

2018

# When Facts Don't Matter

Eric Berger

*University of Nebraska College of Law*, [eric.berger@unl.edu](mailto:eric.berger@unl.edu)

Follow this and additional works at: <http://digitalcommons.unl.edu/lawfacpub>



Part of the [Courts Commons](#)

---

Berger, Eric, "When Facts Don't Matter" (2018). *College of Law, Faculty Publications*. 213.  
<http://digitalcommons.unl.edu/lawfacpub/213>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in College of Law, Faculty Publications by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

May 2017

## When Facts Don't Matter

Eric Berger

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Eric Berger, *When Facts Don't Matter*, 2017 BYU L. Rev. 525 (2018).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2017/iss3/4>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## When Facts Don't Matter

*Eric Berger\**

*We are used to thinking that facts shape legal outcomes, but sometimes the Supreme Court wants nothing to do with facts. In some high-profile constitutional decisions, the Roberts Court has ignored important congressional findings, deeming irrelevant facts that document the very mischief Congress sought to remedy. Similarly, in these same cases the Court exploits the muddy line between facial and as-applied challenges to avoid confronting particular facts. The Justices in these cases do not question the veracity of seemingly relevant facts. Rather, they write their opinions as though these facts don't matter.*

*This Article examines the Court's penchant for brushing aside inconvenient facts. Using three prominent decisions as case studies, it argues that a majority of Justices too often rely on novel constitutional doctrine to dismiss congressional findings and other facts. This collective disdain for facts muddles constitutional law, aggrandizes the judiciary, and privileges ideology over evidence. Of course, the relevance of particular facts is ultimately a legal question, so the Court clearly enjoys the prerogative to determine which findings have constitutional salience. That said, the Court still owes Congress and the country a more careful explanation when it deems irrelevant the very facts that prompted legislative action in the first place.*

---

\* Associate Dean for Faculty and Professor of Law, University of Nebraska College of Law. For helpful comments and conversations about early drafts and presentations, I thank Bill Araiza, Anne Duncan, Brandon Garrett, Corinna Lain, Richard Posner, Lori Ringhand, Eric Segall, Alex Tsesis, and Maggie Wittlin, as well as the participants in the University of Wisconsin Discussion Group on Constitutionalism, the Law & Society Association's 2015 Annual Meeting Panel on the Roberts Court, the Loyola Chicago Constitutional Law Colloquium, and the University of Nebraska College of Law Faculty Workshop. Thanks also to Stefanie Pearlman and Sandy Placzek for exemplary library assistance; to Sarah Burghaus for very helpful research assistance; to Morgan Hoffman and the other editors of the *BYU Law Review* for painstaking editorial assistance; and to Vida Eden for excellent secretarial assistance. A McCollum Grant helped support the writing of this Article. Remaining errors are mine.

## CONTENTS

INTRODUCTION .....	527
I. THE DISAPPEARANCE OF FACTS IN CONSTITUTIONAL DECISIONS.....	532
A. Congressional Facts and Constitutional Decision Making.....	532
1. <i>Shelby County</i> and the social conditions justifying regulation .....	533
2. <i>Citizens United</i> and the political conditions justifying regulation .....	539
3. <i>NFIB</i> and the object of congressional regulation .....	544
B. Facts and Facial Challenges .....	550
1. <i>Shelby County</i> .....	551
2. <i>Citizens United</i> .....	554
3. <i>NFIB</i> .....	556
II. EXPLANATIONS .....	561
A. The Doctrinal Explanation: (Novel) Constitutional First Principles .....	562
B. The Political Explanation: The Conservative Counter Revolution .....	570
C. The Psychological Explanation: Motivated Reasoning and Cultural Cognition .....	574
D. The Practical Explanation: The Opinion-Writing Process .....	576
E. The Legalist Explanation: A Lack of Rules .....	577
F. The Institutional Explanation: Mistrust of Congress and the Allure of Judicial Supremacy .....	579
III. IMPLICATIONS .....	581
A. Doctrinal Puzzles and the Relationship Between Law and Fact .....	581
1. <i>Shelby County</i> .....	582
2. <i>Citizens United</i> .....	584
3. <i>NFIB</i> .....	586
4. More general doctrinal implications .....	587
B. Institutional Implications .....	589
1. Congressional irrelevance .....	589
2. Separation-of-powers concerns .....	590
3. Judicial confidence and public opinion.....	592

C. The Demise of Facts .....	595
IV. POTENTIAL REFORMS.....	597
A. The Content of the Court's Determinations .....	598
1. The legal relevance of facts .....	598
2. The characterization of facts .....	600
3. The context of institutional analysis .....	601
B. The Tone of the Court's Determinations .....	605
1. Aporetic engagement .....	605
2. Candor .....	606
CONCLUSION .....	608

## INTRODUCTION

We live in a post-factual world. Prominent political figures, including the President of the United States, regularly accuse their opponents of peddling lies.<sup>1</sup> Conservatives and liberals both routinely characterize inconvenient news stories as “fake.”<sup>2</sup> Our body politic is bitterly divided, and the disagreement isn't limited just to politics and policy. We disagree about facts.

If any public institution in our society is above such partisan epistemology, one would think it would be the judiciary. Trial courts follow rules of evidence and discovery procedures, and appellate courts have various doctrines guiding their approach to different kinds of facts.<sup>3</sup> Federal judges, moreover, enjoy life tenure,<sup>4</sup> so they should not be subject to the same political pressures that lead some politicians to reject inconvenient facts. If facts should matter anywhere, it is in courts.

---

1. See Julie Hirschfeld David & Glenn Thrush, *Calling Comey a Liar, Trump Says He Will Testify Under Oath*, N.Y. TIMES (June 9, 2017), <https://www.nytimes.com/2017/06/09/us/politics/trump-comey.html?mcubz=3>; Katie Zezima, *Clinton Accuses Trump of Spreading 'Racist Birther Lie'*, WASH. POST (Sept. 26, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/09/26/clinton-accuses-trump-of-spreading-racist-birther-lie/?utm\\_term=.50d19d6ccf80](https://www.washingtonpost.com/news/post-politics/wp/2016/09/26/clinton-accuses-trump-of-spreading-racist-birther-lie/?utm_term=.50d19d6ccf80).

2. See Danielle Kurtzleben, *With 'Fake News,' Trump Moves from Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017, 8:27 PM), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language>; John Siciliano, *Climate Skeptics Slam New York Times as 'Fake News,'* WASH. EXAMINER (Aug. 9, 2017, 6:51 PM), <http://www.washingtonexaminer.com/climate-skeptics-slam-new-york-times-as-fake-news/article/2631098>.

3. See *infra* Section II.E.

4. See U.S. CONST. art. III, § 1.

Except sometimes they don't. Indeed, the U.S. Supreme Court, our most prestigious and important court, sometimes deems irrelevant facts that reasonable observers may consider important or even crucial. To be clear, the Justices do not usually opportunistically embrace "fake" facts like hack politicians or pundits. But the Justices are sometimes remarkably willing to cast seemingly vital facts aside when rendering important constitutional decisions. In some prominent cases, facts don't matter.

To be sure, the decision about which facts "count" in litigation is ultimately a *legal* determination. Courts usually decide the salience of particular facts, and legal doctrine sheds light on the facts a party must prove to assert a viable legal claim. What is striking, though, is the Court's willingness in constitutional litigation to discard certain facts without explaining clearly why those facts are legally irrelevant. Even more striking is the Court's willingness to do this even when Congress has relied on these very facts in passing the statute at issue.

The Court's penchant for avoiding inconvenient facts does not stop there. The Justices also sometimes take advantage of the muddy distinction between facial and as-applied challenges, treating certain cases as facial challenges, thus avoiding certain facts that would arise under an as-applied analysis. In so doing, the Court is able not only to steer around inconvenient facts but also to issue broad holdings. The Justices, then, not only decide some cases largely in a factual vacuum, but do so in the service of aggressive opinions with far-reaching consequences.

This Article focuses on three case studies of these interrelated phenomena. *Shelby County v. Holder*,<sup>5</sup> *Citizens United v. Federal Election Commission*,<sup>6</sup> and *National Federation of Independent Business (NFIB) v. Sebelius*<sup>7</sup> are among the most important constitutional decisions of the Roberts Court. In each case, five Justices, citing novel or, at best, deeply contested constitutional principles, deemed legally irrelevant the very facts that Congress had thought necessitated the law at issue. In each case, the Justices offered minimal discussion of the facts it ignored. In each case, they

---

5. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

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

7. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

offered minimal institutional analysis to support its decision to ignore the legislature's findings. In each case, they also treated the challenge as a broad facial one, though there was good reason to approach the dispute as a narrower as-applied challenge. Finally, in each case the Justices, by a 5-4 vote, reined in congressional authority, indicating that Congress had acted unconstitutionally, at least in part.

Beneath the Court's decision to cordon off certain facts as irrelevant lie deeper intuitions about how the world and Constitution do (or should) work. These intuitions, contested among the Justices themselves, are not deeply etched in constitutional doctrine. Indeed, in *Shelby County* and *NFIB*, the Justices concocted new doctrinal justifications for ruling out certain facts, and in *Citizens United*, they overruled important precedent to do the same. Given the political charge of these cases, it seems reasonable to ask whether the Court's repeated disregard for inconvenient facts might serve an ambitious normative agenda.

This problem is not a new one. As Professor Faigman has observed, "interpreting the Constitution is a normative enterprise. Not surprisingly, therefore, in 'finding' facts, the Court's vision often has been affected by the outcome it sought."<sup>8</sup> To Professor Faigman's observation, we might add that the Court's preferred outcome also guides its views of which facts are constitutionally relevant.<sup>9</sup> And yet, though the determination that certain facts cannot support federal legislation is plainly a legal one, the Court in these cases has been strikingly slippery about the legal analysis guiding the relevance of facts.

Given this doctrinal obfuscation, the Court enjoys great flexibility to focus on some facts at the exclusion of others. The Court has been evasive enough about these inquiries that it is difficult to pin down exactly what moves it is making and whether those moves carry precedential weight. The common thread is

---

8. David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 612 (1991).

9. Cf. DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS I (2008) ("The Court's constitutional pronouncements float above the empirical mire, neither being informed by contingent realities nor subject to empirical check by those realities.").

that the Court's treatment of factual questions in constitutional litigation is often stealthy and conclusory—and still frequently outcome determinative.

Scholarly attention to the Supreme Court's use of facts in constitutional cases is not new.<sup>10</sup> Some great work in recent years has called attention to a variety of problems involving constitutional facts, including the U.S. Supreme Court's fact-finding processes in constitutional cases;<sup>11</sup> the Court's reliance on amicus briefs and “in-house” research to make factual determinations;<sup>12</sup> the deference due to congressional factual findings;<sup>13</sup> appellate deference to legislative facts more generally;<sup>14</sup> and the Court's reliance on “foundational facts” to drive doctrinal shifts.<sup>15</sup> This scholarship collectively shines important light on the significance of facts in the Supreme Court's constitutional decision-making.<sup>16</sup>

This Article seeks to complicate the conclusions from these important studies by arguing that sometimes facts don't matter as much as we like to think. Building on my earlier work on judicial

---

10. See generally FAIGMAN, *supra* note 9; Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

11. See, e.g., FAIGMAN, *supra* note 9; Gorod, *supra* note 10.

12. See generally Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016) [hereinafter Larsen, *Amicus Machine*]; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) [hereinafter Larsen, *Amicus Facts*]; Larsen, *supra* note 10.

13. See generally William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878 (2013); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2008); Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027 (2014).

14. See generally Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251 (2016).

15. See generally Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145.

16. A recent news study also identifies numerous factual errors in recent Supreme Court opinions. See Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017, 8:00 AM), <https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find>.



deference in constitutional cases,<sup>17</sup> this Article explores the Court's overlooked propensity to reject the legal relevance of seemingly central facts. To be sure, it is often important to examine how courts determine facts, as the scholars in these earlier pieces have very ably done. But judges, lawyers, and scholars must also recognize that the content of facts in litigation don't matter one whit if the court deems them legally irrelevant.

The Justices, to be sure, likely think that they are doing no more than exercising their power of judicial review. But when they do so without any regard for the facts Congress relied on when legislating, they appear stubbornly determined to consider constitutional questions in an intellectual vacuum, divorced from the real-world conditions that prompted congressional action in the first place. Moreover, the Court's reliance on new doctrinal developments to justify its refusal to consider Congress's facts aggrandizes the judiciary's own power. Though the Justices sometimes talk approvingly of judicial restraint, this doctrinal bait-and-switch increases their ability to evade Congress's facts and steer constitutional law in new directions. As a result, the Court looks less like an impartial tribunal and more like a political body pretending that constitutional questions have much easier and clearer answers than they in fact do.<sup>18</sup>

Part I of this Article examines three prominent Roberts Court constitutional decisions in which the Court rejected the relevance of facts seemingly justifying the legislation at issue. It further explains how these judicial moves helped the Court steer its opinion toward both the outcome it desired and a broad holding facially invalidating the statutory provisions at issue. Part II offers some explanations for this phenomenon. These explanations are not justifications, but they can help us understand the phenomenon from various angles. Part

---

17. See generally Eric Berger, *Gross Error*, 91 WASH. L. REV. 929 (2016); Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465 (2013) [hereinafter Berger, *Deference Determinations*]; Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029 (2011) [hereinafter Berger, *Administrative Law Norms*]; Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1 (2010).

18. See Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667 (2015) [hereinafter Berger, *Rhetoric*].

III examines the implications of the Court's aggressive treatment of legislative facts. The Court's behavior in these cases poses both knotty doctrinal questions and broader institutional questions about the Court's role in our constitutional system. Finally, Part IV proposes some modest changes to the Court's approaches to these kinds of questions. These proposals would not radically change the Court's work, but they would encourage more careful discussion of facts' relevance and more even-handed constitutional opinions that avoid the temptation to brush aside inconvenient evidence.

#### I. THE DISAPPEARANCE OF FACTS IN CONSTITUTIONAL DECISIONS

##### *A. Congressional Facts and Constitutional Decision Making*

The Supreme Court in each of the case studies examined here ignored congressional facts to help it steer the case toward the outcome the majority favored.<sup>19</sup> These facts fall into the category of "legislative facts"<sup>20</sup>—that is, general facts about the world that usually "transcend individual disputes and would likely recur in different cases involving similar subjects."<sup>21</sup> In each case, Congress, relying on evidence it had examined, legislated to address what it believed to be a serious problem requiring a national solution. In each case, the Court deemed Congress's facts irrelevant and concluded that Congress had acted unconstitutionally, at least in part. Closer consideration of Congress's facts might not have required a different outcome but certainly would have complicated the majority's opinion.

---

19. By "congressional facts," I refer broadly to evidence members of Congress examine and rely upon when considering a proposed bill. Oftentimes, these facts document the mischief Congress sought to address in the relevant statute. In some instances, Congress formally includes these facts as part of a statute. In other instances, Congress relies on reports and other congressional fact-gathering efforts to educate itself on the realities of the situation. (While these wrinkles arguably should be legally relevant, the Supreme Court in the cases examined here brushed aside facts without examining these nuances at all.)

20. By contrast, adjudicative facts deal with the particulars of the case before the court. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

21. See David L. Faigman, *Fact-Finding in Constitutional Cases*, in HOW LAW KNOWS 156, 162 (Austin Sarat et al. eds., 2007).

### 1. *Shelby County and the social conditions justifying regulation*

*Shelby County v. Holder* considered the constitutionality of section 4 of the Voting Rights Act of 1965 (VRA), which provided the “coverage formula” defining which jurisdictions are covered by section 5 of the Act.<sup>22</sup> Under section 5, covered jurisdictions must seek preclearance—that is, federal approval—for changes to voting procedures.<sup>23</sup> Recognizing the longstanding and pernicious history of voter discrimination in this country, Congress’s purpose behind section 5 was to suspend “all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination.”<sup>24</sup>

Congress reauthorized the Act several times, but in both 1982 and 2006, its reauthorizations did not alter the coverage formula.<sup>25</sup> Consequently, most jurisdictions covered in 1975 were also covered in 2013, subject to certain “bail out” provisions.<sup>26</sup> When the U.S. Attorney General objected to voting changes proposed in the covered jurisdiction of Shelby County, Alabama, on the grounds that the proposed changes harmed minority voters,<sup>27</sup> the county sued, challenging the constitutionality of the coverage formula.

The Supreme Court ruled in *Shelby County*’s favor, striking down section 4 in its entirety.<sup>28</sup> Though the constitutionality of section 5, the preclearance provision, was not at issue in the case, the Court effectively gutted that section by invalidating the coverage

---

22. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619–21 (2013).

23. *Id.* at 2620.

24. *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966).

25. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended in scattered sections of 52 U.S.C. (Supp. III 2016) (transferred from 42 U.S.C. §§ 1971, 1973 (2012))); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended in scattered sections of 52 U.S.C. (Supp. III 2016) (transferred from 42 U.S.C. §§ 1971, 1973 (2012))).

26. See 52 U.S.C. § 10301(a) (Supp. III 2016) (transferred from 42 U.S.C. § 1973(a)); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 211–14 (2007) (discussing the bailout provision).

27. See Joint Appendix at 115a, *Shelby Cty.*, 133 S. Ct. 2612 (No. 12-96) (noting that city had not met “its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect”).

28. See *Shelby Cty.*, 133 S. Ct. at 2631.

formula. Without a coverage formula, no jurisdiction is subject to section 5's preclearance requirements.

In striking down section 4, Chief Justice Roberts's majority opinion emphasized that in reauthorizing the VRA in 2006 without updating the coverage formula, Congress imposed extreme burdens on states unjustified by current needs.<sup>29</sup> As the Court put it, "things have changed dramatically" since 1965.<sup>30</sup> Whereas African-Americans once voted at far lower rates than whites, voter turnout and registration "approach parity" today.<sup>31</sup> By 2006, "disparities in voter registration and turnout" no longer existed,<sup>32</sup> and "African-Americans attained political office in record numbers."<sup>33</sup>

Having emphasized that voter discrimination was mostly a thing of the past, the Court faulted Congress for failing to amend the scope of the section 4 coverage formula, which was "based on decades-old data and eradicated practices."<sup>34</sup> Whereas racial disparity in voter registration and turnout helped the Court in *South Carolina v. Katzenbach* justify the coverage formula and preclearance scheme in the mid-1960s,<sup>35</sup> such disparity no longer existed.<sup>36</sup> Federal intrusion into state voting procedures may once have been necessary, but according to the Court, it was unfair to perpetuate a coverage formula based on decades-old state practices.<sup>37</sup>

The Court's holding hinged largely on its understanding of the facts, but it ignored the very facts that had prompted Congress to reauthorize the VRA in the first place. For example, Congress had amassed 15,000 pages of findings documenting pervasive and

---

29. *Id.* at 2630–31 (asserting that it was irrational for Congress to reauthorize a coverage formula that was based on forty-year-old data, when current statistics reflect "an entirely different story").

30. *Id.* at 2625.

31. *Id.*

32. A recent news study questioned Chief Justice Roberts's data suggesting that blacks' voter registration rates in 2004 matched or even outstripped whites' rates. This study contended that the Chief Justice used numbers that counted Hispanics as white, including non-citizen Hispanics who could not legally register to vote, thus "inaccurately lowering the rate for white registration." See Gabrielson, *supra* note 16.

33. *Shelby Cty.*, 133 S. Ct. at 2628.

34. *Id.* at 2627.

