

2009

The Empirical Judiciary. Book Review Of:
Constitutional Fictions: A Unified Theory of
Constitutional Facts. by David L. Faigman

A. Christopher Bryant

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Bryant, A. Christopher, "The Empirical Judiciary. Book Review Of: Constitutional Fictions: A Unified Theory of Constitutional Facts. by David L. Faigman" (2009). *Constitutional Commentary*. 29.
<https://scholarship.law.umn.edu/concomm/29>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Book Reviews

THE EMPIRICAL JUDICIARY

CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS. By David L. Faigman.¹ Oxford University Press. 2008. Pp. xiii + 230. \$65.00.

*A. Christopher Bryant*²

INTRODUCTION

In *Gonzales v. Carhart*, the Supreme Court sustained the constitutionality of the federal Partial-Birth Abortion Ban Act without overruling its decision seven years earlier invalidating a nearly identical Nebraska law.³ In doing so, the Court sided with, though conspicuously did not defer to, Congress's factual finding that the banned procedure was virtually never medically necessary, rejecting the contrary conclusion of all six lower federal courts confronted with challenges to the federal law. The ruling shone a spotlight on the methods, or lack thereof, that the Court employs in receiving evidence and resolving disagreements about questions of legislative facts in constitutional cases.

The ruling was merely the most recent of numerous cases in which the result turned on disputed questions of legislative fact. Examples from the Supreme Court's last decade can be found in

1. John F. Digardi Distinguished Professor of Law, University of California, Hastings College of Law.

2. Professor, University of Cincinnati College of Law. I am grateful to Lou Bilionis, Paul Caron, David Faigman, Emily Houh, Betsy Malloy, Bill Marshall, Tom McAfee, Darrell Miller, Michael Solimine, Verna Williams, and Ingrid Wuerth for helpful comments; Anna Dailey, Brennan Grayson, and Kane Kayser for excellent research assistance; and the Harold C. Schott Foundation for financial support.

3. Compare *Gonzales v. Carhart*, 550 U.S. 124 (2007) with *Stenberg v. Carhart*, 530 U.S. 914 (2000).

nearly every substantive area of constitutional law, including the dormant commerce clause, the scope of congressional power to regulate interstate commerce and enforce the Fourteenth Amendment, the requirements of the due process and the equal protection clauses thereof, as well the freedoms of religion and expression. Moreover, the centrality of legislative facts to constitutional litigation is nothing new. To some extent their significance is an inevitable corollary to judicial review, which makes all the more astounding the judiciary's failure to establish a consistent or coherent approach to resolving questions of legislative fact. Over the course of the last century, few issues have more persistently or profoundly perplexed judges than how they should address questions of legislative fact when reviewing the constitutionality of a challenged statute.

Nor has the subject received the kind of sustained scholarly investigation its import clearly merits. Though the problem is a ubiquitous and recurring one, scholarly efforts to solve it tend to come in waves, several scholars addressing the question during a brief span of time (often in response to one or two salient decisions) and then ignoring the matter for years. But an issue that implicates the very legitimacy of judicial review ought not be ignored. So David Faigman's *Constitutional Fictions: A Unified Theory of Constitutional Facts* merits celebration for taking up such an important and too-often neglected subject.

His book should be celebrated for more than its topic, however. *Constitutional Fictions* does the legal profession an invaluable service by identifying and articulating the many frequently unspoken questions that arise in the context of judicial consideration and resolution of facts, especially legislative facts, in constitutional cases. The book also documents the largely unremarked ubiquity of these questions, the wide variety of circumstances in which they occur, and the depth of the theoretical issues they implicate. These are not mean achievements, as they outstrip the occasional efforts of some of the most distinguished legal scholars of the past century. Professor Faigman accomplishes all this in crisp, lucid, and admirably concise prose. Nor could Professor Faigman's book be more timely. Several of the Roberts Court's most salient and controversial constitutional decisions have turned on questions of legislative fact.

Constitutional Fictions treats an important topic with impressive insight and grace. But it will not be the last word on the subject. Professor Faigman may have planned an exhaustive study, but instead the subject appears to have exhausted him.

When *Constitutional Fictions* finally comes round to normative and prescriptive analysis of the status quo, Faigman shies away from the broader implications of his critique. As he acknowledges, the Supreme Court has been unpardonably opaque and inconsistent in its treatment of questions of legislative fact in constitutional cases. These are not venial judicial sins.

But Faigman proves too tolerant of the Court's disarray and the resulting judicial freedom from constraint. Ultimately he concludes that meaningful judicial review makes much of this indeterminacy inevitable. Implicit in this reasoning is an excessively muscular conception of judicial supremacy, or even exclusivity, in the implementation of the Constitution. After briefly reviewing Faigman's arguments, this essay explores how other models of the roles different institutions properly play in constitutional practice might compel more sweeping changes than he suggests.

Part I of this essay situates *Constitutional Fictions* within the pre-existing scholarly framework. The second Part then summarizes the book's substantial contributions towards greater recognition and understanding of the present doctrinal disorder concerning legislative facts in constitutional cases. Part III identifies issues with, and alternatives to, present judicial practices not addressed in *Constitutional Fictions*, in the hopes of compiling a catalog of questions for future research.

