual cannot persuasively establish Congress' enforcement role in a particular area, nor should it ensure judicial deference. The propriety of allowing Congress alone to set national civil rights policy in an area must first be examined. For example, whether Congress can determine as a matter of fact that human life begins at conception depends upon an evaluation of the various policy considerations for and against reestablishing a legislative role in regulating women's choices concerning abortions. This policy analysis is imperative because where the facts are outcome determinative, policy considerations are inextricably tied to the characterization of findings as "facts." The policy considerations must first be settled, in order to rely upon the factfinding theory, because the findings cannot properly be called factual until then. Also, and perhaps most importantly, proponents of the

372 See Pullman-Standard v. Swint, 102 S. Ct. at 1796 (Marshall, J., dissenting) (discussing the matter in terms of "controlling legal issues" and "effective judicial administration").


factfinding theory must concede that the final characterization of a question as one of fact or law is ultimately reserved in our system for the Supreme Court.

IV. Conclusion

In order to be helpful, the debate over the proper scope of congressional power under the post-Civil War amendments must be separated from the "vexing . . . distinction between questions of fact and questions of law."375 Instead, we should forthrightly address the issue of whether policy considerations in a particular area work to expand or contract the functions we give an institution to perform. Perhaps Justice Harlan recognized this in his Oregon dissent: "Judicial deference is based, not on relative factfinding competence, but on due regard for the decision of the body constitutionally appointed to decide."376 His characterization of the issue was incomplete only because it did not acknowledge (or admit) that determining which institution is "constitutionally appointed" to be preeminent in a particular area is itself a policy decision—one reserved to the judiciary.

This article has identified two flaws in the factfinding theory used to justify enhanced congressional power under the post-Civil War amendments. First, an examination of the different factfinding procedures used by legislatures and courts shows that neither can claim in the abstract that it possesses an absolutely superior capability to find and use facts to support its decisionmaking. The particularities of the issues considered, personalities involved, and institutional constraints must be figured into any analysis of factfinding competence. Second, and more importantly, the factfinding theory is misleading; it relies upon the term "fact," which embraces highly subjective policy concepts, without acknowledging the term's conclusory nature. Use of the term to justify a realignment of the relative power of Congress and the Supreme Court with regard to abortion policy, or any other policy, without initially analyzing the issues surrounding the realignment of authority itself, cannot help but be incomplete.