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

36. See *Shelby Cty.*, 133 S. Ct. at 2627–28 (discussing *South Carolina v. Katzenbach*).

37. See *id.* at 2628 ("There is no longer such disparity.").

troubling ongoing discrimination.<sup>38</sup> This record demonstrated that voting discrimination was not just a problem of the past. Indeed, the statute itself included findings detailing evidence of continued discrimination, such as various election practices used to dilute minority voting strength.<sup>39</sup>

Congress had also relied on numerous pieces of anecdotal evidence detailing covered jurisdictions' measures that would either inhibit racial minorities' ability to vote or dilute their voting power.<sup>40</sup> It also had cited studies indicating that discriminatory purpose motivated numerous redistricting plans as recently as the 1990s.<sup>41</sup> In light of these findings, Congress concluded that while "[d]iscrimination today is more subtle than the visible methods used in 1965, . . . the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates."<sup>42</sup>

---

38. See 52 U.S.C. § 10301 note (b)(2) (Supp. III 2016) (Congressional Purpose and Findings) (transferred from 42 U.S.C. § 1973 (2012)) (“[V]estiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”); *Shelby Cty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting); *Shelby Cty. v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

39. See 52 U.S.C. § 10301 note (b)(4)(a) (Supp. III 2016) (Congressional Purpose and Findings) (transferred from 42 U.S.C. § 1973 (2012)) (citing as evidence of continued discrimination “the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and Section 5 [15 U.S.C. 10304] enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength” (alteration in original)).

40. See *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 464–65 (D.D.C. 2011) (listing examples from congressional record), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

41. See *id.* at 465 (noting that Congress had considered several studies).

42. H.R. REP. NO. 109–478, at 6 (2006) (quoted in *Shelby Cty.*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting)); see also 52 U.S.C. § 10301 note (b)(5) (Supp. III 2016) (Congressional Purpose and Findings) (transferred from 42 U.S.C. § 1973 (2012)) (“The evidence clearly shows the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982, as demonstrated in the counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.”).

Interestingly, the majority did not dispute the veracity of Congress's findings.<sup>43</sup> Rather, the Court disparaged those facts' relevance and signaled that Congress should have focused on different facts.<sup>44</sup> "Regardless of how [we] look at the record," it explained, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination . . . in 1965."<sup>45</sup> Continued voter discrimination, then, was irrelevant in the Court's eyes, because it paled in comparison to discrimination of years past. The Court, however, never explained why continuing discrimination is legally irrelevant just because it is less severe than past discrimination.<sup>46</sup>

The majority also did not grapple carefully with Congress's findings that the preclearance provision continued to play an important role in reducing voter discrimination.<sup>47</sup> To its credit, the Court did concede that the VRA deserved substantial credit for the decrease in voting discrimination.<sup>48</sup> But in so doing, the Court did not explain why preclearance did not remain a vital tool to combat voter discrimination, especially given evidence indicating that the preclearance provision continued to do real work blocking voter discrimination. For example, the House report, drawing on voluminous evidence, had found that "between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a

---

43. *But see* Ross, *supra* note 13, at 2062–63 (arguing that the majority in *Shelby County* distrusted Congress's facts).

44. *See id.* at 2061 ("[T]he majority selectively emphasized certain record evidence, second-guessed other evidence, and simply ignored other evidence.").

45. *Id.* at 2062 (quoting *Shelby Cty.*, 133 S. Ct. at 2629).

46. *See* Ross, *supra* note 13, at 2062 ("The conservative Justices essentially disposed of the remainder of the 15,000 page congressional record supporting the Act in one sentence.").

47. *See* 52 U.S.C. § 10301 note (b)(1) (Supp. III 2016) (Congressional Purpose and Findings) (transferred from 42 U.S.C. § 1973 (2012)) ("Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965 [this chapter and chapters 105 and 107 of this title]." (alteration in original)).

48. *See Shelby Cty.*, 133 S. Ct. at 2626 ("There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.").

determination that the changes were discriminatory.”<sup>49</sup> The obvious implication was that without preclearance, voter discrimination in this country would have been substantially worse than it is. The Court, however, brushed aside these facts, arguing simply that Congress’s record “played no role in shaping the statutory formula” at issue.<sup>50</sup>

The Court, to be sure, was correct that the coverage formula had been designed decades earlier. The majority, however, did not explain why it should not consider evidence before Congress that updating the coverage formula would have been ill advised.<sup>51</sup> Nor did the majority grapple with congressional experts who explained that tinkering with the coverage formula might have turned the statute “into a farce.”<sup>52</sup> Based on the evidence before it, Congress concluded that voter discrimination was still a problem serious enough to merit preclearance and that, given the practical problems inherent in updating, the best option was to preserve the old coverage formula.<sup>53</sup> The Court did not engage with any of these facts.

---

49. *See id.* at 2639 (Ginsburg, J., dissenting) (citing H.R. REP. NO. 109-478, at 21 (2006)). Statistics about DOJ objections can hardly be blamed on an overzealous, liberal Department of Justice, given that Republicans controlled the White House for sixteen of the twenty-four years in question. *See also Voting Determination Letters for Alabama*, THE UNITED STATES DEPARTMENT OF JUSTICE (Aug. 7, 2015), <https://www.justice.gov/crt/voting-determination-letters-alabama> (listing DOJ objections to Alabama voting practices by year).

50. *Shelby Cty.*, 133 S. Ct. at 2629.

51. *See Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 438 (D.D.C. 2011) (quoting *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 99 (2006) (explaining that updating the formula on the basis of turnout and registration data from 2000 and 2004 would have ignored the “long, open, and notorious history of disenfranchising minority citizens”)), *aff’d*, 679 F.3d 848 (D.C. Cir. 2012), *rev’d*, 133 S. Ct. 2612 (2013).

52. 152 CONG. REC. H5181 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (criticizing proposal in House to change the coverage formula); *see also Shelby Cty.*, 811 F. Supp. 2d at 438 (citing voting rights scholars).

53. *See Shelby Cty.*, 811 F. Supp. 2d at 508 (“Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still needed to safeguard racial and language minority voters.”). To be sure, an updated coverage formula was probably theoretically preferable, *see id.* at 438 (noting that many voting rights scholars before Congress in theory preferred an “updated trigger”), but most scholars also told Congress that they were “skeptical” about plans to update the coverage formula, *see id.*

The Court presumably ignored these congressional facts because it believed that preclearance imposed unfair burdens on covered jurisdictions whose behavior had improved in recent decades.<sup>54</sup> But given the Court's concern for the burdens the VRA imposed on covered jurisdictions, the Court should have also more carefully explained why the statute's "bail out" provision was inadequate. That provision permits covered jurisdictions to relieve themselves of preclearance burdens by demonstrating their improved practices.<sup>55</sup> Almost 200 jurisdictions have bailed out of the preclearance requirement successfully since the provision took effect in 1984.<sup>56</sup> Though the Court made passing reference to these provisions, it failed to confront the argument that the VRA, far from being static, is "capable of adjusting to changing conditions."<sup>57</sup> The Court's blind eye to congressional facts and its sympathy to the burdens the statute imposed on benevolent state governments, then, is especially strange given that the statute provided a mechanism for those very states to exempt themselves.

The Court's decision to brush aside Congress's findings is even stranger in light of the fact that section 2 of the Fifteenth Amendment entrusts Congress with broad power to protect against race-based voter discrimination.<sup>58</sup> The Court's treatment of Congress's facts amounted to a legal determination that those facts were constitutionally irrelevant, but the Court did not explain why that must be so. If anything, one would think that section 2 of the Fifteenth Amendment should require the opposite presumption that

---

54. See *Shelby Cty.*, 133 S. Ct. at 2619 ("[T]he Act imposes current burdens and must be justified by current needs." (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))).

55. See 52 U.S.C. § 10303 (Supp. III 2016) (transferred from 42 U.S.C. § 1973b(a) (2012)).

56. See *Shelby Cty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).

57. *Id.*

58. See Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1500 (2014) (arguing that because the Fifteenth Amendment's subject matter is narrower, Congress's power to enforce it is not at risk of becoming a plenary power, and therefore courts should give Congress more deference when it legislates under that provision); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 381–86 (2014) (arguing that in light of section 2 of the Fourteenth Amendment, federal preclearance for voting changes is a modest measure Congress may take to protect against voter discrimination).



Congress has broad leeway to tackle race-based voter discrimination and that its factual findings therefore deserve deference.<sup>59</sup> The Court, however, refused to grapple with these complications, preferring instead to brush aside inconvenient evidence.<sup>60</sup>

## 2. Citizens United and the political conditions justifying regulation

*Citizens United v. FEC*<sup>61</sup> provides another example of the Court's refusal to engage with congressional facts. The Bipartisan Campaign Reform Act of 2002 (BCRA) contained several amendments to the Federal Election Campaign Act of 1971 (FECA). Most relevant here, it prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or that expressly advocates for the election or defeat of a candidate.<sup>62</sup>

Citizens United, a non-profit corporation, released *Hillary: The Movie*, a documentary attacking Hillary Clinton, who was then running for president. Recognizing that it might run afoul of BCRA if it ran the movie in the days leading up to the primary election, Citizens United sought to enjoin the Federal Election Commission (FEC) from enforcing these provisions on the grounds that BCRA violated the First Amendment.<sup>63</sup> The U.S. Supreme Court agreed with the plaintiff, holding that restrictions on independent expenditures by corporations' general treasuries for election-related speech violated the First Amendment.<sup>64</sup>

As in *Shelby County*, the Court deemed irrelevant facts that had motivated the law in the first place. Before passing BCRA, Congress had carefully studied the role of money in elections. Specifically, in the wake of the 1996 election, the Senate Committee on

59. See U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2; Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 182 (1997) (noting that the Reconstruction Amendments left the remedy to Congress).

60. Cf. Transcript of Oral Argument at 46–47, *Shelby Cty.*, 133 S. Ct. 2612 (No. 12-96); Ross, *supra* note 13, at 2061 (arguing that the majority's approach to Congress's findings "appears to have been driven by a presumption about political process malfunction").

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

62. See 52 U.S.C. § 30118 (Supp. III 2016) (transferred from 2 U.S.C. § 441b (2012)).

63. See *Citizens United*, 558 U.S. at 320–22.

64. The Court upheld BCRA's disclaimer and disclosure requirements. See *id.* at 372.

Governmental Affairs commenced an extensive investigation into campaign practices during that election. The Committee in 1998 ultimately issued a six-volume report presenting its findings.<sup>65</sup>

The report concluded that the nation's election system was "in crisis, with the worst problems stemming not from activities that are illegal under current law, but from those that are legal."<sup>66</sup> In particular, the report blamed the "soft money loophole" for causing "a meltdown of a campaign finance system."<sup>67</sup> The report concluded that in 1996 "both parties [had] promised and provided [large donors with] special access to [important] candidates and [g]overnment officials in exchange for large soft-money contributions."<sup>68</sup> Congress paid close attention to the report's conclusions and ended up enacting many of the Committee's proposed reforms when it passed BCRA in 2002.<sup>69</sup>

Though *McConnell v. FEC* had upheld BCRA's limitations on electioneering communications,<sup>70</sup> *Citizens United* reversed course.<sup>71</sup> Of particular relevance here, *Citizens United* gave virtually no weight to Congress's findings documenting the pernicious role of money in our elections.<sup>72</sup> The majority pointedly rejected the argument that Congress has a "compelling constitutional basis" to guard against corruption and the appearance of corruption in local and national elections.<sup>73</sup> Instead, the Court summarily concluded "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>74</sup>

In so concluding, the Court entirely ignored the Senate Committee report's findings to the contrary.<sup>75</sup> The report, indeed,

---

65. See S. REP. NO. 105-167, vol. 1, at 7-9 (1998).

66. S. REP. NO. 105-167, vol. 4, at 4610.

67. See *id.* at 4611; see also *McConnell v. FEC*, 540 U.S. 93, 129 (2003) (summarizing Senate Committee report).

68. See *McConnell*, 540 U.S. at 130 (summarizing Senate Committee report).

69. See *id.* at 132.

70. *Id.*

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

72. *Id.*

73. *Id.* at 394 (Stevens, J., dissenting).

74. See *id.* at 357 (majority opinion).

75. *Citizen United's* refusal to consider the report's findings contrasted sharply with *McConnell*, which had not only discussed the report in some detail but noted that Congress

had asserted that “large concentrations of wealth . . . hav[e] the potential to corrupt the federal election process.”<sup>76</sup> For example, the report documented numerous allegations of government officials taking action during an election cycle “to obtain or reward a campaign contribution.”<sup>77</sup> Many such actions did not violate the law prior to BCRA but nonetheless, as the report emphasized, “create an appearance of favoritism or impropriety.”<sup>78</sup> The report went so far as to note that most experts it heard from agreed that this culture of buying political access amounted to a “crisis in American democracy.”<sup>79</sup>

The report did not reflect the thoughts merely of some fringe senators. To the contrary, these conclusions reflected the views of both the Senate majority and minority.<sup>80</sup> Additionally, important scholarship and the district court’s findings in *McConnell v. FEC* both reinforced the report’s basic conclusions.<sup>81</sup>

---

had enacted many of the report’s proposed reforms in BCRA to address the concerns raised by the report’s findings. See *McConnell*, 540 U.S. at 129–32.

76. S. REP. NO. 105-167, vol. 5, at 7516 (1998).

77. *Id.* at 7541.

78. *Id.* at 7542.

79. *Id.* at 7516 (quoting former Vice President Walter Mondale and noting that most of the expert witnesses from whom the Committee heard agreed with this sentiment).

80. The majority report had focused on Democratic Party fundraising, while the minority report had focused on Republican Party fundraising. See generally S. REP. NO. 105-167; *McConnell*, 540 U.S. at 130.

81. See, e.g., *McConnell v. FEC*, 251 F. Supp. 2d 176, 555–60, 622–25 (D.D.C.) (finding that corporations and labor unions routinely notify members of Congress about their electioneering communications relevant to those members’ elections with the not-so-subtle objective of currying favor), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003), *overruled in part* by *Citizens United v. FEC*, 558 U.S. 310 (2010); LAWRENCE LESSIG, *REPUBLIC, LOST* 94–95 (2011); Pamela S. Karlan, *The Supreme Court 2011 Term – Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 30 (2012) (“[I]t is just as possible to defend campaign finance regulation as an effort to clear the channels of political change by reducing the influence of wealth on electoral outcomes.”); Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783, 1789 (2015); Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1105–06 (2002) (noting that “corporations might be particularly pernicious rent seekers,” and that therefore discrimination against corporate political speech might be “an appropriate response to the competitive advantages provided by the corporate form in the market for legislation”); Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606, 615 (1991) (concluding that sugar industry interest groups successfully used political contributions to purchase legislative subsidies).

Though Congress had compiled this “virtual mountain of research on the corruption that previous legislation had failed to avert,”<sup>82</sup> the Court dismissed those findings as irrelevant. The Court emphasized that preventing quid pro quo corruption—that is, political favors in direct exchange for monetary contributions—was the only permissible governmental interest justifying the kinds of regulations at issue.<sup>83</sup> Because the Court limited the doctrinal inquiry to this narrow definition of corruption, the Court could ignore Congress’s findings.<sup>84</sup> As the Court explained, there were no “direct examples of votes being exchanged for . . . expenditures.”<sup>85</sup> “Ingratiation and access,” the Court asserted, “are not corruption.”<sup>86</sup> This narrow definition of “corruption” allowed the Justices to turn a blind eye to the very facts that Congress thought merited legislation.<sup>87</sup>

To its credit, the Court at least acknowledged this doctrinal move, tracing it back to the seminal campaign finance decision, *Buckley v. Valeo*.<sup>88</sup> *Buckley*, however, was hardly the Court’s only word on the matter.<sup>89</sup> Furthermore, merely citing *Buckley* as the source of the unique concern for quid pro quo corruption does not adequately justify the Court’s refusal to consider factual evidence of corruption (understood more broadly) that Congress thought justified the statute.

---

82. *Citizens United*, 558 U.S. at 400 (Stevens, J., dissenting).

83. *See id.* at 359 (majority opinion) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”); *see also* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (“Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.”).

84. *Citizens United*, 558 U.S. at 400 (Stevens, J., dissenting).

85. *See id.* at 360 (majority opinion) (quoting *McConnell*, 251 F. Supp. 2d at 360).

86. *Id.*

87. *See* Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L. J. 295, 298 (2011) (explaining that Justice Kennedy seemed to believe that facts did not aid the analysis in *Citizens United*).

88. *See Citizens United*, 558 U.S. at 345 (“The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures.”).

89. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

Phrased differently, the majority's approach enabled it to duck the strict scrutiny analysis that examines not only the burden on free speech but also the mischief Congress sought to address. How could the Court know whether the government has a compelling interest in stemming corruption (broadly defined) and the appearance of corruption without considering Congress's evidence that corruption exists and causes serious harm to our political system? And how could the Court know that BCRA's efforts to limit such corruption were not narrowly tailored enough without examining the statute against the problem Congress sought to remedy? The Court's narrow definition of "corruption" may have seemed like a clever rhetorical move that determined the outcome of the case. However, on closer analysis, this argument merely sidestepped the relevant First Amendment inquiry.

The Court's ungenerous attitude toward congressional findings is especially noteworthy, because BCRA permitted corporations to engage in election-related speech through Political Action Committees (PACs).<sup>90</sup> Congress, in other words, left open PACs as an avenue for corporations to engage in the same speech that BCRA regulated.<sup>91</sup> The Court quickly dismissed the PACs as "burdensome alternatives,"<sup>92</sup> but it is far from clear why this should be so. As Professor Briffault explains, the various rules regulating PACs, such as record-keeping requirements, "appear to be pretty basic requirements essential to any campaign finance regime for assuring the regularity, responsibility, and transparency of campaign finance participants."<sup>93</sup> Moreover, the Court pointed to no facts to support its conclusion that the PAC requirement was too burdensome.<sup>94</sup>

---

90. See 52 U.S.C. § 30118(b)(2)(C) (Supp. III 2016) (transferred from 2 U.S.C. § 441b(b)(2)(C) (2012)).

91. Cf. *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure . . . without jeopardizing the associational rights of advocacy organizations' members . . .").

92. *Citizens United*, 558 U.S. at 337–38.

93. Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 666 (2011).

94. See *Citizens United*, 558 U.S. at 416 (Stevens, J., dissenting) (arguing that the majority found the PAC option too burdensome without reference to the record but simply by resorting to its "own unsupported factfinding").

To be fair, the majority had significant constitutional arguments in its favor. The law did “muffle” some political speech,<sup>95</sup> which enjoys special status under the First Amendment.<sup>96</sup> The Court also made the legitimate point that the government’s interest in campaign finance regulations is undermined, at least in part, by the frequency with which many political contributors circumvent such regulations.<sup>97</sup> Moreover, strict scrutiny usually protects the right holder, so the Court may well have struck down the law even had it examined the facts.

That all said, the Court did not actually apply the strict scrutiny test to the facts upon which Congress relied so much as announce that the government had failed it. The Court therefore never explained why, given Congress’s findings, the challenged policy was not narrowly enough tailored to serve a compelling governmental interest, especially given that the law still permitted corporations to engage in election-related speech through PACs.<sup>98</sup> The Court, in short, gave scant hearing to the argument that campaign finance regulation is necessary to protect against wealthy individuals and corporations controlling the outcome of elections and thereby skewing policy to suit their interests.<sup>99</sup>

### 3. NFIB and the object of congressional regulation

A majority of Justices also deemed important facts legally irrelevant in their Commerce Clause analysis in *NFIB v. Sebelius*.<sup>100</sup> That portion of the case involved a constitutional challenge to the individual mandate of the 2010 Patient Protection and Affordable Care Act (ACA). The ACA aimed to increase the number of Americans with health insurance and to decrease the cost of health

---

95. *See id.* at 336–41, 354 (majority opinion).