I. PRIOR EFFORTS

To appreciate fully Faigman's distinctive contribution, it must be assessed in the context of the pre-existing treatments of the subject; hence this Part briefly canvases those efforts. The implications of judicial determination of legislative facts⁴ in constitutional cases first garnered scholarly attention in the wake of the Supreme Court's decision in *Lochner v. New York*.⁵ *Lochner* of course served as precedent for judicial disapproval of numer-

4. As used herein, "legislative facts" are facts of general applicability that do (or do not) support the public policy judgment leading to the enactment of legislation. At least since the early 1940s, commentators and jurists have distinguished legislative from adjudicative facts, which concern the application of a general rule to the unique, concrete circumstances of a particular dispute. See, e.g., Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 S. CT. REV. 75, 77 (noting that the "phrase virtually belongs to Professor Kenneth C. Davis") (citing KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958)).

5. 198 U.S. 45 (1905).

ous Progressive Era efforts to regulate wages, hours, and working conditions in an increasingly industrialized American economy.⁶

In 1916 then-Harvard law professor Felix Frankfurter published a survey of judicial rulings on the validity of laws limiting working hours.⁷ He concluded that “study of these opinions indicates a change not only in the decisions but in the groundwork of the decisions,” adding that the “turning point comes in 1908 with *Muller v. Oregon*.”⁸ The future New Dealer and Supreme Court Justice wrote in his typically self-assured fashion. Nevertheless he failed to hide his fundamental ambivalence about the judicial determination of legislative facts in constitutional decisions. Describing a trend towards greater judicial receptivity to maximum hours laws, which he ardently applauded, he came close to endorsing a minimalist and highly deferential judicial role in addressing such matters. He noted that a chief virtue of the more recent rulings was that they recognized that questions concerning the propriety of limits on hours of labor were matters of degree “solely for the legislator.”⁹

But elsewhere in the essay, Frankfurter assiduously preserved a substantial role for courts in re-examining the factual basis for such legislation. He stressed the value and necessity of Brandeis briefs such as those Louis Brandeis himself famously filed in *Muller*. Ultimately, he explicitly declined to choose between judicial abdication and judicial reinvestigation characterized by what he described as attention to “scientific” principles: “either the legislative judgment should be sustained if there is no means of judicial determination that the legislature is indisputably wrong, or the Court should demand that the legislative judgment be supported by available proof.”¹⁰ Frankfurter concluded his survey with an optimistic prophecy that once the factual nature of these kinds of controversies became apparent, the legal profession would bring to bear its formidable resources and resolve the conundrum in some way not yet apparent to him. Ninety-three years later, Frankfurter’s hopes have not been fulfilled.

6. See generally David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003).

7. Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916).

8. *Id.* at 362 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)) (footnote omitted).

9. Frankfurter, *supra* note 7, at 367.

10. *Id.* at 372.

To be sure, others have tried. Writing in the *Harvard Law Review* nine years deeper into the *Lochner* Era, Henry Wolf Biklé focused on cases in which the constitutionality of legislation depended upon the courts' assessment of "some question of fact which the statute postulates or with reference to which it is to be applied."¹¹ Professor Biklé acknowledged that judges' legal expertise did not accord them any inherently greater aptitude to determine such questions than that enjoyed by the proverbial man in the street.¹² He postulated further, perhaps with Frankfurter's earlier commentary in mind, that "a substantial part of the criticism which has been leveled against [judicial review was] due to the fact that decisions have been made which turn on the resolution of these underlying questions of fact."¹³

After listing the various ways, ranging from *a priori* reasoning to reliance on findings made by state supreme courts, that the U.S. Supreme Court had resolved such questions, Biklé urged the Court to uphold statutes unless the formal record of judicial proceedings included proof of facts showing the law to be unconstitutional.¹⁴ Recognizing that scrupulous adherence to such requirements could swamp the federal courts, Biklé suggested that some "machinery" be established whereby such questions could be explored and pertinent factual records could be compiled before the matters found their way to federal court. Biklé pointed to the proceedings before the Interstate Commerce Commission as a possible model. Of course, as to many economic, industrial, commercial, and environmental activities, Biklé's proposal has proven prophetic, insofar as the Administrative Procedure Act¹⁵ provides for judicial oversight of the massive federal bureaucracy currently regulating such matters. Far from all constitutional litigation flows through these channels, however. And the Court has never bound itself to the kind of "on the record" requirement Biklé proposed.

So the issue Frankfurter and Biklé addressed not only outlived them but was fueled by the rise of the administrative state. Accordingly, after a period of neglect, the issue was again taken up, albeit sporadically, by some of the foremost constitutional

11. Henry Wolf Biklé, *Judicial Determination of Facts Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 6 (1924).

12. *See id.* at 6-7.

13. *See id.* at 7.

14. *Id.* at 21-22.

15. 5 U.S.C. §§ 551-59, 701-06 (2000).

scholars of the second half of the twentieth century.¹⁶ A thorough exploration of their work exceeds the narrow confines of a book review. Nonetheless, the particularly noteworthy contributions of Archibald Cox merit mention. The Harvard law professor and former U.S. Solicitor General published two articles in which he examined the relative capacities of Congress and the Supreme Court to determine legislative facts in human rights cases.

Cox celebrated the Court's Voting Rights Act rulings handed down in the October 1965 Term of the Court. In particular, he lauded the Justices' decision to borrow from commerce-clause case law, and extend to the enforcement clauses of the Reconstruction Amendments, a "presumption that facts exist which sustain [congressional] legislation and . . . [judicial] deference to congressional judgment upon questions of degree and proportion."¹⁷ Cox also approved the Court's recognition of Congress's relative institutional strengths, among them a superior ability to determine questions of legislative fact, in devising means for the protection of core constitutional values.¹⁸ Just five years later, however, Cox conceded that his earlier synthesis of the Court's cases had been overly optimistic. Upon reflection he found it "hard to divine whether the Justices have developed a philosophy concerning the weight to be given legislative determinations of fact, characterization, or degree in civil liberties cases,"¹⁹ a judgment as accurate today as when first spoken. So while the controversy surrounding judicial determination of legislative facts in constitutional cases is an ancient one, the legal profession's understanding of it remains inadequate.

II. JUST THE FACTS

Faigman opens his book by discussing illustrative examples of judicial incoherence in the reception of constitutional facts. He makes a case study of the Supreme Court's efforts to deal

16. See, e.g., Dean Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978); Karst, *supra* note 4; Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Arthur S. Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

17. Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

18. *Id.* at 118–21.

19. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 213 (1971).

with the related questions of when, for constitutional purposes, human life begins and ends. He adeptly demonstrates that the relevant cases are utterly inconsistent in their treatment of questions of constitutional fact and reflect a more universal confusion about the way in which such questions should be resolved.

Faigman follows this introduction with an examination of his subject's philosophical foundations. Specifically, he surveys the debate between scientific realists²⁰ and their more skeptical critics. In doing so, Faigman both reveals his own (quite modest) starting assumptions and situates his project within a broader debate about the nature of human knowledge. As he explains, antirealists insist that facts and values are inextricably intertwined, whereas Faigman, like other scientific realists, maintains that "facts can exist independent of biasing influences" (p. 24). This makes possible the distinction between constitutional law and constitutional fact upon which his book is based. The consequence of these assumptions is that lawyers and judges can and should "take facts seriously" (p. 24), even (especially?) when relevant to constitutional litigation. Put another way, Faigman argues that, because facts exist independent of the values of their beholders, courts have a duty to discover them, rather than just employ them "rhetorically, as premises that can be manipulated or massaged in the service of one or another legal outcome" (p. 25). Throughout the book Faigman exposes the Supreme Court's relentless tendency to do the latter.

The next four chapters constitute the heart of the book, wherein Faigman explains how and why the Court has dealt so carelessly with constitutional facts. This effort starts with a taxonomy of constitutional facts that improves upon the well-worn but highly influential distinction Kenneth Culp Davis made between adjudicative and legislative facts.²¹ Insofar as the former class matters to constitutional rulings, Faigman denominates them "constitutional case-specific facts." He divides the latter class into two subcategories based on the function the facts perform in the court's constitutional analysis. "Constitutional doctrinal facts" concern or even determine the content of legal rules that become tenets of constitutional law. "Constitutional reviewable facts," in contrast, relate to the application of legal rules to

20. Scientific realists, discussed in the text, ought not be confused with legal realists. On the latter, see, for example, LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986).

21. See *supra* note 4.

particular circumstances, though such facts still transcend the parties presently before the court. Faigman acknowledges that these categories, while distinct in theory, are not always easy to distinguish in practice (pp. 46–49).

A single area of First Amendment jurisprudence illustrates these distinctions. In explaining its decision to exclude “obscenity” from First Amendment protection, the Court has asserted that exposure to obscene material degrades the moral sensibilities of the community²² and may even increase the incidence of antisocial behavior.²³ These claims concern matters of legislative fact, because they extend beyond the parties to any particular obscenity prosecution. Within Faigman’s taxonomy, they are constitutional *doctrinal* facts, because the Court asserts them in support of its choice of a legal rule, namely a free speech doctrine with an exception for obscene material. The Court has defined obscenity to exclude material having “serious literary, artistic, political, or scientific value.”²⁴ Whether a specific work is of sufficient value to exempt its authors, publishers, or distributors from liability, however, is a question of constitutional *reviewable* fact. It is legislative rather than adjudicative in nature because the Supreme Court has made it clear that the value of a work does not “vary from community to community.”²⁵ Thus, such a determination transcends any single obscenity prosecution. But because this factual issue concerns the application of an established legal standard rather than the announcement of a new one, it is, to use Faigman’s terminology, a constitutional *reviewable* (rather than a *doctrinal*) fact.²⁶

Faigman’s decision to classify different types of legislative facts according to the function they serve in constitutional analysis is a sound one. As I argue below, however, this insight might profitably be taken even further.

The next chapter, on the “Constitution’s Frames of Reference,” explores the ways in which the Supreme Court has manipulated the distinction between facial and as-applied challenges to statutes in order to frame constitutional questions so as to fo-

22. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59, 63 (1973).

23. See *id.* at 60.

24. *Miller v. California*, 413 U.S. 15, 24 (1973).

25. *Pope v. Illinois*, 481 U.S. 497, 500 (1987).