96. *See id.* at 336–41.

97. *See id.* at 364 (“Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.”).

98. *See id.* at 393 (Stevens, J., dissenting) (“The real issue in this case concerns how, not if, the appellant may finance its electioneering.”); Alexander Tsesis, *Multifactorial Free Speech*, 101 NW. U. L. REV. 1017, 1042–49 (2016) (arguing that the Court gave inadequate scrutiny to whether corporate contributions from general treasury funds harm eligible voters’ abilities to influence the political process).

99. *See* Karlan, *supra* note 81, at 30.

100. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

care.<sup>101</sup> To that end, the individual mandate requires most Americans to maintain “minimum essential” health insurance coverage.<sup>102</sup> The challengers asserted, *inter alia*, that the mandate exceeded Congress’s Commerce Clause authority.

Chief Justice Roberts and, in a separate joint dissent, Justices Scalia, Kennedy, Thomas, and Alito all agreed that the Commerce Clause did not authorize the mandate.<sup>103</sup> Though the Court ultimately did uphold the constitutionality of the mandate because the Chief Justice and Justices Ginsburg, Breyer, Sotomayor, and Kagan agreed that it *was* constitutional under Congress’s taxing power, the Justices nevertheless addressed the Commerce Clause issue at some length.

The Chief Justice, for his part, concluded that the mandate does not “regulate” commerce but instead compels unwilling individuals to become active in commerce by buying health insurance.<sup>104</sup> “Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing,” the Chief Justice concluded, “would open a new and potentially vast domain to congressional authority.”<sup>105</sup> Congress, on this account, was regulating *inactivity* by requiring people to enter a market for health insurance they otherwise would avoid.<sup>106</sup>

The joint dissent saw the facts similarly. It contended that uninsured young persons “are quite simply not participants in [the health care] market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.”<sup>107</sup>

---

101. *See id.* at 2580.

102. *See* 26 U.S.C. § 5000A (2012); *NFIB*, 132 S. Ct. at 2580.

103. The joint dissent disagreed with the Chief Justice’s opinion insofar as he upheld the individual mandate under Congress’s taxing power. However, like the Chief Justice, the joint dissent thought the individual mandate exceeded Congress’s commerce power. Because the two opinions’ analyses of the commerce issue were similar, this Part will discuss them together. Similarly, this Article will sometimes refer to these five Justices’ views of the Commerce Clause issue as the view of the majority (because on this issue, they were).

104. *See NFIB*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.).

105. *Id.*

106. *See id.*

107. *Id.* at 2648 (joint dissent).

The Chief Justice and joint dissent's characterization of the mandate as unwelcome governmental regulation of the inactive turned in part on a conception of time that differed from Congress's. Congress viewed the problem over a period of months or even years.<sup>108</sup> A person who is healthy today may become gravely ill or injured tomorrow. The young and vigorous will eventually become old and infirm.<sup>109</sup> Almost everybody will eventually need health care, and some people will unexpectedly require it in the next year. For those reasons, in Congress's eyes, an individual's decision not to buy health insurance today should constitute *action*.<sup>110</sup> As Dean Minow puts it, that decision "becomes a predicate for financial disaster when medical bills arrive," as they almost inevitably will.<sup>111</sup>

By contrast, the Chief Justice and the joint dissent saw the same decision through a much narrower temporal frame. Individuals who don't want health insurance should be viewed only as of the present moment.<sup>112</sup> So understood, they cannot be deemed active in the health care market (or anything else). These people are "doing nothing" right now,<sup>113</sup> and it doesn't matter that some inevitably will go to the doctor tomorrow.

Given their characterizations, the Chief Justice and joint dissenters could conclude that the individual mandate compels unwilling participation in a market.<sup>114</sup> This conclusion was crucial. Indeed, the key doctrinal innovation—that Congress cannot use its Commerce Clause authority to regulate *inactivity*—hinged on the assertion that the individual mandate forced people into a market they otherwise would have avoided.

---

108. See Martha Minow, *Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117, 126–27 (2012).

109. See *NFIB*, 132 S. Ct. at 2611–12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

110. See Minow, *supra* note 108, at 126–27.

111. See *id.* at 127.

112. See *id.*

113. *NFIB*, 132 S. Ct. at 2586–87 (opinion of Roberts, C.J.).

114. See *id.* The Chief Justice acknowledged that economists might see no distinction between activity and inactivity, but he evaded this difficulty by concluding that "the distinction between doing something and doing nothing would not have been lost" on the Constitution's framers. *Id.* at 2589.



This doctrinal innovation may have been rhetorically clever, but it deliberately turned a blind eye to Congress's findings. More specifically, both the Chief Justice and the joint dissent ignored evidence demonstrating that many uninsured people *are* doing something. Specifically, many people are consuming health care without paying for it, thereby passing their costs on to other Americans.<sup>115</sup>

Congress, in fact, included in the statute itself findings supporting this very proposition.<sup>116</sup> For example, Congress found that “[t]he cost of providing uncompensated care to the uninsured was \$43,000,000,000 in 2008” and substantially affected interstate commerce.<sup>117</sup> It further found that “[t]he economy loses up to \$207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured.”<sup>118</sup> Congress concluded that the mandate, in conjunction with the Act's other provisions, would significantly reduce this economic cost by reducing the number of uninsured persons.<sup>119</sup> Admittedly, Congress did little of this research itself, looking instead to policy briefings and academic studies.<sup>120</sup> Nevertheless, Congress relied on the evidence it studied to deem health care reform an urgent legislative priority with broad ramifications for the national economy.<sup>121</sup>

In addition to this compiled evidence, Congress highlighted the reason why the decision not to purchase health insurance should not be characterized as “inactivity.” In the provision articulating the connection between the national economy and interstate commerce, Congress explained:

The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how

---

115. See 42 U.S.C. § 18091(2)(A) (2012).

116. See generally *id.* § 18091(1)–(2)(J).

117. *Id.* § 18091(2)(F); see also *id.* § 18091(1); Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, HEALTH AFFAIRS, Aug. 25, 2008, at 402 (estimating that, in 2008, uninsured people would receive \$54.3 billion of uncompensated care).

118. 42 U.S.C. § 18091(2)(E).

119. *Id.* § 18091(2)(F).

120. See Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 GEO. L.J. 637, 652–75 (2014).

121. See generally 42 U.S.C. § 18091.

and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.<sup>122</sup>

Congress, in other words, found that the great number of uninsured individuals burdens the nation's health care system by consuming health care without paying for it.<sup>123</sup> Because almost everybody enters this market during their lives and because many people enter it unwillingly or unexpectedly every year,<sup>124</sup> Congress was simply trying to ensure that people would pay, through insurance, for the services they inevitably consume. Quite simply, many uninsured persons get sick, go to the emergency room, can't pay their bills, and thus raise the cost of health care for everyone else.<sup>125</sup> Consequently, "the decision to forego insurance is hardly . . . equivalent to 'doing nothing,'" but is rather, as Justice Ginsburg put it, "an economic decision Congress has the authority to address under the Commerce Clause."<sup>126</sup>

As in *Shelby County* and *Citizens United*, the majority of Justices cast aside these findings as legally irrelevant. However, whereas in those cases the Court indicated that Congress had focused on the wrong kinds of facts, the *NFIB* majority signaled that Congress had mischaracterized the phenomenon. In the majority's eyes, an

---

122. *Id.* § 18091(2)(A).

123. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2611 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

124. *See id.* at 2610 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L CTR. FOR HEALTH STATISTICS, SUMMARY HEALTH STATISTICS FOR U.S. ADULTS: NATIONAL HEALTH INTERVIEW SURVEY 2009, ser. 10, no. 249, tbl. 37, at 124 (Dec. 2010)).

125. *See* 155 CONG. REC. H12,853 (daily ed. Nov. 7, 2009) (statement of Rep. Jackson-Lee); Arthur Nussbaum, *Can Congress Make You Buy Health Insurance? The Affordable Care Act, National Health Care Reform, and the Constitutionality of the Individual Mandate*, 50 DUQ. L. REV. 411, 452–53 (2012) (arguing everyone participates in the health care market because the uninsured are really just self-insured); Robert F. Rich et al., *The Patient Protection and Affordable Care Act of 2010: Implementation Challenges in the Context of Federalism*, 16 J. HEALTH CARE L. & POL'Y 77, 96–97 (2013) (discussing whether the individual mandate regulates the "insurance" market or the "health care" market).

126. *NFIB*, 132 S. Ct. at 2617 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

individual's decision to self-insure was *inactivity* and therefore beyond the scope of commerce.

Accordingly, Congress's factual findings about the economic consequences of free riders in the health care market were legally irrelevant.<sup>127</sup> As in *Shelby County* and *Citizens United*, the Chief Justice mostly did not dispute Congress's facts as an empirical matter. He did, however, contend that Congress was relying on mere prophesy when it determined that some uninsured people will consume health care without paying for it.<sup>128</sup> This argument, however, ignored Congress's evidence that many uninsured people *do* go to the hospital each year and fail to pay their bills.<sup>129</sup> The Chief Justice and joint dissenters, in other words, crafted an analysis that treated hard data as hypothetical.

The Chief Justice and joint dissent's approach to Congress's facts in *NFIB* is even stranger, because it is at odds with other cases emphasizing the respect owed to legislative choices. Most relevant here, in *King v. Burwell*, a statutory interpretation case about the ACA, the Court declared that "[a] fair reading of legislation demands a fair understanding of the legislative plan."<sup>130</sup> In stark contrast to *NFIB*'s Commerce Clause discussion, the Court engaged seriously with the ACA's policy objectives to "minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums."<sup>131</sup> *King*, thus, admonished that courts should "respect the role of the

---

127. See Crane, *supra* note 120, at 652–75.

128. See *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.) ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent.").

129. The analysis of the Commerce Clause issue was not the only important portion of the opinion in which the Justices disagreed about facts. For example, in the sections of the opinions addressing the constitutionality of the Medicaid expansion under the Spending Clause, the Justices disagreed about whether that expansion resulted in two separate Medicaid programs or one. Compare *id.* at 2605–06 ("The Medicaid expansion . . . accomplishes a shift in kind, not merely degree."), with *id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Medicaid, as amended by the ACA . . . is a single program with a constant aim."). See also Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 9–29 (2013) (discussing whether the Medicaid expansion was an incremental change or a shift in kind).

130. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

131. *Id.* at 2493 (quoting 42 U.S.C. § 18091(2)(I)).

Legislature, and take care not to undo what it has done.”<sup>132</sup> Neither *King* nor the constitutional cases examined here explain why the Court should afford respect to legislative goals and findings in some contexts but not others involving the same statute.<sup>133</sup>

Five Justices’ approach to facts in their Commerce Clause discussions may seem inconsequential dicta, given that the Court decided to uphold the mandate anyway under Congress’s taxing power. Nevertheless, the fact that five Justices took the trouble to write or join extensive discussions rejecting Congress’s view of what it was regulating speaks to the Court’s disregard for congressional facts. If anything, the Chief Justice’s willingness to cast aside congressional findings here is especially striking because the discussion was entirely unnecessary.<sup>134</sup>

### *B. Facts and Facial Challenges*

In addition to ignoring Congress’s facts, the Justices in these cases also treated each challenge as a facial one. This move enabled the majorities to avoid other inconvenient facts. It also helped them write broad opinions that invalidated the relevant provisions in all their applications rather than simply as applied to the plaintiffs in those cases.<sup>135</sup>

The decision to treat a case as a facial or as-applied challenge may seem unrelated to its treatment of congressional findings. However, upon closer examination, both determinations allow the Justices to push aside facts they prefer to avoid. We do not typically think of the distinction between facial and as-applied challenges as being a determination about facts, but whether a challenge is framed as facial

---

132. *Id.* at 2496.

133. *Cf.* Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 94 (2012) (arguing that the Chief Justice’s approach to the Commerce Clause in *NFIB* “reads a statute to create constitutional problems”).

134. The joint dissenters shared this view, but their discussion of this issue *was* necessary, because they would have invalidated the individual mandate and therefore needed to explain why Congress lacked the power to pass the mandate under the Taxing, Commerce, and Necessary and Proper Clauses.

135. *See, e.g.*, Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 917 (2011) (noting the Justices’ “assumption that facial challenges are and ought to be rare”).

or as-applied has potentially important consequences for the universe of relevant facts.

Though the Court's approach to the distinction between facial and as-applied challenges is inconsistent,<sup>136</sup> as-applied challenges often implicate narrower, adjudicative facts involving the particular party to the litigation.<sup>137</sup> By contrast, a facial challenge tends to involve broader, legislative facts about the statute writ large. After all, the facial challenge calls into question the validity of the statute in all its applications. To be sure, the universe of relevant facts does not define the distinction between facial and as-applied challenges, and the characterization offered here does not always hold. However, given that the Justices sometimes take advantage of the inchoate lines between the two to pursue substantive goals,<sup>138</sup> it is important to recognize that the choice between facial and as-applied challenges can shape the facts at issue.

### I. Shelby County

The Court treated the lawsuit in *Shelby County* as a facial challenge.<sup>139</sup> This move limited the universe of facts the Court considered. It also greatly expanded the reach of its decision.

Shelby County brought the case as a facial challenge, seeking to invalidate the coverage formula in its entirety, as opposed to challenging only its applicability to the county itself.<sup>140</sup> Notwithstanding this plaintiff's initial framing, the Court's stated

---

136. See, e.g., Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* in Toto, 98 VA. L. REV. 301, 307–18 (2012).

137. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 662 (3d ed. 1988) (“Challenges to the validity of a statute as applied to specific facts . . . turn necessarily on a determination of what the adjudicative facts were.”). However, it is important to note that the distinction between facial and as-applied challenges is muddy and shifting. As Professor Metzger points out, this formulation was absent from later editions of Hart and Wechsler's *Federal Courts* casebook. See Gillian E. Metzger, Essay, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 882 (2005).

138. See Metzger, *supra* note 137, at 880.

139. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding that the coverage formula “can no longer be used as a basis for subjecting jurisdictions to preclearance”); see also *id.* at 2644–48 (Ginsburg, J., dissenting) (criticizing the Court's decision to treat the case as a facial challenge).

140. See *id.* at 2621–22 (majority opinion).

preference is to treat cases as as-applied challenges.<sup>141</sup> Indeed, the Supreme Court generally, and the Roberts Court in particular, has repeatedly resisted facial challenges on the theory that litigants can instead bring narrower as-applied attacks (on remand, if need be).<sup>142</sup>

Had the Court treated the case as an as-applied challenge, it would have asked whether preclearance was an appropriate remedy for voter discrimination in Shelby County itself or perhaps in the State of Alabama. If the Court needed more information to make this determination, it could have remanded the case for jurisdiction-specific factual findings. Instead, by permitting the case to proceed as a facial attack, the Court was able to brush aside evidence that voter discrimination persisted in Shelby County.<sup>143</sup>

Because it treated the case as a facial challenge, the Court reviewed the propriety of preclearance for *all* jurisdictions subject to it rather than focusing on the record of voter discrimination of the jurisdiction at issue in this case. In so doing, the Court made it easier to find a constitutional violation. By pointing to broad national trends indicating changed times and reduced discrimination, the Justices were able to sidestep evidence that Shelby County's and Alabama's records of voter discrimination were damning enough to merit preclearance.<sup>144</sup>

The Court's opinion certainly would have been harder to write had it looked more closely at the state's and county's histories. More

---

141. See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 *FORDHAM URB. L.J.* 773, 773 (2009) ("One recurring theme of the Roberts Court's jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation.").

142. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored."); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *United States v. Raines*, 362 U.S. 17, 20–21 (1960); *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912); Fallon, *supra* note 135, at 917; Metzger, *supra* note 141, at 773.

143. See *Shelby Cty.*, 133 S. Ct. at 2629 (contending that the dissent's argument that the Court should consider Shelby County's actual record of voting discrimination "is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired").

144. See *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 441–43 (D.D.C. 2011) (detailing history of voter discrimination in Shelby County), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

specifically, the Court's decision to treat the case as a facial challenge allowed it to ignore important trial court findings about the record of voter discrimination in the jurisdictions at issue. As the district court explained, in the decades since the initial passage of the VRA, Alabama had a substantial history of creating at-large electoral districts designed to keep its black citizens "politically downtrodden."<sup>145</sup> Between 1982 and 2005, Alabama had the second-highest rate of successful voter discrimination suits under section 2 of the VRA.<sup>146</sup> In the 1980s, Shelby County itself had been a party to litigation challenging these practices and had entered into a consent decree agreeing to change its at-large system to a single-member district with one majority-black district.<sup>147</sup> As recently as 2008, the U.S. Attorney General objected to a redistricting plan that would have eliminated the sole majority-black district in a city within Shelby County.<sup>148</sup>

Had the Court considered only this narrower history of voter discrimination in the jurisdiction at issue, it would have been substantially harder to conclude that preclearance was unfairly burdening Shelby County itself. As Justice Ginsburg summarized in dissent, "Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement."<sup>149</sup> In fact, Shelby County itself did not challenge the specific application of preclearance to any of its proposed voting changes.<sup>150</sup> But by viewing the case through a broad nationwide lens, the Court was able to highlight that "things have changed,"<sup>151</sup> without having to confront evidence that things may not have changed enough in the very county that initiated the litigation.

---

145. *See id.* at 442 (citing *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1357 (M.D. Ala. 1986)).

146. *See Shelby Cty.*, 133 S. Ct. at 2645 (Ginsburg, J., dissenting). Mississippi had the highest rate. *See id.*

147. *See Shelby Cty.*, 811 F. Supp. 2d at 442–43.

148. *See id.*

149. *See Shelby Cty.*, 133 S. Ct. at 2645 (Ginsburg, J., dissenting).

150. *See Shelby Cty.*, 811 F. Supp. 2d at 443.

151. *Shelby Cty.*, 133 S. Ct. at 2625 (majority opinion).

The Court's treatment also tremendously extended the reach of its decision. Because the Court vindicated Shelby County's facial challenge, its ruling invalidated the coverage formula in its entirety, not just as applied to the plaintiff. As a result, the Court effectively removed preclearance as a tool for combatting voter discrimination nationwide. The Court did so despite the VRA's "exceptionally broad severability provision,"<sup>152</sup> indicating that "[i]f any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."<sup>153</sup> The Court's aggressive rejection of the entire preclearance scheme, then, ignored both Congress's facts and legal instructions.

## 2. Citizens United

*Shelby County's* breadth is notable, but it is not anomalous. In *Citizens United*, the Court also declared the statute in question facially unconstitutional.<sup>154</sup> Indeed, the Court's move in *Citizens United* was even more aggressive, converting an as-applied challenge into a facial one.<sup>155</sup> As in *Shelby County*, the decision to treat the case as a facial challenge helped the Court simultaneously evade important facts and extend the reach of the decision.

The plaintiffs in *Citizens United* brought an as-applied challenge, contending, *inter alia*, that section 441b of BCRA was unconstitutional as applied to *Hillary: The Movie*.<sup>156</sup> Nevertheless, the Court treated the challenge as a facial one.<sup>157</sup> As Justice Stevens pointed out, had the plaintiff itself brought a facial challenge, "the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual

---

152. *Id.* at 2648 (Ginsburg, J., dissenting).