26. The question, however, of the work’s offensiveness, another requirement of the legal test for obscenity, is limited to the specific geographical context of that particular prosecution. See *id.* Accordingly, such an issue concerns a constitutional case-specific fact (p. 57).

reordain their answers. These frames of reference matter for present purposes because they dictate the form issues of legislative fact take in constitutional cases. Case specific facts are most likely to be relevant to constitutional questions posed at a highly specific level of generality, whereas reviewable or even doctrinal facts are more likely to be pertinent to those asked and answered at a more abstract level.²⁷ In *United States v. Salerno*, the Supreme Court insisted that a facial challenge to a statute may succeed only where “no set of circumstances exists under which the act would be valid.”²⁸ Faigman joins the majority of commentators in dismissing *Salerno*’s dictum as the product of “romantic notions of a restrained judiciary” and “timeworn banalities of judicial restraint” (pp. 65–66). In Part III, I argue that these banalities deserve more of a hearing than *Constitutional Fictions* accords them.

In any event, Faigman insists that his critique “does not depend upon a belief in expansive judicial authority” (p. 66). And he is surely correct to chastise the Court for its selective and incoherent application of the *Salerno* rule. Faigman argues that this confusion is merely one manifestation of the Court’s more general inattention to the essential (but often implicit) selection of the appropriate level of generality for resolving constitutional controversies. He calls upon judges (especially Justices) and lawyers to be more self-aware in making these choices. As he demonstrates (pp. 73–78), their neglect has made possible much mischief, at times allowing courts to play a constitutional shell game.

Assuming the constitutional fact issues have been properly framed, questions remain about the correct approach to their initial resolution by trial judges and subsequent reevaluation by appellate courts. These problems are the ones most in need of fixing, for as Faigman acknowledges the judiciary’s practices in receiving and evaluating proof of legislative facts in constitutional cases are “chaotic,” and “procedural guidelines and evaluative guideposts” are nonexistent (p. 98). At the trial-court level, testimony offered as proof of legislative facts must satisfy the demanding standards of evidentiary rules, frequently including the

27. As Faigman colorfully puts it, “the question of what frame of reference to employ . . . largely involves choosing between reviewable facts or case-specific facts as the denomination of constitutional currency” (p. 97).

28. 481 U.S. 739, 745 (1986).

rigorous scrutiny applicable to expert witnesses.²⁹ On appeal, however, *amici*, who are under no obligation to demonstrate relevant expertise, file briefs packed with assertions of legislative fact, which may then be relied upon to justify reversal. Nor is the Court guided by any “overriding theory of when it should be deferential to other bodies —judicial and nonjudicial—that have made findings of constitutional fact” (p. 114). This disorder has consequences. As Faigman rightly observes, the indeterminacy of modern constitutional law can to a significant extent be traced to the Court’s refusal to recognize, let alone rationalize, the role legislative facts play in constitutional adjudication. The status quo maximizes the discretionary authority of the Justices to the detriment of fundamental rule of law values.

But Faigman offers only the most modest and precatory solutions, largely because he deems the present state of affairs to be inevitable. For example, he dismisses as “unrealistic and unhelpful” pleas that assertions of legislative fact be subjected to the rigors of the adversarial process. His explanation is that because such assertions concern facts that “transcend any single litigation, and thus have precedential import, the development of a factual record cannot be left to the parties” (p. 100).³⁰

Similarly, Faigman defends *de novo* judicial review of a legislature’s factual findings, at least where important constitutional rights are implicated.³¹ He goes so far as to dismiss as essentially irrelevant considerations of comparative institutional competence. Though he nowhere explicitly says as much, these conclusions apparently rest at least in part on an inchoate assumption of absolute judicial supremacy. Earlier in the book he demonstrates that disputes about legislative facts ultimately concern the meaning of the Constitution (pp. 88–90). The implicit syllogism seems to be that (1) with a few exceptions, it is for the Court to tell the country what the Constitution means, (2) resolving issues of constitutional fact is a component of constitutional interpretation, and therefore (3) the Justices must enjoy the same freedom in deciding questions of constitutional fact that they enjoy in deciding questions of law. Were the major premise relaxed to acknowledge that other institutions also properly put flesh on the

29. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

30. The possibility, however, deserves more discussion than he gives it. See *infra* Part IIIA.

31. *But cf.* Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 767 (2008) (concluding that the “Court’s lack of solicitousness to congressional factfinding is indefensible on both constitutional and prudential grounds”).

Constitution's bare bones, the conclusion would to that extent merit reconsideration. Faigman also stresses the ultimate need for uniform resolution of constitutional questions, which, he reasons, precludes Supreme Court deference to what often amounts to a multiplicity of fact-finders (p. 116).³² Here again, however, there is more to constitutional facts than is dreamt of in Professor Faigman's philosophy.

III. QUESTIONS NOT ASKED

As the preceding synopsis shows, *Constitutional Fictions* vastly improves upon the pre-existing legal literature. By recognizing the subject as one demanding trans-substantive examination, Faigman highlights for scholarly scrutiny a fundamental element of the actual practice of judicial review too often ignored by judges and their critics.

The book's most significant and original contribution is its insight that disputes about legislative facts in constitutional cases are really disputes about the meaning of the Constitution itself. Resolution of those disputes cannot be separated from the task of constitutional interpretation. Put more concretely, "[p]art of the exposition of any constitutional rule should include a statement of which party—the challenger or the State—has the burden of proof [as to pertinent legislative facts] and at what level of proof that burden must be met" (p. 101). While this injunction may seem elementary, it connects issues of legislative fact to the work of constitutional interpretation in a clear, concise, and practical manner that significantly exceeds prior efforts. Moreover, were the injunction to be honored, it would effect dramatic change in the way constitutional cases are litigated and decided. Thus, the revelation of the relationship between constitutional facts and constitutional meaning was in itself a major achievement.

Unfortunately, Faigman fails to explore the full ramifications of that observation. At several points in his analysis he in

32. The emphasis here on the need for finality and uniformity echoes one of the academic literature's more prominent arguments for a strong version of judicial supremacy in constitutional interpretation, namely that such a role for the Court provides a means for settlement of otherwise persistent and divisive controversies. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997) (arguing that a strong version of judicial supremacy is necessary to fulfill the "settlement function of law").

effect treats this insight as the end, when in reality it is just the beginning, of analysis. Faigman tacitly assumes that the Supreme Court must have the pre-eminent role in assessing legislative facts in constitutional cases. He even rejects some efforts to regularize or channel this function, apparently on the ground that judges, and especially Supreme Court Justices, must remain free to pursue these questions however they choose to do so. He reasons that “[j]ust as no court would defer to the parties to say what the law is, no court should rely on the parties exclusively to say what the reviewable facts are” (p. 100).

But the analogy goes only so far. Whereas judges are professional referees of legal reasoning, they can lay no similar claim to expertise about the wide array of empirical questions that come before them. Those questions run the gamut of social and scientific knowledge. To rely upon judges, especially appellate judges limited by the record created below, to know or discover the answers to these questions is at least as problematic as relying upon the parties to do so. There must be better answers to this problem.

A. THE REMAND OPTION

On occasion the Supreme Court has, when confronted with a dispositive but disputed question of legislative fact, remanded the constitutional case to the trial court with directions to supplement the formal evidentiary record. The Court’s 1994 and 1997 *Turner Broadcasting* decisions³³ illustrate this approach. At issue there was the constitutionality of the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable television providers to dedicate a portion of their channels to carrying local broadcast television stations.³⁴ Congress imposed this requirement to protect local broadcasters from cable companies, which, Congress had concluded, increasingly enjoyed monopoly status in most markets.³⁵

Shortly after the Act became law, numerous cable operators and programmers filed suit in federal court claiming that the must-carry provisions violated the Free Speech and Press Claus-

33. *Turner Broadcasting Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997); *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

34. *Turner I* at 626.

35. *Id.* at 623; see also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 § 2(a)(16), 106 Stat. 1460, 1461 (1992).

es of the First Amendment.³⁶ After a three-judge district court rejected the plaintiffs' constitutional challenge and upheld the Act,³⁷ the plaintiffs appealed directly to the Supreme Court. Even though the Court affirmed the district court's decision to apply the more deferential "intermediate level of scrutiny applicable to content-neutral restrictions,"³⁸ the Court nevertheless vacated the district court's decision granting summary judgment in favor of the government.³⁹ The Court "ha[d] no difficulty concluding" that Congress's asserted interests in preserving free, over-the-air local broadcast television and promoting fair competition in the television industry constituted "important governmental interest[s]" for the purposes of intermediate scrutiny when "viewed in the abstract."⁴⁰ Nevertheless the Court remanded because "[o]n the state of the record developed thus far," it could neither confirm nor reject Congress's prediction that the economic viability of local broadcast television would be threatened absent the Act's must-carry requirements.⁴¹

On remand, after the parties put "reams of paper"⁴² before the district court, the judges again ruled for the government.⁴³ The plaintiffs appealed, and the Supreme Court affirmed.⁴⁴ Writing for the majority, Justice Kennedy found that the "expanded record"⁴⁵ assuaged the Court's prior doubts about the reasonableness of Congress's perception that broadcast television faced a serious threat and Congress's judgment that must-carry rules constituted a measured response.

A remand for development of the record relating to an issue of legislative fact in a constitutional case is unusual, at least outside of the administrative-agency context. But the two *Turner* decisions show that it can be and relatively recently has been done. This procedure is, of course, time consuming as well as burdensome on the parties and the courts. Still, to the extent

36. *Turner I*, 512 U.S. at 634.

37. Pursuant to the Act's command, a three-judge district court was convened in response to the constitutional challenge to the must-carry provisions. See § 23, 106 Stat. at 1500.

38. *Turner I*, 512 U.S. at 662.

39. *Id.* at 668.

40. *Id.* at 663.

41. *Id.* at 665.

42. *Turner Broadcasting v. FCC*, 910 F. Supp. 734, 739 (D.D.C. 1995).

43. *Id.*

44. Justice Breyer, who had replaced Justice Blackmun in the interim, voted to affirm. *Turner II*, 520 U.S. at 225 (Breyer, J., concurring in part).

45. *Id.* at 195.

that it promotes a more empirically rigorous constitutional jurisprudence, it might be well worth the cost.⁴⁶ The possibility that this method should be employed more frequently at least deserves careful consideration in a book dedicated to presenting a “procedural blueprint for constitutional fact-finding” (p. 159). Faigman, however, accords the issue no more than a passing reference, and implicitly rejects the approach without elaboration. More needs to be said before a process combining the virtues of the adversarial system with the judicial hierarchy necessary to a uniform interpretation of the Constitution is put out of mind.