153. 52 U.S.C. § 10313 (Supp. III 2016) (transferred from 42 U.S.C. § 1973p (2012)).

154. *See* *Citizens United v. FEC*, 558 U.S. 310, 321, 330 (2010) (justifying decision to treat case as a facial challenge).

155. *See id.* at 398–99 (Stevens, J., concurring in part and dissenting in part).

156. *See id.* at 321 (majority opinion).

157. *See id.* at 330 ("[I]t is necessary to consider . . . the facial validity of §441b's expenditure ban.").



burdens and its actual benefits, on *all* manner of corporations and unions.”<sup>158</sup> Citizens United, however, had abandoned its facial challenge in the district court,<sup>159</sup> so there was no such record. As we have already seen, the Court ignored the facts that prompted legislative action. By recharacterizing the as-applied challenge as a facial one, it similarly avoided considering facts about the effects of the law.

Also like *Shelby County*, the decision in *Citizens United* to treat the challenge as a facial one made it easier to strike down the statute. Had the Court actually grappled with facts about the role of money in politics, it might have been harder to conclude that the statute was not narrowly tailored to advance a compelling governmental interest. By invalidating the statute on its face without the benefit of a district court record, the Court could emphasize the statute’s imposition on free speech without engaging with the harms the statute sought to remedy.

Of course, it is possible that a fully developed district court record would have supported the majority’s holding.<sup>160</sup> Perhaps, for example, the trial court could have found that money finds its way into politics anyway,<sup>161</sup> so that section 441b was not effective enough to justify its intrusion on free speech. However, by ruling without the benefit of any record, the Court was able to reach its desired result without having to grapple with facts about the law’s effects.

Finally, and again like *Shelby County*, the Court’s facial invalidation of section 441b increased the significance of its decision. Quite simply, the ruling invalidated the statutory provision in all its

---

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

159. See Motion for Summary Judgment by Citizens United, *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (No. 52); Stipulation Regarding Count 5 of the Amended Complaint by Citizens United, *Citizens United v. FEC*, 530 F. Supp.2d 274 (D.D.C. 2008) (No. 53); Order Dismissing Count 5 of the Amended Complaint, *Citizens United v. FEC*, 530 F. Supp.2d 274 (D.D.C. 2008) (No. 54); *Citizens United*, 558 U.S. at 396–97 (Stevens, J., concurring in part and dissenting in part) (noting that Citizens United “expressly abandoned its facial challenge”).

160. *But see* *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

161. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (“[P]olitical money, like water, has to go somewhere. It never really disappears into thin air.”).

applications, rather than just as applied to one plaintiff. A narrower, as-applied holding could have permitted the plaintiff to show *Hillary: The Movie* in the days leading up to an election but would have reserved for future cases the constitutionality of section 441b applied to other entities in other contexts.<sup>162</sup> The Court, instead, struck down the provision in all its applications, thus issuing a decision with a tremendous reach.

### 3. NFIB

Though *NFIB* did not use the language of facial and as-applied challenges, it too can be thought of in those terms. The Chief Justice's and joint dissent's approaches essentially converted an as-applied challenge (brought by uninsured non-free riders<sup>163</sup>) to a facial challenge (seeking to invalidate the individual mandate as applied to *all* individuals, including free riders who consume health care without paying for it). As in *Shelby County* and *Citizens United*, this move allowed these five Justices to ignore inconvenient facts, steer the decision toward its desired outcome, and write broader opinions.<sup>164</sup>

The Chief Justice and joint dissenters took for granted that the government was forcing the plaintiffs unwillingly into a market in which they otherwise would not have participated. In this way, these five Justices assumed that the individual mandate was unconstitutional as applied to everyone without health insurance. But it is difficult to contend that Congress lacks the Commerce Clause power to impose a mandate on health-care free riders.<sup>165</sup> To the contrary, uninsured persons who receive but do not pay for

---

162. See, e.g., Fallon, *supra* note 135, at 946 (noting that the Court could have held the relevant BCRA provision invalid only as applied to the party before it, but instead it found the provision invalid on its face).

163. By "uninsured non-free riders," I refer to uninsured persons who do not pass their health care costs onto society at large, either because they never consume health care or because they are able to pay out of pocket for the health care costs they incur.

164. Admittedly, the Court ultimately upheld the mandate. See *supra* notes 103–04, 133–34 and accompanying text.

165. Probably for this reason, the challengers made sure to select plaintiffs who, though uninsured, expected to be able to pay out of pocket for their health care needs. See, e.g., Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1270–71 (N.D. Fla. 2011).

health care harm everyone else by passing their costs onto the rest of society. Simply put, the free rider's actions surely impacts interstate commerce, especially in the aggregate.<sup>166</sup>

The Chief Justice and joint dissenters completely ignored this complication.<sup>167</sup> Indeed, they did not seek any assurance that the plaintiffs would not free ride off the system. For example, these Justices could have perhaps asked the plaintiffs to demonstrate that they had not been free riders in the past and that they had the savings to pay out of pocket for unexpected health care expenses. Such an approach, though unwieldy, would at least have sought to identify regulated individuals whose behavior did not substantially affect interstate commerce.

The Chief Justice and joint dissenters, though, did not wrestle with such problems, instead treating each uninsured person as though she were entirely out of the health care market.<sup>168</sup> The Chief Justice, indeed, brushed aside Congress's claim that uninsured people will consume health care as mere "prophesied future activity."<sup>169</sup> As noted above, this argument ignores congressional findings indicating that every year many uninsured persons *do* consume health care for which they do not pay. By ignoring this evidence, the Chief Justice and joint dissenters could contend that the individual mandate was beyond Congress's commerce power in all instances, even as applied to those free riders whose behavior unquestionably impacts interstate commerce and partially prompted the legislation in the first place. The Justices, in other words, treated

---

166. *Cf.* *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

167. It is possible that these five Justices thought the individual mandate was unconstitutional as applied to uninsured non-free riders and that this unconstitutional application of the statute could not be severed from any constitutional applications of the mandate. However, though these Justices engaged in a lengthy discussion of whether the entire statute must fall due to the invalidity of the individual mandate and the Medicaid expansion, they did not explore whether one could sever constitutional and unconstitutional applications of the individual mandate. *Compare* *NFIB v. Sebelius*, 132 S. Ct. 2566, 2607–08 (2012) (opinion of Roberts, C.J.), *with id.* at 2668–76 (joint dissent).

168. *See id.* at 2611 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).

169. *See id.* at 2590 (majority opinion).

the case as a facial challenge to all applications of the statute, rather than an as-applied challenge by non-free riders (i.e., uninsured persons with a plausible argument that they did not impact interstate commerce).

In fairness, Commerce Clause challenges, such as *United States v. Lopez* and *United States v. Morrison*, usually proceed facially.<sup>170</sup> To that extent, the Court's decision to treat the mandate challenge as a facial one seems unremarkable. But *NFIB* differed in important respects from both those cases. Both *Lopez* and *Morrison* emphasized that the statutes at issue regulated non-economic activities (guns in school zones and violence against women).<sup>171</sup> As a result, the Court would not permit Congress to view these activities in the aggregate as substantially affecting interstate commerce.<sup>172</sup> To this extent, the statutes there were unconstitutional in all their applications.

By contrast, the argument that an uninsured person is not engaged in economic activity is plausible only if that person never seeks health care. If a person consumes health care without paying for it, she is actively passing the costs of her health care consumption onto the medical provider and, ultimately, society. Phrased differently, such a free rider is actively engaged in economic activity that substantially affects interstate commerce. By contrast, the man who carries a gun into a school zone or who abuses his wife is simply not engaged in economic activity (even if his activity may have economic effects).

Given *Lopez* and *Morrison*'s reasoning, the Court's decisions to treat those cases as facial challenges make sense. No application of either statute regulated *economic* activity. By contrast, the free rider is plainly making an economic decision that impacts interstate commerce. Accordingly, the Chief Justice's and joint dissenters' opinions must be read as asserting either that the existence of the free rider is uncertain and therefore legally irrelevant, or that the

---

170. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000); *United States v. Lopez*, 514 U.S. 549, 559–68 (1995); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 62–68 (2006); Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L. J. 1557, 1563 (2010); Metzger, *supra* note 137, at 905.

171. See *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 561.

172. See *Morrison*, 529 U.S. at 609–10; *Lopez*, 514 U.S. at 561.

unconstitutional application of the mandate to some non-free riders should sink the mandate's constitutionality under the Commerce Clause in all its applications. It is not entirely clear which argument the Chief Justice and joint dissenters were advancing, but, either way, these Justices treated the case as a facial challenge.

Even assuming *arguendo* that these five Justices were correct that the mandate exceeded Congress's authority as applied to uninsured non-free riders, it is strange that that unconstitutional application should invalidate the mandate in all its applications. Federal statutes passed pursuant to the Commerce Clause are typically valid if they regulate some economic activity substantially impacting interstate commerce.<sup>173</sup> The Court historically has indicated it would uphold statutes that, in some applications, may regulate activity that does not affect interstate commerce.<sup>174</sup> Ever since 1937, the assumption has been that so long as the statute in some regard regulates economic behavior substantially affecting interstate commerce, the statute would stand.<sup>175</sup>

The five Justices in *NFIB* reversed this presumption, suggesting (but not stating) that a statute enacted pursuant to the commerce power must fall if some of its applications reach behavior not implicating interstate commerce. This move made it possible for five Justices to conclude that the mandate exceeded the commerce power. It also allowed the Justices to ignore Congress's findings that the problem of free riders substantially affected interstate commerce. Indeed, neither the Chief Justice nor the joint dissenters tried to identify just how many people subject to the individual mandate were, in fact, non-free riders. Presumably, a substantial portion of the regulated individuals were or would soon become free riders whose behavior impacts interstate commerce. Some people, in fact, forego health insurance knowing that they soon will consume health care

---

173. See *Lopez*, 514 U.S. at 558–59.

174. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 302–04 (1964) (upholding application of Title II of the Civil Rights Act to a restaurant and rejecting the appellees' contention that the Court should engage in a "case-by-case determination . . . that racial discrimination in a particular restaurant affects commerce.").

175. See *Lopez*, 514 U.S. at 558–59. There is some disagreement about whether the test should be whether the activity "affects" or "substantially affects" interstate commerce. Compare *id.* at 559, with *id.* at 615 (Breyer, J., dissenting).

for which they will be unable to pay. Congress itself had found that very large numbers of Americans contribute to the very free-rider problem Congress was trying to address, thus imposing enormous costs on to the national economy.<sup>176</sup>

Admittedly, it would have been difficult to distinguish *ex ante* between free riders and uninsured persons who will not burden the system. However, that difficulty should have cut in favor of the mandate's constitutionality. Given that the great number of free riders substantially raised health care costs for everyone else, the Chief Justice's decision to focus exclusively on the non-free rider is highly questionable. This approach effectively vindicated a facial attack on the mandate, even though the legal argument applied only to a subset (probably only a small subset) of the regulated individuals.

\* \* \*

It would be misleading to characterize the Court's approach to facial challenges here as plainly erroneous. After all, the Court not infrequently entertains and vindicates facial challenges, notwithstanding its rhetoric that facial challenges ought to be rare.<sup>177</sup> What is more noticeable, though, is that the Court made this crucial move in each opinion with minimal explanation and with no acknowledgement that doing so excluded from the Court's consideration facts that reasonable observers might deem central to the cases at hand.

The Chief Justice and joint dissenters in *NFIB* did not mention the matter at all, discussing the mandate as though the constitutional issue were identical for free riders and non-free riders alike.<sup>178</sup> The

---

176. See 42 U.S.C. § 18091(2)(E)–(F) (2012).

177. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”); *Brockett v. Spokane Arcades*, 472 U.S. 491, 501–02 (1985); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994) (pointing out that the Supreme Court's stated approach disfavoring facial challenges does not “accurately reflect[] the Court's practice”); Fallon, *supra* note 135, at 935; Metzger, *supra* note 137, at 878 (“[T]he Court accepts facial challenges far more frequently than its stated doctrine suggests.”).

178. See *supra* Section I.B.3.

Court in *Shelby County* did not justify its decision to treat the case as a facial challenge.<sup>179</sup> And though *Citizens United* tried to justify its decision to convert the case into a facial challenge,<sup>180</sup> it failed to explain convincingly why it ought not remand the case for fact finding about the statute's effects.

The apparent allure of facial challenges in these cases was not just that they enabled the Justices to weave around inconvenient facts, but also that they enabled the Justices to write broader opinions than would have otherwise been possible.<sup>181</sup> Indeed, this judicial aggrandizement is consistent with other moves in these cases enhancing the Justices' power. In *NFIB*, for example, the Chief Justice need not have discussed the Commerce Clause issue at all, given that it upheld the individual mandate under Congress's taxing power.<sup>182</sup> *Citizens United* need not have reached the facial constitutional issue, given that it could have been decided on narrow statutory grounds or as an as-applied constitutional challenge.<sup>183</sup> Indeed, in that case, the Court requested additional briefing and rescheduled oral argument precisely to inject into the case a broad First Amendment issue.<sup>184</sup> To this extent, the Court's treatment of facts and facial challenges in these cases is part of a broader pattern of aggressive judicial efforts to issue far-reaching constitutional decisions.

## II. EXPLANATIONS

The Court's avoidance of inconvenient facts in these cases is striking. One would think that the Justices would at least want to *consider* the facts motivating federal legislation, even if they ultimately deemed those facts insufficient to support the statute at

---

179. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2644–45 (Ginsburg, J., dissenting).

180. See, e.g., *Citizens United v. FEC* 558 U.S. 310, 329–30 (2010).

181. Cf. Metzger, *supra* note 137, at 880 (arguing that the Justices “are less concerned with” treating the distinction between facial and as-applied challenges consistently and more concerned “with results in particular cases”).

182. See *supra* Section I.A.3.

183. See Briffault, *supra* note 93, at 663 (noting “several legal theories” that would have permitted *Citizens United* to pay for the movie in question that would not have required the Court to invalidate laws banning corporate campaign spending).

184. See *Citizens United*, 558 U.S. at 322 (directing parties to file supplemental briefs addressing constitutional questions).

issue. After all, core constitutional doctrines, like ripeness and standing, are premised partially on the notion that judges decide cases more wisely when they have concrete disputes with developed facts in front of them.<sup>185</sup>

To the extent the majority in each of these cases found creative ways to decide important constitutional cases without considering seemingly relevant facts, it is important to explore *why* the Justices act as they do. It is worth noting that no single explanation for the Court's approach is fully satisfactory, and some apply to some cases more convincingly than to others. Nevertheless, collectively the various explanations examined here help shed light on the practice and the Court's constitutional decision making more generally.

*A. The Doctrinal Explanation: (Novel) Constitutional First Principles*

Perhaps the most obvious explanation behind the Court's aggressive avoidance of facts, including congressional facts, is that the Court cared more about deeper constitutional norms and less about the facts prompting congressional policy. In each case here, the Court's analysis largely sidestepped facts, instead focusing on what the majority perceived to be constitutional first principles. Interestingly, these principles were deeply contested and, in some cases, wholly novel. Nevertheless, these principles were very much at the heart of the majority Justices' theories of these cases.

*Citizens United* presents the most obvious example—and the one example in which the principle in question already was important in the case law. The Court rejected the relevance of Congress's findings that corporate campaign finance contributions can lead to an undue and corrupting corporate influence over the political process.<sup>186</sup> Only quid pro quo corruption, the Court said, mattered for free speech purposes.<sup>187</sup>

---

185. See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 471–72 (2008) (summarizing views of the functions of standing); Fallon, *supra* note 135, at 960.

186. See *supra* Section I.A.2.

187. See *Citizens United*, 558 U.S. at 359 (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”).



While the Court cited *Buckley* for this proposition,<sup>188</sup> a fuller explanation rests with the Court's understanding of representative democracy. Quoting his own opinion from *McConnell*, Justice Kennedy explained:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.<sup>189</sup>

The Court's vision of representative democracy, then, accepts rent seeking and speech supporting it as inevitable features of our governmental system. On this view, Congress's evidence that campaign contributions "corrupt," established only what Justice Kennedy deemed inherent in our governmental system. Many businesses and other interest groups contribute to political candidates precisely because they hope that those candidates, if elected, will pass laws favorable to those contributors. Far from lamenting this state of affairs, the Court accepted it as inevitable.<sup>190</sup> Accordingly, no congressional findings short of quid pro quo corruption could justify regulations that so substantially impinged on campaign contributors' First Amendment interests.

*Shelby County's* attitude toward congressional facts also rested on constitutional first principles. The Court began with the proposition that state sovereignty generally, and equal state sovereignty in particular, are constitutional principles of the highest importance.<sup>191</sup> Building on this premise, the majority insisted that only

---

188. *See id.*

189. *Id.* at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010)).

190. *See* Sitkoff, *supra* note 81, at 1106.

191. *See* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013) (describing the VRA as "a drastic departure from basic principles of federalism" and "an equally dramatic departure from the principle that all States enjoy equal sovereignty").

extraordinary circumstances could justify intruding on these principles. The Court accepted that the VRA's "strong medicine" may once have been necessary to combat the insidious practice of voter discrimination but insisted that it was constitutionally illegitimate absent "exceptional conditions."<sup>192</sup> Whereas the Jim Crow South's blatant voter discrimination, which often prevented African Americans from casting ballots at all, rose to this level,<sup>193</sup> more subtle and contemporary forms of voter discrimination did not.<sup>194</sup>

The Court's point was not that these barriers did not exist. Rather, the Court assumed that these barriers were not as serious as they had been when Congress first passed the VRA in 1965. Accordingly, the Court concluded that whatever the factual record, it could not support Congress's intrusion on state sovereignty.

Additionally, the Court's opinion rested on the latent but palpable principle of color blindness. During oral argument, the majority Justices signaled that they saw the VRA as a racial entitlement—that is, as a governmental benefit bestowed upon racial minorities (and, in particular, African Americans).<sup>195</sup> Some Justices, thus, signaled that a statute that treated states differently *and* extended special protections to certain racial minorities was unconstitutional absent especially robust findings. The constitutional bar, in fact, was so high that the Court did not even need to look at the evidence to conclude that it was not good enough.<sup>196</sup>

Like *Shelby County*, *NFIB's* Commerce Clause analysis also ignored congressional facts in service of federalism. The Chief Justice, for instance, quoting *The Federalist* No. 48, openly worried that without a firm judicial check on Congress, the federal legislature would be "everywhere extending the sphere of its activity and

---

192. *Id.* at 2618.

193. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 52–55, 85–86 (2004).

194. *See, e.g.*, H.R. REP. No. 109–478, at 6 (2006).

195. *See* Transcript of Oral Argument at 46–47, *Shelby Cty.*, 133 S. Ct. 2612 (No. 1296).

196. *See Shelby Cty.*, 133 S. Ct. at 2629 ("Regardless of how to look at the record . . . no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination . . . in 1965.").

drawing all power into its impetuous vortex.”<sup>197</sup> The joint dissenters similarly contended that “if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.”<sup>198</sup>

This federalism principle dictated that Congress’s findings should not matter. Because Congress had relied on its findings about the serious economic consequences of uninsured persons to justify an unprecedented exercise of its commerce authority,<sup>199</sup> these Justices recharacterized the very phenomenon Congress regulated as “inaction.” Given the federalism principles at stake, both the Chief Justice and the joint dissenters indicated that they would not accept a characterization of the facts that would permit Congress such broad commerce power.