B. FACTS’ FUNCTIONS

Faigman properly divides legislative facts into the subcategories “doctrinal” and “reviewable,” depending upon the function the facts play in judicial analysis (pp. 46–47). A functional taxonomy, however, could profitably be developed further. Just as not all legislative facts are alike, neither are all doctrinal or reviewable facts.

As to the former, which a court employs in formulating a governing legal rule, Faigman gives as illustrative examples historical questions relevant to an originalist approach to constitutional interpretation and social-science questions relevant to interpretative claims based on constitutional structure. As he correctly notes, determining doctrinal facts is a component part of judicial lawmaking. From this Faigman argues that judges must remain free to discover such facts unfettered by the limits of the adversarial process. To be sure, it is hard to quarrel with the notion that “[j]ust as a judge might retire to the library to research a line of cases, a judge might consult ‘The Federalist’ when considering what foundational principles underlie the Supremacy Clause.” Nor would many argue that a “judge who reads a biography of Alexander Hamilton or a history of the New Deal Court” ought not “apply this newfound knowledge to his or her constitutional cases,” (p. 89) though there is something slightly discomfiting about the idea that results in constitutional cases might turn on the content of a judge’s summer reading list.⁴⁷ Faigman ultimately concludes that “traditional notions sur-

46. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 126 (2008) (arguing that an appellate court should “remand [a] case to the lower court for consideration of a dispositive factual issue that the appellate court believes was missed or for reconsideration of an issue which, in the view of the appellate court, needs further evidentiary vetting”).

47. Cf. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY*

rounding evidence and burdens of proof are largely inapposite in the case of constitutional doctrinal facts" (p. 88). In the contexts he highlights—matters of history or political science—this conclusion seems largely unobjectionable.

But, as Faigman notes, doctrinal facts take other forms as well. In *Washington v. Glucksberg*,⁴⁸ for example, Justice Souter concurred in the Court's judgment rejecting a claimed right to physician-assisted suicide for the terminally ill. Souter emphasized, however, that the Court might reconsider the issue were it subsequently presented with evidence that such a right would not create an intolerable risk of euthanasia or coerced suicide.⁴⁹ Pointing to the legality of physician-assisted suicide in the Netherlands, Souter took notice of a considerable debate as to the lessons of the Dutch experience.⁵⁰ For him that debate counseled caution for the time being. He stressed, however, that "[t]he day may come when we can say with some assurance which side is right,"⁵¹ and thus he did not reject respondents' constitutional claim "for all time."⁵² In the meantime, though, he was content to leave the issue with state legislatures, which he noted enjoyed significant institutional advantages in exploring such questions.⁵³

Souter's opinion raises issues Faigman might have examined—namely, whether, and, if so, when it is appropriate for a court to defer a constitutional ruling in a justiciable case because of the sort of factual uncertainty that proved dispositive to Souter in *Glucksberg*. Of course, this question then raises a corollary one about the procedural and decisional rules appropriate in such circumstances.⁵⁴ While it might be tempting to dis-

BLACKMUN'S SUPREME COURT JOURNEY 83, 90–91 (2005) (describing Justice Blackmun's summer visit to the Mayo Clinic library and dinner-table discussion with his daughters about abortion while drafting the Court's opinion in *Roe v. Wade*).

48. 521 U.S. 702 (1997).

49. *Id.* at 782 (Souter, J., concurring in the judgment).

50. *Id.* at 786.

51. *Id.* For contrasting views as to the lessons to be drawn from the first decade under Oregon's assisted-suicide statute, compare Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg's Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1603 (2008) (concluding that the "experience in Oregon has demonstrated that a carefully drafted law does not put patients at risk"), with Herbert Hendin & Kathleen Foley, *Physician-Assisted Suicide in Oregon: A Medical Perspective*, 106 MICH. L. REV. 1613, 1614 (2008) (finding that "the implementation of the law has had unintended, harmful consequences for patients").

52. *Glucksberg*, 521 U.S. at 789 (Souter, J., concurring in the judgment).

53. *Id.*

54. *Roper v. Simmons* is another recent case wherein a disputable social-science conclusion apparently affected the Court's choice among potential doctrinal rules. 543

miss Souter's musings as eccentric, the Court's modern constitutional jurisprudence suggests that the only eccentric aspect of Souter's opinion was its candor.⁵⁵ In any event, this example illustrates that not all doctrinal facts present the same challenges to the legal system. The undisciplined approach to legislative facts that seems unobjectionable in the context of interpreting *The Federalist Papers* becomes more suspect when applied to more deeply empirical questions, such as the ones with which Souter wrestled in *Glucksberg*.

Reviewable facts could likewise be usefully divided into subcategories. Distinguishing among types of reviewable facts based on the various functions they serve in judicial analysis might suggest reasons courts should approach different categories of fact differently. As Faigman notes, issues of reviewable fact are ubiquitous in modern constitutional law (p. 98). In some cases, the result turns on the existence of (or the rationality of congressional belief in) facts necessary to trigger federal authority.⁵⁶ In others, courts question whether intrusions upon recognized individual rights are justifiable as an effective solution⁵⁷ to a real and sufficiently serious social problem.⁵⁸ Sometimes judicial discussion of reviewable facts in truth has less to do with empirical assertions than with judgments about constitutional values.⁵⁹ Elsewhere, concerns about reviewable facts take the form of judicial imposition of procedural hurdles for legislatures.

U.S. 551 (2005). See Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379 (2006) (contending "that some of the case law and social science research that form the basis for the United States Supreme Court's decision in *Roper v. Simmons* are insufficient and outdated").

55. Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 n.25 (2001) (Souter, J.) (declining invitation to impose Fourth Amendment limit on the power of a police officer to arrest for non-violent misdemeanors in part because "there simply is no evidence of widespread abuse of minor-offense arrest authority").

56. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

57. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2003); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

58. See *supra* notes 33-45 and accompanying text.

59. Arguably the infamous footnote 11 in Chief Justice Warren's opinion for the Court in *Brown v. Board of Education* belongs in this category, 347 U.S. 483 (1954). See, e.g., David L. Faigman, *Fact-Finding in Constitutional Cases*, in *HOW LAW KNOWS* 166 n.52 (Austin Sarat et al. ed., 2007) (noting that the "question whether the social science cited in *Brown* was truly relied upon by the Court has been debated ever since the opinion was announced" and that "[m]ost commentators have concluded that the studies were a makeweight for a conclusion reached on other grounds").

the apparent aim of which is to ensure legislative deliberation about the constitutional question.⁶⁰

The wide variety of functions reviewable facts serve in constitutional cases at least invites consideration of the possibility that different procedural rules and standards of proof, as well as different standards for appellate review, might be most appropriate in these different contexts. No scholar has of yet accepted that invitation.

C. JUDICIAL GOVERNMENT

Greater attention should be paid to alternative procedures for appellate judicial decision of debatable questions of legislative facts in constitutional cases. But judicial resolution of such questions, whatever form it may take, still raises fundamental issues about the role of judicial review in our constitutional order.

Most modern constitutional scholars probably take as a given a pre-eminent role for the judiciary in constitutional interpretation, but not all do.⁶¹ The first decade of the twenty-first century has witnessed the reinvigoration of the age-old debate between judicial supremacists and their critics.⁶² The former presume that judicial review provides both an indispensable checking function on the political branches⁶³ and a necessary means for settlement of discord between them,⁶⁴ in effect producing

60. See generally A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001).

61. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2706–07 (2003) (describing prevalent assumption of judicial supremacy in constitutional interpretation).

62. See Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 105 (2004) (“One of the vibrant constitutional debates at the turn of the twenty-first century concerns enduring questions about the appropriate role of nonjudicial entities—especially Congress and the President—in the development of constitutional meaning.”). See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We The Court*, 115 HARV. L. REV. 4 (2001); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005); Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006).

63. See GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 86 (5th ed. 2005) (noting argument that judicial review “rest[s] on the broader ground that the Supreme Court was accorded a distinctive role as the guarantor of the supremacy of the Constitution as against the states and the federal legislature”).

64. See Alexander & Schauer, *supra* note 32, at 1371.

what might more aptly be termed judicial exclusivity⁶⁵ or judicial sovereignty.⁶⁶

A book review is no place to resolve this debate. The point here, rather, is that the dilemma posed by constitutional cases turning on issues of legislative fact cannot be considered apart from the on-going debate about the extent of the authority judicial review legitimately confers upon the courts. Even more importantly, the prevalence and significance of legislative facts in constitutional adjudication might have important lessons for the debate over judicial supremacy, at least with respect to some categories of constitutional questions. The problematic nature of judicial determination of legislative facts, reflected in the failure of the Justices to develop principles to guide appellate courts in their reception and decision, should be a major consideration in that debate. To the poverty of judicial procedures should be added concerns about the severe constraints on judicial competence to resolve issues of legislative fact. Faigman reasons that, because appellate courts cannot with confidence rely on the parties to provide sufficient evidence of legislative facts, they must be allowed the submissions of *amici*, who admittedly may lack any claim to relevant expertise and largely escape the rigors of the adversarial process. He also asserts that, because the submissions of *amici* will not always suffice, judges must be free to conduct their own investigations (p. 100).

Of course one could as easily stand this reasoning on its head. That existing litigation procedures at best awkwardly allow for inquiry into legislative facts provides a reason for judges to shy away from deciding such questions. How might this be done? An exhaustive discussion lies outside the scope of a book review. Thus for present purposes it must suffice to list some of the possible means *not* considered in *Constitutional Fictions*.

The Court might eschew standards and balancing tests in favor of more rules-based approaches that would depend less on the kinds of empirical judgments that strain the judiciary's capacity. The Court might more assiduously avoid facial challenges to statutes, thereby limiting (though to be sure not eliminating)

65. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (discussing, and resisting, the arguments for judicial exclusivity in interpretation of the Constitution).

66. See Kramer, *supra* note 62, at 13 ("There is . . . a world of difference between having the last word and having the only word: between judicial supremacy and judicial sovereignty.").

the significance of a ruling for parties not before the Court.⁶⁷ Stricter adherence to “case or controversy” requirements such as standing, ripeness, mootness, and the political question doctrine might defer or avoid confrontation with constitutional issues that turn on legislative facts.⁶⁸ A greater appreciation for the roles that other governmental institutions play in the creation of constitutional law might justify reliance on those institutions to investigate questions of legislative fact relevant to at least some categories of constitutional issues.⁶⁹ With respect to such issues, the Court might give greater deference to the even implicit determinations of legislative facts that underlie, and support the constitutionality of, the actions of co-ordinate branches of the federal government or of the States. At a minimum, the Court’s limited capacity to find complex legislative facts counsels in favor of greater efforts to rationalize the method by which they are proven in litigation.