In one sense, these judicial statements were candid admissions that a normative constitutional preference for limited federal government was pushing aside seemingly key facts.<sup>200</sup> That candor, however, can be understood also as an acknowledgement that these Justices—and the joint dissenters in particular—were prepared to characterize the facts however necessary to hold that the individual mandate exceeded the commerce power. On that account, it didn’t really matter whether Congress regulated behavior that substantially affected interstate commerce, because five Justices believed Congress shouldn’t be regulating in that way, regardless of the underlying facts.

Indeed, it is noteworthy that the Court’s constitutional justifications for ignoring Congress’s facts in these cases rested on novel or, at best, deeply contested constitutional theories. For example, the distinction between action and inaction did not exist in Commerce Clause doctrine prior to *NFIB*. The Chief Justice justified this innovation by contending that “[a]llowing Congress to justify federal regulation by pointing to the effect of inaction on

---

197. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (opinion of Roberts, C.J.) (quoting *THE FEDERALIST* NO. 48, at 309 (James Madison)).

198. *Id.* at 2648 (joint dissent).

199. See 42 U.S.C. § 18091(2)(F) (2012).

200. See *infra* Section IV.B.2.

commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation.”<sup>201</sup>

However, this distinction between action and inaction is largely arbitrary.<sup>202</sup> As Justice Ginsburg, quoting Judge Easterbrook, noted, “it is possible to restate most actions as corresponding inactions with the same effect.”<sup>203</sup> As already discussed, while the Chief Justice and the joint dissenters painted a person’s failure to purchase health insurance as “inaction,” one could just as easily characterize it as an affirmative decision to impose one’s own medical expenses onto hospitals and society more generally.

Even more to the point, this doctrinal distinction did not exist prior to *NFIB* and is, in fact, in tension with earlier Commerce Clause cases.<sup>204</sup> Moreover, even if we accept the distinction, the Necessary and Proper Clause permits Congress to enact measures “plainly adapted” to accomplish Congress’s legitimate goals.<sup>205</sup> ACA provisions forbidding insurance companies from denying coverage or charging higher prices to individuals with preexisting medical conditions plainly fall within the Commerce power.<sup>206</sup> Without the individual mandate, however, those provisions would never work.<sup>207</sup> The individual mandate, then, was “‘reasonably adapted’ to the attainment of a legitimate end under the commerce power”<sup>208</sup> and, therefore, valid under Necessary and Proper Clause precedent.

The Chief Justice steered around this precedent on the theory that the individual mandate was not “proper,” because it interfered

---

201. *NFIB*, 132 S. Ct. at 2587.

202. See David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 20.

203. *NFIB*, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Archie v. Racine*, 847 F. 2d 1211, 1213 (7th Cir. 1988) (en banc)).

204. See Strauss, *supra* note 202, at 20–23 (discussing *Wickard* and other early Commerce Clause cases); *supra* Sections I.A.3, I.B.3.

205. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); Strauss, *supra* note 202, at 9.

206. See *NFIB*, 132 S. Ct. at 2626 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

207. See *id.* (explaining adverse selection problem that would arise if the guaranteed issue and community rating provisions were unaccompanied by the individual mandate).

208. See *id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

with the “structure of government.”<sup>209</sup> However, as Justice Ginsburg explained, the Chief Justice cited just two cases for this proposition, both of which were easily distinguishable, because, unlike the individual mandate, they compelled state officials to act on behalf of the federal government.<sup>210</sup> Regardless of whether it is persuasive, the Chief Justice’s approach charts new constitutional territory. The Chief Justice’s rejection of congressional facts in *NFIB*, then, is all the more notable, because it rested upon newfangled doctrine.

*Shelby County*, too, rejected facts based primarily on new doctrine. While the Court had cited the principle of equal state sovereignty before, that concept had rested dormant for much of our constitutional history.<sup>211</sup> Furthermore, that constitutional principle was often narrow, only requiring Congress to admit new states on the same terms as the original thirteen states.<sup>212</sup> Thus, as Professor Litman argues, “*Shelby County* broadened the equal sovereignty principle beyond how it had been used in prior cases.”<sup>213</sup> The Court, for its part, cited its 2009 decision in *Northwest Austin Municipal Utility District v. Holder*,<sup>214</sup> but in that case the Court found that the jurisdiction in question was eligible to seek bailout from preclearance obligations.<sup>215</sup> The Court, therefore, decided *Northwest Austin* as a matter of statutory, rather than constitutional, interpretation. Though *Northwest Austin* discussed the equal state sovereignty principle, that principle did not decide the case.

Finally, while *Citizens United*’s narrow view of corruption was already part of First Amendment doctrine, the majority opinion was also at odds with important First Amendment precedents and historical understandings.<sup>216</sup> Cases like *Austin v. Michigan Chamber*

---

209. See *id.* at 2592 (opinion of Roberts, C.J.).

210. See *id.* at 2627 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing Chief Justice’s analysis of *New York v. United States* and *Printz v. United States*).

211. See Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1228–29 (2016).

212. See *id.* at 1211.

213. *Id.*

214. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

215. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009).

216. See *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 395 (2010); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652

of *Commerce*<sup>217</sup> and *McConnell v. FEC*<sup>218</sup> had upheld campaign finance restrictions, including (in *McConnell*'s case) the very BCRA provision at issue in *Citizens United*.<sup>219</sup> Unlike *Citizens United*, those cases had wrestled explicitly with the government interest in campaign finance regulation.<sup>220</sup>

Similarly, *FEC v. National Right to Work Commission* had also unanimously recognized a sufficient governmental interest in “ensur[ing] that substantial aggregations of wealth amassed by” corporations would not “be used to incur political debts from legislators who are aided by the contributions.”<sup>221</sup> That case had likewise accepted that Congress’s decision to place special limitations on corporations’ campaign spending “reflects a permissible assessment of the dangers posed by those entities to the electoral process.”<sup>222</sup> Thus, as Justice Stevens argued in dissent in *Citizens United*, the majority’s approach overruled or disavowed a long line of case law upholding campaign finance regulations.<sup>223</sup>

The Court’s willingness to accept corporate rent-seeking also ignored concerns about the dangers of corruption dating back to the Founding era. As Professor Teachout argues, the United States, throughout its history, has a tradition of viewing corruption broadly

---

(1990). See generally ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 2 (2014) (discussing deep concerns about corruption, broadly defined, in American history); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) (“The Constitution carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism.”).

217. *Austin*, 494 U.S. 652.

218. *McConnell*, 540 U.S. 93.

219. Admittedly, the rationale in *Austin* was somewhat different from that asserted by the government to defend the statute at issue in *Citizens United*. See *Austin*, 494 U.S. at 660 (“[T]he corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . that have little or no correlation to the public’s support for the corporation’s political ideas.”).

220. *McConnell*, 540 U.S. at 205 (“We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’” (quoting *Austin*, 494 U.S. at 660)).

221. *FEC v. Nat’l Right to Work Comm’n*, 459 U.S. 197, 207 (1982).

222. *Id.* at 209.

223. See *Citizens United v. FEC*, 558 U.S. 310, 395 (2010) (Stevens, J., concurring in part and dissenting in part) (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *FEC v. Beaumont*, 539 U.S. 146 (2003); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981)).

to include not only “blatant bribes and theft from the public till . . . [but also] many situations where politicians and public institutions serve private interests at the public’s expense.”<sup>224</sup> This type of anti-rent-seeking principle, arguably baked into the Constitution in provisions like the Emoluments Clause,<sup>225</sup> calls into question the majority’s assumptions about representative democracy under the Constitution. While the depth and scope of this anti-corruption principle is certainly contestable,<sup>226</sup> its very existence raises questions about whether the Court’s preferred constitutional first principle was necessarily correct.

Of course, just because the majority relied on novel or deeply contested constitutional principles in these cases does not necessarily mean that those principles are wrong. New doctrines sometimes become canonical. Nevertheless, it is striking that the Court’s efforts to avoid grappling with inconvenient facts relied largely on doctrinal innovations.<sup>227</sup>

Indeed, the majority’s willingness to brush aside these facts in the service of new or deeply contested constitutional doctrine suggests that the Justices here are guided less by constitutional precedent and more by the spirit of innovation. The Court’s aggressive rejection of Congress’s facts—and its related confidence in its own view of the world—speak, then, not to passive jurists applying clear legal principles to the case before them, but rather to Justices aggressively moving the law in their preferred directions.<sup>228</sup> The Court may have hoped to seem apolitical when it ignored the

224. See TEACHOUT, *supra* note 216, at 2.

225. See U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); NORMAN L. EISEN ET AL., GOVERNANCE STUDIES AT BROOKINGS, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 5 (2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf) (arguing that the Emoluments Clause was a broad “anti-corruption measure”).

226. See, e.g., Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 404–17 (2012) (arguing that the Founders were not “obsessed” with corruption and that the anti-corruption principle extends not to elected federal positions but only to appointed federal officers).

227. See also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Morrison v. United States*, 529 U.S. 598 (2000).

228. See generally ERIC J. SEGALL, SUPREME MYTHS (2012).

facts and focused on constitutional principles, but its disregard of inconvenient facts instead suggests deep commitment to an ideological agenda.

*B. The Political Explanation: The Conservative Counter Revolution*

We thus turn to a second and closely related explanation: political norms. In each of the cases discussed here, a conservative majority of the Court voted to invalidate parts of federal statutes serving progressive agendas. As Professor Karlan has argued, whereas conservatives once advocated for judicial restraint as a reaction against the perceived excesses of the Warren Court, judicial conservatives in more recent years have used the judicial power to attack constitutional doctrines undergirding liberal legislative accomplishments.<sup>229</sup> This is not a judicial conservatism devoted to the passive virtues of judicial modesty,<sup>230</sup> but a far more aggressive conservatism that promotes the Republican Party's agenda through court decisions.<sup>231</sup>

Of course, politics alone cannot explain constitutional law, and the media sometimes over-emphasizes political factors when it reports on judicial decisions. Nevertheless, it is striking that the majority Justices on these issues—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—were all appointed by Republican presidents.<sup>232</sup> By contrast, the dissenters—Justices Ginsburg, Breyer, Sotomayor, and Kagan—were all appointed by Democratic presidents and predictably share more liberal tendencies. Only the Republican-appointed Justice Stevens, who wrote the dissent in *Citizens United* shortly before retiring, took a position that departed from the likely preferences of the party of the appointing President (and Stevens was appointed by President Ford, a very moderate Republican by contemporary standards).<sup>233</sup>

---

229. See Karlan, *supra* note 81, at 10.

230. See, e.g., Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

231. See Karlan, *supra* note 81, at 11, 70.

232. As noted above, though *NFIB* ultimately upheld the individual mandate, the five conservative Justices comprised the majority on the Commerce Clause issue.

233. Of course, the Chief Justice's vote to uphold the individual mandate on Taxing Clause grounds also departed from Republican Party preferences. Similarly, Justices Breyer's



Given this stark divide, it should not be surprising that the decisions here can be seen as conservative in both constitutional and political terms. In constitutional terms, as just discussed, each opinion vindicated constitutional principles generally associated with conservative thought.<sup>234</sup> In crasser political terms, the opinions also plausibly could be understood to serve conservative ends. The majority of jurisdictions subject to VRA preclearance leaned Republican,<sup>235</sup> and preclearance sometimes blocked changes to voting procedures that would have likely harmed Democratic candidates.<sup>236</sup> Perhaps predictably, shortly after *Shelby County*, North Carolina enacted a vote-suppression law, which likely limited the right to vote among low income and minority voters, who tend to vote more Democratic.<sup>237</sup> While litigation under section 2 of the VRA may discourage (or even halt) some other state-wide vote-suppression efforts,<sup>238</sup> the absence of pre-clearance is probably more apparent in local jurisdictions, where vote-suppression receives less attention and is more likely to fly under the radar.<sup>239</sup> As a result, localities can more easily make changes to voting rules, which

---

and Kagan's votes on the Spending Clause issue in *NFIB* departed from Democratic Party preferences. As these examples demonstrate, we ought not overstate the effect of political preferences on judicial decision making.

234. See *supra* Section II.A.

235. See Editors, *Leave the Voting Rights Act Alone*, NAT'L REV. (Aug. 12, 2015), <http://www.nationalreview.com/node/422408/print> (stating that the jurisdictions that had been subject to preclearance, though originally Democratic in the 1960s, were by the 2000s mostly in heavily Republican states).

236. See *id.* (stating that the preclearance requirements generally would be more likely to help Democrats today); Heather Gerken, *Opting into the Voting Rights Act*, REUTERS (Jan. 30, 2013), <http://blogs.reuters.com/great-debate/2013/01/30/opting-into-the-voting-rights-act>.

237. See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 72 (2014); Jamie Fuller, *How Has Voting Changed Since Shelby County v. Holder?*, WASH. POST (July 7, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/?utm\\_term=.272394194f7a](https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/?utm_term=.272394194f7a); Theodore R. Johnson, *Why Are African-Americans Such Loyal Democrats When They Are So Ideologically Diverse?*, WASH. POST (Sept. 28, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/28/can-trump-win-black-vote-s-what-we-know-from-5-decades-of-black-voting-data/?utm\\_term=.4caf7f19281f](https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/28/can-trump-win-black-vote-s-what-we-know-from-5-decades-of-black-voting-data/?utm_term=.4caf7f19281f).

238. See Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292 (2013) (discussing the possibility of section 2 voting rights litigation).

239. See Tokaji, *supra* note 237, at 72.

previously would have been subject to preclearance. Such changes likely dilute minority voting power.<sup>240</sup> While the complete effects of the decision are complicated and difficult to measure, *Shelby County*, as a political matter, likely favored Republicans more than Democrats.<sup>241</sup>

*Citizens United* also seems to help conservative causes. While both Democratic and Republican candidates can benefit from corporate independent expenditures, corporations sometimes make such expenditures hoping that their candidate, if elected, will decrease burdensome regulations.<sup>242</sup> The Republican Party, of course, generally champions deregulation. It therefore should not be surprising that fundraising rules post-*Citizens United* may often favor Republicans.<sup>243</sup> Additionally, while unions theoretically enjoy the same ability as corporations to spend general treasury funds to influence elections under the *Citizens United* framework, unions face additional constraints that corporations don't because union dues

---

240. See *id.* at 72 (“[P]reclearance was most effective in curbing redistricting plans and other practices thought to weaken minority representation . . . .”); Jon Greenbaum et al., *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 822 (2014) (noting that Congress determined repeatedly in the decades after 1965 that section 5 of the VRA “was still needed because of efforts to dilute minority voting strength”); Keesha M. Middlemass, *The Need to Resurrect Section 5 of the Voting Rights Act of 1965*, 28 J. CIVIL RIGHTS & ECON. DEV. 61, 102 (2015).

241. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 231 (2016) (classifying *Shelby County* as ideologically conservative); Tokaji, *supra* note 237, at 76 (“The conventional wisdom is that these [voting] laws will hurt Democrats more than Republicans.”); Vann R. Newkirk II, *The Battle for North Carolina*, THE ATLANTIC (Oct. 27, 2016), <http://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257> (stating that immediately after *Shelby County*, North Carolina Republicans began passing laws restricting voting access for minorities).

242. See, e.g., Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1559 (2005) (“Enron developed its political capital—making large political contributions and building relationships with state and federal government officials—in order to obtain regulatory changes that would enable it to build its energy trading market.”).

243. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 285–86 (2014) (noting that Republicans enjoyed a “substantial financial edge” in the 2012 election); Anu Narayanswamy et al., *Money Raised as of Dec. 31*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/> (stating that for the candidates other than Trump and Clinton, 13% of the Democratic funding was from super PACs and other independent groups and 33% of the Republican funding was from these groups) (last updated Feb. 1, 2017).

payments make up much of their treasury funds.<sup>244</sup> The result is an asymmetry that favors corporations over unions.<sup>245</sup>

The conservatives in *NFIB*, too, favored a politically conservative outcome, attacking the Obama administration's most important policy accomplishment. Of course, the Court ended up upholding most of the law, including the controversial individual mandate. However, the Court did invalidate a portion of the statute extending Medicaid to more individuals, essentially rendering that provision optional for states.<sup>246</sup> Moreover, even in upholding the individual mandate, the Chief Justice fired a warning shot across Congress's bow.<sup>247</sup> Indeed, by upholding the mandate on taxing, rather than commerce, grounds, the Chief Justice may have limited Congress's regulatory authority. Taxes, after all, are politically unpopular.<sup>248</sup>

To be clear, the point here is not to accuse the Justices of consciously deciding cases to advance political goals. Empirical studies typically conclude that judges do not have conscious political goals.<sup>249</sup> The Justices do not think of themselves as politicians, and there certainly were plausible legal arguments in favor of the Court's outcomes in each of these cases. Nevertheless, it is striking that the Justices who disregarded facts undergirding the legislation were all appointed by presidents of the party more likely to oppose the policies at issue.<sup>250</sup> Indeed, as we shall see, political preferences likely filter into Justices' unconscious biases. To this extent, politics probably drives the Justices' decision-making more than they realize.

244. See Karlan, *supra* note 81, at 40 (describing limitations on unions' ability to spend general treasury funds to influence elections).

245. See *id.*

246. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

247. See Karlan, *supra* note 81, at 47 (describing Chief Justice Roberts' *NFIB* opinion as "probably the most grudging opinion ever to uphold a major piece of legislation").

248. See David Orentlicher, *Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law*, 160 U. PA. L. REV. 19, 29 (2011).

249. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 25 (2008) (summarizing empirical studies noting that no attitudinal study demonstrates that "judges have conscious political goals").

250. See *id.* at 22–23 (noting that studies show that the political inclinations of judges invariably "explain much of the variance in judges' votes on politically charged issues").

*C. The Psychological Explanation: Motivated Reasoning and Cultural Cognition*

Psychological research helps deepen our understanding of the doctrinal and political explanations. Whether or not they realize it, the Justices' background assumptions and normative views inevitably shape their perceptions of the relevance of facts.<sup>251</sup> Like people more generally, the Justices are subject to motivated reasoning—that is, to the unconscious tendency of individuals to process information in a manner more likely to reinforce existing beliefs than to form accurate ones.<sup>252</sup> Thus, the Justices will naturally deem relevant those facts confirming their own worldview or vindicating their preferred constitutional principles. As the social psychologist Ziva Kunda explains, “when one wants to draw a particular conclusion, one feels obligated to construct a justification for that conclusion that would be plausible to a dispassionate observer. In doing so, one accesses only a biased subset of the relevant beliefs and rules.”<sup>253</sup>

Professor Kahan has explored the related phenomenon of cultural cognition, which “refers to the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews.”<sup>254</sup> He argues persuasively that individuals are likely to seek out information that supports positions and groups they normatively favor.<sup>255</sup> According to Professor Kahan and other scholars, Supreme Court Justices are hardly immune from this phenomenon.<sup>256</sup>

The Justices' background normative assumptions, cultural identities, and political views, then, likely played a role, perhaps even a substantial one, in their attitudes toward congressional and other

---

251. Cf. SEGALL, *supra* note 228, at 6.

252. See Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 490–91 (1990).

253. Kunda, *supra* note 252, at 493.

254. Kahan, *supra* note 252, at 23.

255. See *id.*

256. See *id.* at 20; Gerald N. Rosenberg, *Incentives, Reputation, and the Glorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 637 (2000).

facts.<sup>257</sup> The Justices are sophisticated actors, so they are probably less inclined to embrace fake facts than many members of the public. That said, the Justices' ideological predispositions likely shape their attitudes toward particular factual propositions.

In each of these cases, a conservative majority of Justices rejected statutory provisions that impinged on conservative values. In each case, the more liberal Justices would have sustained the challenged portions of the legislation. From this perspective, the Court may have rejected Congress's facts because they were inconvenient obstacles to a conservative outcome the majority wanted to reach. Similarly, the more liberal Justices may have been more inclined to accept Congress's facts because they helped support the outcome they were inclined to reach anyway.<sup>258</sup>

Background norms and political preferences, then, are necessarily part of judicial decision-making.<sup>259</sup> To be sure, professional judgment and legal training can help counter-act the pull of cognitive biases.<sup>260</sup> That said, while most judges follow clear law when it exists, Supreme Court cases often present difficult issues about which reasonable people can disagree.<sup>261</sup> After all, many issues before the Supreme Court divide lower courts.<sup>262</sup> Moreover, Supreme Court constitutional cases, in particular, often offer little in the way of clear doctrine to cabin judicial discretion.<sup>263</sup> Most Justices do not ignore the law to further their own political views, but it is natural and probably inevitable that a Justice's "priors," as Judge Posner calls

---

257. See Kahan, *supra* note 252, at 19 (describing "the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs").

258. See Devins, *supra* note 13, at 1175 ("Justices sympathetic to the goals of a particular statute, if not Congress itself, typically see the issue before them as one of fact; Justices skeptical of Congress, in contrast, are more apt to see the issue as one of law.").

259. See, e.g., Ross, *supra* note 13, at 2030 (noting that Court's treatment of the legislative record "seemed to rest on whether they believed the evidence supporting the law in the first place").

260. See Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349, 354 (2016).

261. See POSNER, *supra* note 249, at 274.

262. See U.S. SUP. CT. R. 10 (listing splits among U.S. court of appeals and/or state high courts as important factors to consider in decision about whether to grant certiorari).

263. See POSNER, *supra* note 249, at 274.

them,<sup>264</sup> will color the way she sees a contested legal question.<sup>265</sup> In these cases, those leanings likely colored the Justices' views of the relevance of Congress's facts.

*D. The Practical Explanation: The Opinion-Writing Process*

Related to the psychological explanation is the opinion-writing process. Justices' decisions about what to include and exclude from their opinions are, for better or worse, often driven by the Justices' understandable desire to draft a coherent, persuasive opinion. Sometimes, Justices conceal factors because they realize that addressing those factors "will not write."<sup>266</sup>

To this extent, some Justices may sometimes downplay or altogether ignore facts that other Justices deem central to a case.<sup>267</sup> These moves may be conscious decisions to steer around inconvenient evidence, but they may also sometimes be quite unconscious attempts to defend the preferred outcome as persuasively as possible.<sup>268</sup> As I have explained elsewhere, it is pithier to dismiss the relevance of certain facts categorically than to explain why, on balance, those facts should not guide the outcome given the context of a case.<sup>269</sup> To this extent, the phenomenon explored here may partially be a product of the writing process as Justices seek to write an opinion that sounds convincing, even if upon closer inspection, that opinion dodges some crucial facts and arguments.

---

264. See Richard A. Posner, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof*, WASH. POST (Mar. 9, 2016), [https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html) ("Priors are what we bring to a new question before we've had a chance to do research on it. They are attitudes, presuppositions derived from upbringing, from training, from personal and career experience, from religion and national origin and character and ideology and politics.").

265. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); POSNER, *supra* note 249, at 269; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Jeffrey A. Segal et al., *Ideological Values and the Votes of the U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995).

266. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1321 (2008) [hereinafter Oldfather, *Writing*].

267. See Berger, *Rhetoric*, *supra* note 18, at 723.

268. See CARL BEREITER & MARLENE SCARDAMALIA, *THE PSYCHOLOGY OF WRITTEN COMPOSITION* 132 (1987); Oldfather, *Writing*, *supra* note 266, at 1308.

269. See Berger, *Rhetoric*, *supra* note 18, at 723.

The Court's approach to facts, then, may sometimes be part of a larger phenomenon in which the Justices often make constitutional cases seem easier than they really are.<sup>270</sup>

Relatedly, the writing process forces the author to address only her key points.<sup>271</sup> Justices must make decisions about which facts to discuss and which to exclude. This process necessarily involves simplifications; a written opinion cannot fully capture the world's true complexity (and many Supreme Court opinions are too long as it is).<sup>272</sup> Sometimes, these simplifications are uncontroversial, because they dispense with facts that no decent lawyer or judge would consider relevant. However, sometimes in the attempt to write a more concise opinion, Justices shortchange facts that others would consider important or even crucial.<sup>273</sup>

Of course, this explanation does not work equally well for every case. For example, it does not adequately explain the Chief Justice's approach to facts in the Commerce Clause section of *NFIB*. It would have been far easier for the Chief Justice to dispense with the Commerce Clause analysis altogether, given his decision to uphold the mandate on Taxing Clause grounds. In this case, then, other explanations, such as constitutional first principles, are more persuasive. That said, this factor likely explains other cases, including *Shelby County* and *Citizens United*, which would have been more complicated opinions had the majority reached the same outcome while grappling thoroughly with facts it discarded.

#### *E. The Legalist Explanation: A Lack of Rules*

Another explanation is that no rules constrain appellate courts' approaches to congressional findings or other kinds of legislative facts.<sup>274</sup> Accordingly, judges and especially Supreme Court Justices

---

270. See generally *id.*

271. See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 157 (2005).

272. See Berger, *Rhetoric*, *supra* note 18, at 724.

273. Cf. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 150 (1976); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 206–07 (1990).

274. See Gorod, *supra* note 10, at 57 (noting the “absence of established procedures” to guide courts' approaches to legislative fact disputes).

are free to make assumptions about the relevance and content of various facts based on their own normative preferences, constitutional commitments, background knowledge, amicus brief perusal, and independent research.<sup>275</sup> The Justices, in fact, can credit or discard these kinds of facts without having to check those assumptions against a trial court record, congressional findings, administrative agency facts, academic literature, or anything else. There is no law there.

By contrast, the Federal Rules of Evidence govern judicial notice of adjudicative facts.<sup>276</sup> Standards of appellate review similarly guide appellate consideration of trial court findings.<sup>277</sup> In administrative law, the Administrative Procedure Act governs judicial review of various agency actions and factual findings.<sup>278</sup> In each of these cases, black-letter law guides judicial consideration of certain kinds of facts. In reality, the rules can be quite malleable, but judges, lawyers, and governmental officials all cite the governing standards and at least ostensibly try to follow them.

No such rules govern Supreme Court review of congressional facts or its treatment of the distinction between facial and as-applied challenges. Even more importantly, no rules require—or plausibly could require—the Court to explain how it decided which facts are legally relevant. Though the Court has often obscured the line between legal and factual conclusions, the decision about which facts “count” is essentially a legal one. To this extent, even were the Court to accept presumptively the veracity of Congress’s factual findings, it would still enjoy substantial leeway to decide the legal relevance of those facts.

---

275. See *id.*; Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 83–86 (2015) [hereinafter, Larsen, *Shelf Life*]; Larsen, *Amicus Facts*, *supra* note 12, at 1778; Larsen, *supra* note 10, at 1280–85.

276. See generally FED. R. EVID. 201(a); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942); Faigman, *supra* note 21, at 162.

277. See FED. R. CIV. P. 52(a)(6).

278. See, e.g., 5 U.S.C. § 706 (2012) (stipulating scope of review for court reviewing agency actions).



*F. The Institutional Explanation: Mistrust of Congress and the Allure of Judicial Supremacy*

A final explanation is that the Court sometimes distrusts Congress and, hence, its facts. Sometimes this distrust is justified. Though Congress has substantial resources to gather and sort information,<sup>279</sup> it does not always make use of those institutional advantages.<sup>280</sup> Sometimes, instead, Congress makes “factual” findings without studying a problem closely.<sup>281</sup> In such cases, Congress’s “facts” may actually be naked partisan statements devoid of empirical support.<sup>282</sup>

The Court, indeed, may suspect sometimes that Congress has made ostensibly empirical findings in bad faith. For example, Congress sometimes points to evidence that conveniently—and suspiciously—fits the legal test for constitutionally controversial legislation.<sup>283</sup> If the legislature’s use of facts is cynical, then the Court may believe that its findings are neither impartial nor empirical but rather the political preferences of the majority dressed up as evidence.<sup>284</sup>

Cognizant of these concerns, the Court may often be disinclined to accept the legal relevance of Congress’s findings.<sup>285</sup> Indeed, Justices may think it easier to brush aside questionable evidence as a

279. Robin Charlow, *Judicial Review, Equal Protection, and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994); see also F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1473 (2010) (noting Congress’s access to the Congressional Research Service that can help facilitate factual findings).

280. See Berger, *Deference Determinations*, *supra* note 17, at 501.

281. See, e.g., Devins, *supra* note 13, at 1182.

282. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007) (noting that Congress found that partial birth abortions are never medically necessary despite medical testimony to the contrary); Araiza, *supra* note 13, at 919–20.

283. See generally Araiza, *supra* note 13, at 913–19; Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 492–93 (2012).

284. The phenomenon is hardly limited to the cases explored here. See, e.g., *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016); Linda Greenhouse, *The Courts Begin to Call Out Lawmakers*, N.Y. TIMES (Aug. 18, 2016), [http://www.nytimes.com/2016/08/18/opinion/the-courts-begin-to-call-out-lawmakers.html?emc=eta1&\\_r=0](http://www.nytimes.com/2016/08/18/opinion/the-courts-begin-to-call-out-lawmakers.html?emc=eta1&_r=0) (noting that the Court has appeared more willing “to call out legislatures for what they are doing, not just what they say they are doing”).

285. See Ross, *supra* note 13, at 2031–32 (“In entire categories of cases, the Court questions whether the state’s record can be believed as a complete and unbiased presentation of evidence related to the constitutionality of the law . . .”).

matter of law than to question openly it as a matter of fact. Additionally, even when the Court does trust Congress's facts, it bears no obligation to accept those facts' constitutional relevance. The Court, protective of its own institutional mission, may well think that its prerogative to determine constitutional meaning would be substantially reduced were it required to accept both the veracity and the legal relevance of Congress's facts.

The Court's mistrust of Congress may also arise from important differences between the legislative and judicial institutions. The Justices themselves have little actual political experience and almost no legislative experience. None of the Justices participating in these cases ever held elected office, and only Justice Breyer worked in Congress (as Chief Counsel of the Senate Judiciary Committee).<sup>286</sup> The Justices' lack of familiarity with the inner workings of Congress might contribute to their lack of trust and sympathy for that institution.

Perhaps even more fundamentally, the Court's kind of work differs dramatically from Congress's. Supreme Court Justices are usually top-notch lawyers—intelligent, meticulous, and analytical. Though some have crafted public personas, the Justices need not return home regularly to address their constituents. Most would likely agree that the Justices should not bring a political agenda to their work.<sup>287</sup>

Congressional representatives, by contrast, must constantly speak to the public about their policy preferences. Whereas most judges value analytical precision, representatives often speak in sound bites and glib generalities. The Justices, then, may distrust Congress in part because judges and politicians value very different professional qualities.

From that perspective, the Justices may see legislatures (or other institutions) injecting their own normative biases into their factual findings. In such cases, Justices may think that they should not credit such naked partisanship. These cases, then, may reflect the

---

286. See Laura Krugman Ray, *The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg*, 115 PENN ST. L. REV. 83, 109 (2010).

287. See Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics into Mayonnaise*, 12 GEO. J.L. & PUB. POL'Y 57, 58 (2014) ("Some Supreme Court justices agree that law and politics must remain separate.").

Justices' own self-confidence that they can sniff out bogus factual assertions.<sup>288</sup>

Relatedly, these cases reflect the Justices' comfort with their own supremacy over questions of constitutional law.<sup>289</sup> If Congress could demonstrate the constitutionality of controversial legislation merely by pointing to facts ostensibly justifying the law, the Court's power of judicial review would be substantially diminished. The Court's penchant for rejecting congressional facts as irrelevant, then, speaks to its interest in retaining the primary authority to decide questions of constitutional law.

### III. IMPLICATIONS

The Supreme Court's rejection of congressional facts, though normatively troubling, is not inherently constitutionally illegitimate. After all, Article III vests the Supreme Court with "appellate jurisdiction, both as to law and fact."<sup>290</sup> Indeed, questions of law and fact can be hard to untangle. As Alexander Hamilton explained in Federalist 83, "Though the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable."<sup>291</sup>

That said, the Court's disregard for congressional findings and other facts has important implications. This part explores those implications for both constitutional doctrine and our separation of powers. It begins with an examination of the doctrinal questions the Court left unresolved. It then turns to broader institutional implications and the status of facts in our society more generally.

#### *A. Doctrinal Puzzles and the Relationship Between Law and Fact*

The Court's approach to facts in these cases leaves open important doctrinal questions. The questions are themselves

---

288. See Berger, *Rhetoric*, *supra* note 18, at 671; Karlan, *supra* note 81, at 68 (noting that the Justices' confidence that they can deliver constitutional "right answers" "may reinforce Justices' sense of their superiority").

289. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

290. U.S. CONST. art. III, § 2, cl. 2.

291. THE FEDERALIST NO. 83, at 504 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

important, as they result in legal uncertainty in important areas of constitutional law. Collectively, however, they also help demonstrate that the Court's approaches to congressional findings in these cases can inject even more uncertainty into already under-determinate areas of law.<sup>292</sup>

More precisely, while these cases indicate that facts may matter less than we are used to thinking, the Court does not tell us when they do matter. Indeed, the Court's approach was decidedly muddy, making it difficult to separate law from fact.<sup>293</sup> As a result, it is hard to measure the precedential impact of the decisions themselves. A lower court in future cases likely enjoys substantial discretion to claim that the Court's decision binds it or, alternatively, that the underlying facts can be distinguished. Of course, to scholars who posit that the distinction between law and fact is itself a legal fiction,<sup>294</sup> this uncertainty is hardly news. Nevertheless, the Court's treatment of law and fact in these cases further exacerbates these difficulties.

### I. Shelby County

*Shelby County's* dismissal of congressional facts raises puzzling doctrinal questions. The Court's analysis conveniently skipped an important step. The Chief Justice contended that because the VRA places a great burden on the principle of equal state sovereignty and because voter discrimination is a smaller problem than it once was, the VRA's constitutional burden is too high for the statute to stand. The Court, however, never considered facts that would shine light on whether the problem of voter discrimination today might warrant the VRA's burden on state sovereignty, notwithstanding improvements over the past half century. Instead, the Court assumed

---

292. See, e.g., J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1995 (2006) ("Few major constitutional debates are clear-cut propositions . . .").

293. See Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 62 (2013); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) (explaining that law and fact "are points of rest and relative stability on a continuum of experience").

294. See Larsen, *supra* note 293, at 67-68 (discussing this scholarship). See generally Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992).

that because “[t]hings have changed in the South,”<sup>295</sup> the coverage formula’s disparate treatment of states was invalid.

The Court’s leap to this conclusion left open serious questions about how future courts should evaluate legislation seeking to enforce the Reconstruction Amendments. The Court, in particular, offered little guidance about what kinds of contemporary evidence might support similar remedial legislation. Indeed, the Court did not even articulate the legal test for reviewing the constitutionality of legislation protecting against voter discrimination.

As a result, it is very difficult for future courts to know how to treat similar legislation with a different record. Would a new coverage formula deserve greater judicial respect? If so, why did the Court ignore evidence that preclearance continued to do important work? Does the principle of equal state sovereignty essentially ban all future attempts to protect against voter discrimination on the theory that only the Jim Crow South’s egregious discrimination justified such intrusions on federalism? Alternatively, would evidence suggesting that racial discrimination in voting had reduced minority turnout or diluted minority voting power in recent elections diminish the decision’s precedential value? And how should lower courts approach other statutes enforcing the Fourteenth and Fifteenth Amendments?<sup>296</sup>

The Court offers little guidance for considering such issues. Even when it asserted that states ought to be treated equally, the Court acknowledged that it would permit “departure from the fundamental principle of equal sovereignty [if there were] a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>297</sup> From this perspective, one should think that different facts could justify a different outcome.<sup>298</sup> That said, a similarly constituted Supreme Court would likely view a new coverage formula skeptically. In all events, these questions about how

---

295. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621 (2013) (alteration in original) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

296. *Cf. Larsen, Shelf Life*, *supra* note 275, at 60–61.

297. *Shelby Cty.*, 133 S. Ct. at 2622 (quoting *Nw. Austin*, 557 U.S. at 203).

298. *Cf. Stuart Minor Benjamin, Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 271–72 (1999).

to treat facts inevitably create further questions about the content of the law.

## 2. Citizens United

*Citizens United's* conclusion that only quid pro quo corruption justifies restrictions on corporate independent expenditures for election-related speech seems plain enough. Even a more robust record of corruption (more broadly understood) cannot support the constitutionality of a law regulating independent expenditures by corporations' general treasuries for election-related speech.<sup>299</sup> To this extent, the law of campaign finance reform is straightforward, albeit controversial.

*Citizens United's* broader First Amendment implications, however, remain unclear. As the Court itself explained, restrictions on speech, especially political speech, typically trigger strict scrutiny.<sup>300</sup> Under strict scrutiny, the government must establish that its policy is necessary to achieve a compelling governmental interest. This is a hard test to meet, but it is not impossible.<sup>301</sup> In a typical case, the government presents facts to try to establish the necessity of its policy. Courts must determine whether those facts justify upholding the law under the strict scrutiny standard. Oftentimes, the policy falls because a court determines that the government has not met its burden.<sup>302</sup> Sometimes, though, as in *Holder v. Humanitarian Law Project*, the Court finds that the policy satisfies strict scrutiny.<sup>303</sup>

---

299. See *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (invalidating Montana campaign finance law despite robust findings about history of corruption in Montana ostensibly justifying law).

300. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting *FED v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007))).

301. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010).

302. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 855 (2006) (noting that speech restrictions survive strict scrutiny in 22% of total cases in federal courts).

303. See *Humanitarian Law Project*, 561 U.S. at 39. Admittedly, the Court upheld the law using "a light touch in examining the government's justifications." Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 23 (2012).

*Citizens United* appeared to prejudge the issue without applying strict scrutiny at all.<sup>304</sup> The Court, in other words, was uninterested in the amount of harm inflicted on our country by corporate rent-seeking,<sup>305</sup> notwithstanding the argument that some “threats of corruption are far more destructive to a democratic society than the odd bribe.”<sup>306</sup> The Court did not so much respond to this argument as offer the unsupported rejoinder that independent expenditures “do not give rise to corruption or the appearance of corruption.”<sup>307</sup> It similarly did not seem to care whether such harm could be prevented by other less speech-restrictive measures. Rather, the majority insisted that, as a matter of law, such evidence did not matter,<sup>308</sup> because the record did not contain “direct examples of votes being exchanged for . . . expenditures.”<sup>309</sup>

Had the Court actually applied the strict scrutiny standard to the facts, it might have still struck down the law. It could have concluded, for instance, that the governmental interest did not have a compelling interest in preventing the corruption Congress had identified.<sup>310</sup> Alternatively, and probably more likely, it could have

304. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 617 (2011) (arguing that by keeping the “evidentiary standard impossibly high and the definition of corruption extremely narrow,” the Court avoided confronting the difficult question of whether expenditure limits might in fact pass strict scrutiny).

305. See 146 CONG. REC. 6950 (2000) (discussing political corruption); Teachout, *supra* note 87, at 297 (noting that *Citizens United* “suffers from a failure to describe real pressures [on politicians and their staffers], and the way those pressures directly interfere with representative government in devastating ways”).