The point is not that all, or even any, of these options would come without costs, which in some cases might prove prohibitive, but just that they deserve much more consideration than they have hitherto been given. Such consideration might even supply an area of mediation between the contending sides of the otherwise stale and stalled debate setting judicial restraint against activism. In any event, some approaches might prove more sound in some categories of constitutional cases than in others. For example, Faigman appropriately stresses that with respect to individual rights guarantees the judiciary serves as a bulwark against majoritarian tyranny (p. 124). In cases concern-

67. To be sure, Faigman explicitly rejects this notion as the product of unduly “romantic notions of a restrained judiciary” (p. 65), though my point here is that he may be too swift to reach that conclusion.

68. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115–16 (2nd ed. 1962) (discussing functions served by non-justiciability doctrines). *But cf.* Heather Elliot, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 464 (2008) (urging, as an alternative to standing analysis, a “vibrant abstention doctrine that permits [the Court] to pursue its separation-of-powers goals”).

69. For example, Archibald Cox urged the Court to recognize and defer to the unique capacity of Congress to effectuate the promises of the Reconstruction Amendments, which not coincidentally expressly authorized their enforcement by Congress. See *supra* notes 17–19 and accompanying text; see also David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 *SUP. CT. REV.* 31, 34 (1997); Michael W. McConnell, *Institutions and Interpretations: A Critique of Boerne v. Flores*, 111 *HARV. L. REV.* 153 (1997). *But see* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 *VAND. L. REV.* 1539, 1624 (1995).

ing these rights, the courts may find it difficult to carry out their counter-majoritarian function without independently evaluating evidence concerning relevant legislative facts.

But not all constitutional cases require the courts to protect minorities by checking majorities. In important categories of cases, it is at the least not obvious that counter-majoritarian concerns play any significant role. As Madison famously argued,⁷⁰ and as the enforcement clauses of the Reconstruction Amendments⁷¹ apparently assumed, national majorities may prove singularly effective in checking abusive majorities at the state or local level. Where Congress acts in just such an effort, independent judicial reconsideration of predicate legislative facts may be less appropriate than in the paradigmatic individual rights case.⁷² Recognition of this distinction might do more than divide the Constitution into rights and powers provisions, as some have urged the Court to do,⁷³ though to be sure a focus on the dilemma legislative facts pose for the courts may provide added support for such arguments. The Court would not necessarily have to abdicate all efforts to safeguard the separation of powers and federalism were it to acknowledge that it should avoid doing so by rejecting Congress's judgment about matters of legislative fact, especially where the Constitution's framers arguably expected Congress to take the lead. That legislative facts are especially likely to be imbued with value judgments may in these kinds of cases make deference to Congress even more appropriate, if as some have argued,⁷⁴ the most compelling interpretation of the Reconstruction Amendments grants Congress a lead role in fashioning appropriate remedies.

Lines might also be drawn based on the role issues of legislative fact play in the constitutional analysis. As noted above,⁷⁵ legislative facts have been made to serve a wide range of func-

70. THE FEDERALIST NO. 10 (James Madison).

71. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

72. *But cf. Flores*, 521 U.S. 507 (1997); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

73. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 n.11 (1985); see also JESSIE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-184 (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

74. See *supra* note 69 and accompanying text.

75. See *supra* notes 47-60 and accompanying text.

tions in constitutional cases. Judicial dependence upon a legislature's, or a lower court's, evidentiary record might be acceptable in cases turning on the existence of facts triggering federal legislative authority. But that dependence might be unacceptable in cases concerning core individual rights. In any event, these possibilities deserve study in any effort to provide a comprehensive treatment of constitutional facts.

CONCLUSION

These criticisms should not obscure the significant contribution *Constitutional Fictions* makes to our understanding of the role legislative facts play in constitutional cases. Prior efforts were for the most part limited to discrete doctrinal categories. By devoting a monograph to a sustained and trans-substantive consideration of the issue, Faigman in effect identifies a fundamentally different problem than the ones most prior studies have examined. The few instances of previous scholarly attention to the issue as Faigman framed it treated all legislative facts alike. By distinguishing doctrinal from reviewable facts, Faigman not only assists analysis of appropriate procedures but also clarifies the relationship between lawmaking and fact-finding. Others can now build on that distinction to construct a theory even more reflective of the full range of nuance implicated by judicial determination of legislative facts.

Faigman drills beneath the surface to disclose that the dispute concerning judicial reception of legislative facts is but a part of the debate between scientific realists and their skeptics. *Constitutional Fictions* also demonstrates that judicial manipulation of frames of reference and paths of proof create both confusion and opportunities for mischief. Finally, by exposing the inconsistency between the Court's pronouncements and its practice concerning deference to legislatures' findings of legislative facts, *Constitutional Fictions* invites efforts to understand this longstanding tension. Indeed, the book's most substantial contribution may be to reveal how much analytical work remains to be done.