306. *Citizens United v. FEC*, 558 U.S. 310, 449 (2010) (Stevens, J., concurring in part and dissenting in part).

307. *Id.* at 357 (majority opinion).

308. See *id.* at 359 (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”).

309. *Id.* at 360 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 560 (D.D.C. 2003)).

310. Such a conclusion would have been in tension with some important First Amendment precedent. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 205–06 & n.88 (2003) (sustaining “legislation aimed at the ‘corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas’” with the purposing of “[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government” (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990))); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788–89 (1978); *id.* at 788 n.26 (“Congress

concluded that the policy was not sufficiently tailored for various reasons, including the ease with which campaign finance regulations are circumvented.<sup>311</sup> But though it gestured toward these conclusions,<sup>312</sup> the Court did not engage seriously with the facts underlying the strict scrutiny analysis.<sup>313</sup>

The Court's approach leaves open important questions for First Amendment doctrine. Are courts to conclude in future campaign finance cases—or even other free speech cases—that some restrictions do not trigger strict scrutiny but rather are categorically invalid? The Court's approach implies a categorical approach that calls into serious question the constitutionality of congressional and state attempts to limit independent expenditures (absent findings of quid pro quo corruption).<sup>314</sup> However, the Court still purports to apply strict scrutiny, which at least ostensibly invites some inquiry into the governmental interest.<sup>315</sup> The result is doctrinal confusion.

### 3. NFIB

Similarly, *NFIB's* Commerce Clause discussion also makes it difficult to disentangle legal determinations from factual ones. Five Justices put significant weight on the distinction between activity and inactivity.<sup>316</sup> Might future Courts invalidate long-accepted exercises of congressional power on the theory that the regulated activity could be characterized as inactivity? For example, as Professor

---

might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”).

311. See, e.g., Heather K. Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1156 (2011) (“[I]n a system like ours—where elections are privately funded, where reform is piecemeal, and where public finance is generally not a realistic option—money hasn’t been taken out of politics. Donors simply find new, less transparent ways to gain influence in the process.”); Issacharoff & Karlan, *supra* note 161, at 1708.

312. See *Citizens United*, 588 U.S. at 364.

313. Cf. *id.* at 394 (Stevens, J., concurring in part and dissenting in part) (“Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.”).

314. See Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 910 (2014) [hereinafter Gerken, *Real Problem*].

315. See *Citizens United*, 588 U.S. at 340.

316. See *supra* Section I.A.3.



Metzger asks, could the Court strike down a federal statute requiring that new cars have seatbelts that can secure a child's car seat, on the theory that some purchasers would not use that feature and are, therefore, inactive?<sup>317</sup> Assuming *arguendo* that the Chief Justice's and joint dissenters' Commerce Clause analyses are not solely dicta, this question is hard to answer without knowing whether those Justices' characterization of the health care market was an idiosyncratic view of the facts in one case or a legal instruction to characterize policy issues so as to limit Congress's power.

More generally, it is unclear whether *NFIB* represents a serious limitation on Congress's commerce authority, or whether it is an isolated decision that applies only to a very unusual statutory feature. The Chief Justice did admit that "it is now well established that Congress has broad authority under the [Commerce] Clause."<sup>318</sup> His interpretation in *NFIB*, though, seemed awfully stingy, denying Congress power to regulate the health care market, despite that market's manifest impact on interstate commerce. It is unclear whether this analysis applies only to Congress's anomalous decision to require the purchase of a product or, alternatively, whether it signals that the Court will approach future Commerce Clause cases with an eye toward limiting federal power.

#### 4. More general doctrinal implications

The Court's approaches in these cases also raise difficult questions about some foundations of our adversarial system. Basic rules of American litigation ensure that courts decide concrete cases so that they have the benefit of a full record of facts. Standing rules, for instance, require that litigants have an actual stake in the case.<sup>319</sup> Ripeness rules, similarly, seek to separate matters that are premature for review from those with injuries appropriate for federal court review.<sup>320</sup> Though both doctrines advance multiple goals, they share the presumption that courts, including appellate courts, should

---

317. See Metzger, *supra* note 133, at 95.

318. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2585 (2012).

319. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

320. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 124 (7th ed. 2016).

decide cases with more than “factually barebones records.”<sup>321</sup> While these decisions do not directly call these doctrines into question, they do raise doubts about the preference for developed facts underlying some justiciability doctrines. Why prioritize developed facts when the Court sometimes just casts them aside?

Relatedly, the Court on numerous occasions has signaled that facial adjudication is premature if sufficient facts are not available.<sup>322</sup> The Court’s approaches in these cases, however, suggest that it often doesn’t care about facts at all. For example, once the Court decided to treat *Citizens United* as a facial challenge, it could have remanded the case for findings about how BCRA operated in practice.<sup>323</sup> The Court instead rushed to judgment, apparently uninterested in the law’s effects. Similarly, the Court in *Shelby County* appeared mostly uninterested in evidence of continued discrimination and preclearance’s role in preventing voter discrimination. The result is confusion about the criteria for determining whether a facial or as-applied challenge is more appropriate.<sup>324</sup> Admittedly, that confusion exists anyway,<sup>325</sup> but the Court’s approach in these cases only deepens it.

In fairness, it is virtually impossible for the Court to balance all the competing norms in play in constitutional litigation. Our Constitution is full of conflicting values,<sup>326</sup> which makes doctrinal tensions nearly inevitable. Nevertheless, the Court’s disregard of facts in these cases heightens those tensions.

---

321. *Sabri v. United States*, 541 U.S. 600, 609 (2004) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

322. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008); *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947); Fallon, *supra* note 135, at 960–61.

323. *See supra* Section I.B.2.

324. *See generally* Fallon, *supra* note 135, at 917–20 (discussing the “general myopia and confusion with respect to facial challenges in the Supreme Court, perhaps most especially, but by no means exclusively, among the Justices themselves”).

325. *See id.* at 917.

326. *See, e.g.*, Justice David H. Souter, Commencement Address at Harvard University (May 27, 2010), in *HARV. GAZETTE*, <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> (“Not even [the Constitution’s] most uncompromising and unconditional language can resolve every potential tension of one provision with another . . .”).

## B. Institutional Implications

### 1. Congressional irrelevance

The Court's willingness to disregard congressional facts when striking down federal legislation makes it harder for Congress to address pressing national problems. To be sure, the Court plays only a small role in the larger problem of congressional paralysis. Extreme partisan strife and the usual vetogates that make legislation hard to pass even in saner times have made it increasingly difficult for Congress to enact statutes.<sup>327</sup> But the Court exacerbates the problem when it develops creative theories to invalidate legislation, knowing full well that Congress is very unlikely to pass a revised version.

For example, when the Court struck down the coverage formula in *Shelby County*, it knew that Congress would not have the wherewithal to enact a new one. The Court indicated that it was merely leaving the matter in Congress's hands,<sup>328</sup> but it knew that current political realities and the structural difficulties of passing legislation made it impossible for Congress to enact a new coverage formula in the foreseeable future. The effect, then, was the invalidation of the preclearance provision, notwithstanding the Court's claims to be addressing only the coverage formula.<sup>329</sup>

Similarly, after *Citizens United* the combination of politics and judicial doctrine made it highly unlikely that Congress could reenact meaningful campaign finance reform. Indeed, as Professor Gerken has pointed out, *Citizens United's* most enduring legacy is that it substantially cut back on Congress's power to regulate in the area of campaign finance.<sup>330</sup> In this way, the Court's approach limited Congress's ability to deal with the nation's ills.

---

327. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 3–106 (2012) (describing partisan strife and political dysfunction); William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L., ECON., & ORG. 756, 756 (2015) (discussing vetogates).

328. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (“Congress may draft another formula based on current conditions.”).

329. See *id.* (“We issue no holding on § 5 itself, only on the coverage formula.”).

330. See Gerken, *Real Problem*, *supra* note 314, at 908–11 (noting that *Citizens United* “prevented Congress and the FEC from adopting sensible fixes going forward”); see also Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 89–100

## 2. *Separation-of-powers concerns*

The Court's aggressive rejection of congressional facts also raises related questions about the judiciary's role in our system of separation of powers. When the Court brushes aside congressional facts, it can more easily rely on its own views of the world. Whereas the Court clearly enjoys the prerogative to say what the law is,<sup>331</sup> it is far more controversial for the Court to assert that its instincts about the health care market, corruption in the political process, or racial discrimination in voting should supersede the other branches' views on such topics.

While the Court in these cases did not purport to enjoy superior expertise to Congress on these topics, it did decide the constitutional questions without careful evaluation of evidence documenting continued voter discrimination, rent-seeking in politics, or the free rider problem in our health care system.<sup>332</sup> Each of these policy areas looks very different when the core problem is brushed aside, and the propriety of legislative action also looks different when Congress seems to be acting without a real problem to address. We are more likely to think Congress has overstepped its bounds when it does not appear to be trying to remedy serious societal mischief but rather is intruding on the liberty of people or institutions who are "doing nothing."<sup>333</sup>

It is not clear that judicial review should encompass the authority to ignore or recharacterize the mischief Congress tries to remedy. After all, the federal judiciary does not possess either the expertise or the constitutional authority to determine which problems require legislative attention.<sup>334</sup> Moreover, the people elect members of

---

(2013) (discussing the emergence of single-candidate Super PACs and the extraordinary amounts of coordination the law permits between Super PAC and political campaign).

331. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

332. Cf. WILLIAM D. ARAIZA, *ENFORCING THE EQUAL PROTECTION CLAUSE* 19 (2016) (noting that the Court has arrogated to itself the power to second guess congressional policy decisions).

333. Cf. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.).

334. See, e.g., Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1737–38 (2016) (comparing the role of elected representatives with that of appointed judges).

Congress to represent their normative views and address the nation's problems.<sup>335</sup> Judicial restraint, indeed, is premised significantly on the understanding that politically accountable representatives, rather than unelected judges, should guide policy decisions and the values inspiring them.<sup>336</sup>

Of course, courts' institutional limitations should not give license to Congress to falsify empirical facts or violate clear constitutional strictures. But the Constitutional "rules" Congress supposedly violated in these cases were hardly clear. To the contrary, the Court devised them in the instant cases.<sup>337</sup> Even more to the point, in each case the Court was able to find the statutes constitutionally infirm only by brushing aside the very evidence that Congress thought justified the statute.

For all its talk of judicial restraint,<sup>338</sup> the Court often trusts its own view of the world more than anyone else's. By deeming irrelevant facts that Congress found and that lawyers subsequently presented,<sup>339</sup> the Court can more easily steer a case to its desired outcome. Indeed, in each of the cases examined here, it would have been harder for the Justices to reach their ultimate conclusion had they forced themselves to grapple honestly and thoroughly with facts they evaded.

The judicial behavior examined here is part of a larger pattern of judicial aggrandizement. The Court, indeed, is increasingly inserting itself into political, policy, and cultural disputes, sometimes

---

335. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 521 (2012) (stating that one meaning sometimes given to judicial self-restraint is constitutional restraint where respect for the elected branch comes from the notion that the elected branch handles policy better).

336. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 139–40 (2d ed.1986); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1082–83 (2008).

337. See *supra* notes 201–227 and accompanying text.

338. Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973) (“[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.”).

339. See, e.g., Brief for the Federal Respondent at 13–34, *Shelby Cty. v. Holder*, 570 U.S. 2 (2013) (No. 12–96), 2013 WL 315242 (citing congressional findings supporting the decision to reenact section 5 and that the statute’s burdens were justified by then current needs and were appropriately tailored geographically); Brief for Petitioners at 3–12, *Dep’t of Health & Hum. Servs. v. Florida*, 567 U.S. 519 (2012) (sub. nom. *NFIB v. Sebelius*) (No. 11–398), 2012 WL 37168 (summarizing facts upon which Congress relied when it enacted ACA).

deemphasizing justiciability doctrines and other reasons to avoid ruling on the merits. As Professor Monaghan has pointed out, the Supreme Court in recent years appears to have shifted its institutional mission from dispute resolution to law declaration.<sup>340</sup> The Court has long vacillated between these different models, but recently it seems especially willing to reach out to decide controversial questions that it could avoid.<sup>341</sup> The Court's treatment of congressional facts, then, is part of a larger phenomenon in which the Court has moved more aggressively to shape its own agenda and announce the country's core constitutional commitments.

In short, the Court's approach to facts raises serious separation-of-powers concerns.<sup>342</sup> This Court's apparent distrust of the legislative branch is a remarkable, if unstated, assertion of judicial supremacy. Though the Court talks a good game about the virtues of deference to elected leaders,<sup>343</sup> its approach to factual findings is symptomatic of a Court that believes it knows best.<sup>344</sup> Given that constitutional law at its essence asks courts to determine "who decides,"<sup>345</sup> it is noteworthy that the Court retains for itself the power to decide not only the content of the law but also fundamental facts about the world in which we all live.

### 3. *Judicial confidence and public opinion*

The Court's treatment of Congress's facts reflects Justices who are very confident in their own views.<sup>346</sup> This confidence is perhaps surprising. Congress may or may not have struck the correct policy balance in these statutes, but it at least studied the issues and made determinations about the underlying problems.<sup>347</sup> The Court, to be

---

340. See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

341. See *id.* at 669.

342. See Karlan, *supra* note 81, at 64 ("Across a broad range of cases, the Court expressed a suspicion of the political process . . .").

343. See Berger, *Deference Determinations*, *supra* note 17, at 469.

344. See SEGALL, *supra* note 228, at 126–27.

345. See, e.g., NEIL K. KOMESAR, *LAW'S LIMITS* 162 (2001).

346. See Jennifer Mason McAward, *Foreword: The Confident Court*, 47 LOY. L.A. L. REV. 379, 384 (2014).

347. See, e.g., Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.–C.L. L.

sure, has superior expertise on questions of constitutional law, but this expertise does not obviously extend to judgments about the problems Congress seeks to remedy. Nevertheless, the Justices based their constitutional analyses in large part on a worldview uninformed by Congress's expertise.

Moreover, notwithstanding the Court's confident rejection of congressional findings, the Justices themselves were deeply divided about the relevance of the underlying facts.<sup>348</sup> Indeed, the congressional findings that five Justices found irrelevant in *Shelby County*, *Citizens United*, and *NFIB* were central to the other four Justices' reasoning in each case. These deep divisions belie the majority's conviction that Congress's facts should be casually discarded.<sup>349</sup>

The majority Justices in these cases may have been convinced they were correct, but their approaches may also compromise the Court's legitimacy. When the Court brushes aside important facts in the name of newfound doctrine, it heightens the chance that the public will understand its opinions to be political documents.<sup>350</sup> This risk is likely highest when a significant portion of the country takes seriously the same facts the Court ignored. For example, the public reacted strongly against *Citizens United*, in part because many people did think corruption of the sort Congress identified was a serious problem.<sup>351</sup> Some readers may also have been skeptical of

REV. 385, 403 (2008) (“[T]he amount of evidence amassed by Congress also stands as evidence of the particularly deliberative approach during the 2006 reauthorization process. Congress considered more evidence and committed more resources to studying the problem of ongoing voting discrimination in covered jurisdictions than it had to any other issue in several years.”); Renata E. Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court*, 9 DUKE J. CONST. L. & PUB. POL’Y 179, 213 (2014) (noting that when Congress considered BCRA, it reviewed, *inter alia*, committee testimony, multiple investigations by Congressional committees, large-scale studies by advocacy and academic organizations, and lengthy statements by members of Congress).

348. See Berger, *Rhetoric*, *supra* note 18, at 694–97; Gorod, *supra* note 10, at 53.

349. Cf. Gorod, *supra* note 10, at 56 (arguing that judicial opinions rarely try to gather all relevant facts and instead depend on “guesswork, intuition, and general impressions”).

350. See Berger, *Rhetoric*, *supra* note 18, at 733–35.

351. See Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 111–12 (noting that 80% of Americans reportedly opposed *Citizens United* and 65% strongly opposed it); Sarah Knight, *Five Years After Citizens United, Signs of a Backlash*, NEWSWEEK (Jan. 31, 2015, 2:09 PM), <http://www.newsweek.com/five-years-after-citizens-united-signs-backlash-303336> (discussing the fallout after *Citizens United*).

the Court's unsupported assertion that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."<sup>352</sup>

Some commentators today contend that the Supreme Court's legitimacy is in serious trouble.<sup>353</sup> According to recent polls, the Supreme Court's approval rating in 2016 fell to 42% and has been below 50% since *Citizens United*.<sup>354</sup> Some studies report that 82% of Americans believe that the Justices decide cases in part based on their personal views.<sup>355</sup> To be sure, the Court has always been the subject of criticism, but some argue that "the institution and its members are being disparaged by a wider and more sophisticated audience than ever before."<sup>356</sup> Indeed, the Court's ostensible impartiality is especially vulnerable to attack when the Justices ignore important facts or rely on contestable ones.<sup>357</sup>

Of course, to the extent public approval for the Court has fallen, the Court's approach to facts is only a part of that phenomenon. The country is sharply divided along partisan lines,<sup>358</sup> and many Americans cheer or jeer judicial decisions because of their outcomes,

---

352. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

353. See Brian Christopher Jones, *Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?*, 2015 WISC. L. REV. ONLINE 53, 63 ("[T]he Court has unquestionably brought this increased disparagement upon itself.").

354. See *Supreme Court*, GALLUP NEWS, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited Nov. 7, 2017); Jeffrey M. Jones, *U.S. Supreme Court Job Approval Rating Ties Record Low*, GALLUP NEWS (July 29, 2016), <http://www.gallup.com/poll/194057/supreme-court-job-approval-rating-ties-record-low.aspx>.

355. See Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in WHAT'S LAW GOT TO DO WITH IT? 306, 308 (Charles Gardner Geyh ed., 2011); B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment"*, 91 TEX. L. REV. 1815, 1816 (2013).

356. See Jones, *supra* note 353, at 53. But see Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 154 (2013) (arguing that public opinion polls have given the Justices more legitimacy).

357. See Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1961–63, 1984–88 (2006) (criticizing courts' reliance on facts in cases involving controversial social change); Kahan, *supra* note 252, at 34 (noting that when the Court has invoked empirical evidence in deeply contested constitutional cases "the genuineness of its reasoning has provoked accusations of bad faith, not only from within the Court but also from without").

358. See generally MANN & ORNSTEIN, *supra* note 327; Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 422–27 (2012).



without reference to their reasoning.<sup>359</sup> That said, when the Court turns a blind eye to seemingly crucial facts, it risks magnifying the losing side's outrage.<sup>360</sup> This reaction, in turn, might heighten the public's sense that the Court is a political institution.

This concern should not be overstated. In an era when some public officials, including the President of the United States, ignore facts entirely,<sup>361</sup> the Court, by contrast, seems like a temple of enlightenment rationality. Yet when the Court is so quick to brush aside important legislative findings without seriously engaging with the evidence or arguments in favor of their relevance, it risks opening itself up to avoidable comparisons with obviously mendacious public actors.<sup>362</sup>

### C. The Demise of Facts

Finally, the Court's attitude in these cases also contributes to the broader decline of facts in our society. Politicians and some segments of the media frequently reject facts they deem inconvenient to their political ends. There has always been good-faith disagreement about which facts are empirically correct and which ones should matter, but in recent years, there has been an alarming tendency to label as "fake" any stories that might harm one's political agenda.<sup>363</sup>

In most regards, the judiciary has done a better job than the other branches of government at examining asserted facts critically and subjecting them to rigorous assessment. Courts, after all, have

359. See Berger, *Rhetoric*, *supra* note 18, at 729–30.

360. See EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* 8 (2011).

361. See, e.g., Nicholas Fandos, *Trump Won't Back Down from His Voting Fraud Lie. Here Are the Facts*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/unauthorized-immigrant-voting-trump-lie.html>; Donald Lambro, *Trump and the Facts*, WASH. TIMES (Jan. 26, 2017), <http://www.washingtontimes.com/news/2017/jan/26/donald-trump-and-the-facts/> (noting that President Trump's administration "has redefined the word 'facts'").

362. Cf. CALHOUN, *supra* note 360, at 108.

363. See Jeremy W. Peters, *Wielding Claims of 'Fake News,' Conservatives Take Aim at Mainstream Media*, N.Y. TIMES (Dec. 25, 2016), <https://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media-.html>; Amber Phillips, *'Fake News'? The Russia Investigation is Getting Very, Very Real*, WASH. POST (Aug. 7, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/08/07/fake-news-the-russia-investigation-is-getting-very-very-real/?utm\\_term=.56952464eab1](https://www.washingtonpost.com/news/the-fix/wp/2017/08/07/fake-news-the-russia-investigation-is-getting-very-very-real/?utm_term=.56952464eab1).

rules governing their consideration of evidence and facts found by other institutions.<sup>364</sup> For all its flaws, the judiciary, including the Supreme Court, is functioning far better these days than the other branches of government.

That said, the Court's approach to facts in these—and other<sup>365</sup>—cases contributes, albeit modestly, to the broader problem. The Court's willingness to brush aside facts that Congress, the dissenters, and many others thought crucial to understanding the challenged legislation is a small part of a broader societal instinct to turn a blind eye to facts that do not conform to one's pre-determined world view.<sup>366</sup> If Supreme Court Justices are so willing to say that seemingly crucial facts do not matter, they may inadvertently signal that it is rhetorically acceptable to disregard inconvenient evidence. The Court's example may be especially important for law students, who learn about the conventions of legal argumentation in part from reading Supreme Court opinions.

Also significantly, the Court rejected these facts' relevance in the name of controversial ideological principles. To be sure, the Justices were correct that the judiciary ultimately must decide when statutes violate the Constitution. But the majorities brushed aside Congress's facts in service of a deeply contested constitutional vision.<sup>367</sup> To this extent, the majorities' treatment of facts is symptomatic of a broader societal phenomenon in which ideology trumps facts.

The Court's apparent prioritization of constitutional ideology over factual detail means that the Justices sometimes decide constitutional questions in an intellectual vacuum. By brushing aside the policy implications of the statutes at issue, the majority Justices rendered each of these decisions more intellectually abstract. This is no coincidence. It is easier to conclude that a statute violates the Constitution if one focuses on the constitutional norms at issue and shortchanges the policy goals the statute seeks to further.

Indeed, it is far from clear that the majorities' ideological preferences could have prevailed had the Justices considered the facts

---

364. *See, e.g.*, FED. R. EVID.; 5 U.S.C. § 706 (2012).

365. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726 (2015); Berger, *Gross Error*, *supra* note 17.

366. *See, e.g.*, Kahan, *supra* note 252; *supra* Section II.C.

367. *See supra* Section II.A.

it ignored.<sup>368</sup> The Court disregarded the real-world effects of the statutes at issue, because consideration of those facts would have militated against the conclusions the Court wished to reach. To be sure, there were strong legal arguments in favor of the majorities' outcomes in these cases. However, the majority opinions in each case were less persuasive because the Court failed to engage carefully with facts from the world around it.

#### IV. POTENTIAL REFORMS

The Court's penchant for evading inconvenient facts may be problematic, but the question remains what to do about it. To the extent some Justices sometimes ignore congressional findings and exploit the muddy distinction between facial and as-applied challenges to advance their own normative commitments, an academic rebuke alone will not solve the problem. A solution is all the more difficult to devise because the Justices' approach to facts sometimes may be quite unconscious, as the Justices, like most people, instinctively gravitate toward evidence supporting their preferred conclusion and away from contrary evidence.<sup>369</sup> To borrow an insight from Professors Posner and Vermeule, given that the problem explored here is a creation of the Justices, it is unrealistic to expect that they would voluntarily mend their ways.<sup>370</sup>

That said, attention is the first step in encouraging changes to the legal culture underlying the problem. While no law review article will immediately prompt changed judicial behavior, a careful discussion of the ways in which the Justices could write better opinions can gradually help change legal norms. Lawyers litigating before the Court, for instance, can emphasize not only important facts but also the reasons why the Justices should not ignore those facts. Relatedly, law professors can encourage their students—tomorrow's lawyers and judges—to think about what sound judicial opinions should include. To that end, this Part discusses modest

---

368. See *supra* notes 338–40 and accompanying text.

369. See FRANCIS BACON, *NOVUM ORGANUM* 23 (Joseph Devey ed., 1902) (1620) (“The human understanding, when any proposition has been once laid down . . . forces everything else to add fresh support and confirmation.”); *supra* Section II.C.

370. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1744–45 (2013).

changes that could improve the Court's opinion writing and its treatment of facts.

*A. The Content of the Court's Determinations*

*1. The legal relevance of facts*

When the Court considers the constitutionality of a federal statute, it should more carefully explain why it finds Congress's facts relevant or not. Similarly, when the Court must choose between treating a constitutional challenge as facial or as-applied, the Court should not only carefully justify its selected approach but also explain the impact that approach has on the universe of relevant facts. These suggestions are so commonsensical as to be obvious, but the Court in the cases examined here did none of these things.

The suggestions here do not infringe on the Court's discretion to invalidate statutes it deems unconstitutional, but they do encourage the Court to acknowledge more fully the facts it sets aside. In particular, the Justices should admit when they are disposing of congressional evidence primarily on the basis of new or long-dormant constitutional doctrine. The Court, of course, enjoys the prerogative to craft new constitutional rules, and sometimes new doctrine is entirely appropriate.<sup>371</sup> But when the Court casts aside reams of evidence in service of new doctrine, it should admit what it is doing.

Indeed, the Court's doctrinal bait-and-switch disrespects Congress, which gathered facts to support a statute under certain constitutional ground rules only to have the Court change course. This practice grants tremendous discretion to judges to invent doctrinal wrinkles that permit them to ignore the very problem Congress sought to address. If the Court can simultaneously announce new doctrinal tests and dismiss congressional facts for failing those new tests, it has virtually limitless power to rewrite both law and fact.

---

371. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

The Justices themselves likely would not admit such authority.<sup>372</sup> Perhaps for that reason, the Court has been far from transparent when it brushes aside congressional facts. The Justices in these cases were quick to cordon off Congress's findings as irrelevant, but they offered little admission that they were doing this and minimal explanation for why those findings didn't matter.

Similarly, the Justices failed to provide thorough explanations for its decision to treat these cases as facial challenges, especially given persuasive arguments that each case (especially *Shelby County* and *Citizens United*) should have been decided as-applied. Nor did the Court explain how those determinations affected the relevance of particular facts. For example, the history of voter discrimination in Alabama and Shelby County would have been central to the analysis had the Court treated the case as an as-applied challenge—and likely would have cut against the Court's holding.<sup>373</sup> The Court should not make such important determinations without more careful discussion.

Nor should the Court brush aside facts as legally irrelevant without offering some explanation of what kinds of facts would suffice. *Shelby County* leaves us to understand that evidence of second-generation barriers to voting is insufficient to justify the Voting Right Act's preclearance coverage formula. Nowhere, however, does the Court clearly state what evidence Congress should offer instead.

To the contrary, the Court substituted pithiness for sustained analysis. Confronted with the argument that section 5's deterrent effects should justify the coverage formula, the Court complained that this approach would leave the law “effectively immune from scrutiny.”<sup>374</sup> “[N]o matter how ‘clean’ the record of covered

---

372. See, e.g., *Turner Broad. Sys., Inc. v. FCC (Turner Broad. II)*, 520 U.S. 180, 195 (1997) (“We owe Congress’ findings deference in part because the institution ‘is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon’ legislative questions.” (internal quotation marks omitted) (quoting *Turner Broad. Sys., Inc. v. FCC (Turner Broad. I)*, 512 U.S. 622, 665–66 (1994) (plurality opinion))); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (noting that legislative findings aid “informed judicial review, as do the reports of the legislative committees, by revealing the rationale of the legislation”); Berger, *Deference Determinations*, *supra* note 17, at 472.

373. See *supra* Section I.B.1.

374. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

jurisdictions,” the Court worried, “the argument could always be made that it was deterrence that accounted for the good behavior.”<sup>375</sup> The Court’s attempted legal jujitsu may be clever, but it fails to grapple with facts before Congress indicating that many covered jurisdictions’ records would not have been “clean” but for section 5.

Rather than looking for a reason to ignore Congress’s findings, a better approach would confront the strongest arguments that Congress’s facts do in fact justify the law at issue. In some cases, the Court might still conclude that the statute is unconstitutional. In all cases, though, the Justices at least would have seriously engaged with the evidence and arguments Congress considered most important.

## 2. *The characterization of facts*

The characterization of facts is closely related to their relevance. Once again, the Court owes a more careful explanation of its determinations. *NFIB*’s Commerce Clause analysis, in particular, turned substantially on how the Court perceived the object of Congress’s regulation. As we have seen, whereas the Chief Justice and joint dissenters characterized the statute as regulating “inaction” (i.e., people forced to buy something they otherwise wouldn’t), Justice Ginsburg treated the same behavior as “action” (i.e., the decision to pass one’s health care costs onto the rest of society).

These characterizations mattered a great deal, but because the Chief Justice simply asserted his preferred characterization, he never clarified the nature of his constitutional objection. Did the Chief Justice believe that it was unconstitutional to require an unwilling person to buy health insurance, even with evidence demonstrating that that same uninsured person will go to the doctor tomorrow and not pay his bill? Alternatively, did he believe that the existence of uninsured non-free riders renders the entire mandate facially unconstitutional, even as applied to free riders? A defense of the preferred characterization would have shed much needed light on these questions.

---

375. *Id.*

Thus, just as the Court could better explain the relevance or irrelevance of particular facts, so too could it better justify its choice of one characterization over another. After all, the Chief Justice in this case selected a characterization that allowed him to ignore findings linking the free rider problem to interstate commerce. In fact, the Court sometimes does not even acknowledge that its version of the “facts” is, really, a preference for one characterization over another.

To be sure, Justices will always be able to steer an opinion where they want it to go. That said, if Justices were in the habit of engaging thoroughly with inconvenient facts, they may be a little more self-aware of the extent to which their own characterizations are value laden. While it may be impossible to remove Justices’ norms from these kinds of determinations,<sup>376</sup> the Justices could do a better job recognizing their underlying values by acknowledging their characterizations in the first place.

### *3. The context of institutional analysis*

The Court could also explain more carefully its reasons for trusting or distrusting Congress in each case. Of course, the veracity and relevance of facts are analytically distinct, and the Court sometimes dismisses Congress’s facts as legally extraneous without indicating that it disbelieves them. That said, the Court may be more inclined to discard certain facts if it distrusts the methods Congress used to gather the facts. After all, if a Justice does distrust congressional facts, it may be easier for judges to brush inconvenient facts aside as a matter of law than to try to demonstrate they are empirically incorrect.

However, the Court ultimately treats congressional facts, it could offer more careful institutional analysis. While the Court theoretically could decide to grant or deny deference in all cases involving congressional facts,<sup>377</sup> there are serious dangers of a one-

---

376. See, e.g., SEGALL, *supra* note 228, at 59–60; William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351–52 (1990).

377. See, e.g., Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 46–55 (2009) (arguing that blind deference is not appropriate and

size-fits-all approach. Institutional behavior and factual contexts can differ tremendously from case to case, and a theory of deference that might make sense in one case might be less desirable or even absurd if mechanically applied elsewhere.<sup>378</sup>

Indeed, depending on the context, Congress may or may not be deserving of deference.<sup>379</sup> On the one hand, Congress, unlike courts, enjoys the resources to gather information from numerous sources. It can hold hearings and call witnesses to bolster its factual understanding of important questions.<sup>380</sup> When Congress makes decisions based on its careful use of these institutional advantages, there are good reasons to think that its facts deserve deference.

Congress, however, sometimes makes decisions based on ideological preferences rather than empirical realities.<sup>381</sup> It sometimes acts at the behest of special interest groups, and, when it does, committees sometimes send staffers to assemble boilerplate factual findings without doing real research.<sup>382</sup> Congressional committees likewise can select witnesses to justify pet projects rather than to gather a complete, unbiased account of the facts.<sup>383</sup> Whether Congress's facts are to be trusted in a particular case, then, depends not on abstractions about its inherent institutional

---

suggesting a theory to apply instead); cf. Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretations*, 80 BROOK. L. REV. 1, 14 (2014).

378. See Araiza, *supra* note 13, at 906–30 (proposing inquiries to guide the deference determination); Berger, *Deference Determinations*, *supra* note 17, at 498–500.

379. See Devins, *supra* note 13, at 1207.

380. See, e.g., Charlow, *supra* note 279, at 578–79; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209–11 (1971); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 448 (1988).

381. See Borgmann, *supra* note 377, at 8; Devins, *supra* note 13, at 1183; William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 398–401 (1988).

382. See, e.g., Devins, *supra* note 13, at 1208; Saul M. Pilchen, *Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 367–68 (1984).

383. See, e.g., *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1017 (N.D. Cal. 2004) (concluding that congressional findings had been driven by policy goals rather than medical or scientific evidence); KOMESAR, *supra* note 345, at 141; Devins, *supra* note 13, at 1197 (“Congress finds facts when there is a reason to do so.”).



properties but whether the legislature made serious use of its fact-finding capacities.<sup>384</sup>

The Court, however, often does not explain why it trusts or distrusts Congress's facts and their relevance in a given case. Of course, sometimes it may be difficult to glean Congress's fact-finding processes from the available materials, but the Court often does not even bother to look.<sup>385</sup> It also often does not even discuss how Congress made use of the facts it found or whether Congress included those facts in the statute itself.

To be sure, the Court sometimes gestures toward Congress's epistemological strengths or weaknesses, but broad platitudes about Congress's broad institutional characteristics are not a substitute for careful, contextual institutional analysis.<sup>386</sup> Rather than relying on generalizations about Congress's institutional strengths, the Court should engage in careful institutional analysis discussing whether Congress's factual findings are likely to be trustworthy given the particular context. Similarly, it should compare Congress's relevant institutional characteristics with its own.<sup>387</sup>

The Court in some cases may suspect Congress of biased fact finding, but because the Justices do not engage carefully in these analyses, it is sometimes difficult to know what they are thinking. In *Shelby County*, for instance, the Court did not make clear if it distrusted evidence indicating that preclearance continued to do important work in many covered jurisdictions. Were Congress's factual findings less rigorous than usual? Did the record suggest that Congress had already determined the "facts" it wanted before it began gathering evidence? Did the Court want more evidence that preclearance continued to protect against voter discrimination or that the coverage formula could not have been effectively redrawn? The Court never said.

---

384. See Araiza, *supra* note 13, at 906–22 (proposing inquiries to guide the deference determination); Devins, *supra* note 13, at 1170.

385. Perhaps some Justices do look but do not include their findings in their written opinions.

386. See Berger, *Deference Determinations*, *supra* note 17, at 501–05.

387. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 197 (1994) (arguing that institutional analysis must necessarily be comparative).

The Court should also examine whether facts enacted into the statute itself deserve special weight. While there are reasons to think courts should care about Congress's sense of the problem in all events, one would think that textualists in particular would want to engage with factual findings enacted into a statute, like the ACA. The Justices in *NFIB*, however, offered no such discussion.

The Court should also discuss whether Congress enjoys particular epistemic authority over the subject matter at issue. Congress presumably will know more than courts about most matters of policy, but arguably it is especially knowledgeable about certain topics. For example, in the areas of voting rights and campaign finance reform, Congress dealt with topics about which senators and representatives have greater experience than most judges.<sup>388</sup> The Court, however, did not even discuss whether Congress's findings over such topics merited special respect or attention.

The point here is not that the Court should necessarily view the political branches' factual findings charitably.<sup>389</sup> Indeed, where facts truly are legally irrelevant, Congress's processes and expertise should not matter. However, the Court sometimes blurs together the legal relevance and trustworthiness of congressional findings. Closer attention to these institutional questions would certainly improve the Justices' assessment of the facts themselves. It may also help them with the legal analysis. After all, constitutional doctrine routinely requires judges to engage with the facts against which the government regulated.

---

388. See Bob Bauer, *What to Do About the Court: Two Views*, MORE SOFT MONEY HARD L. (Oct. 15, 2013), <http://www.moresoftmoneyhardlaw.com/2013/10/what-to-do-about-the-court-two-views/> (arguing that politicians who are convinced that money accounts of certain legislative behavior are the "acknowledged experts" on questions of campaign finance policy).

389. See, e.g., Araiza, *supra* note 13, at 910–22 (examining instances in which Congress's factual findings merit less deference).

*B. The Tone of the Court's Determinations**1. Aporetic engagement*

The problem with the Court's treatment of facts in these cases is a matter not just of content, but also of tone. To this extent, the problem is partially one of judicial craft: the Justices are too willing to steer around inconvenient evidence as they write their opinions.<sup>390</sup> Phrased somewhat differently, the Justices' rejection of congressional facts in these cases is part of a larger phenomenon in which they write opinions to emphasize their strongest points and conceal their weakest.<sup>391</sup>

The Court's quick dismissal of Congress's facts speaks to a broader penchant for refusing to take seriously arguments on the other side of the litigation ledger.<sup>392</sup> As I have argued elsewhere, the Court often writes its opinions to make hard cases sound much easier than they in fact are.<sup>393</sup> That phenomenon helps explain the problem here. If the Justices were more committed to conceding the difficulty of the case at hand, they would be less inclined to brush aside inconvenient facts. To this extent, a change in tone could also yield a change in the facts with which the Court carefully engages.

As Professor Kahan has argued, the Court could cultivate a more aporetic rhetoric.<sup>394</sup> "Aporia," as he explains it, refers to a mode of argumentative engagement that acknowledges, rather than dismisses, complexity and competing evidence.<sup>395</sup> A Justice writing an opinion in the aporetic mode can still render a binding decision in a case but should acknowledge the other side's strong arguments and facts.<sup>396</sup>

More aporetic engagement would require the Court to discuss carefully Congress's policy goals and the factual landscape that prompted legislative action in the first place. Similarly, this approach would encourage the Court to examine closely how the decision about whether to treat a challenge as facial or as-applied impacts the

---

390. See *supra* Section II.D.

391. See Berger, *Rhetoric*, *supra* note 18, at 729.

392. See *id.* at 751–52.

393. See *id.* at 671–79.

394. See Kahan, *supra* note 252, at 62.

395. See *id.* at 62–63.

396. See *id.*

universe of relevant facts. If Congress has, in fact, exceeded its constitutional authority or violated an individual right, the Court should invalidate the relevant statutory provision. The Court, however, should not do so without honest consideration of the problems Congress tried to address.

Of course, a statute's constitutionality does not rest solely on Congress's belief it is addressing a grave societal mischief. That said, the Court owes it to Congress to take seriously its worldview. More aporetic engagement would encourage the Court to discuss Congress's findings carefully before deciding whether they were legally irrelevant. While such engagement realistically may not change the Justices' minds often, it could force them to think more consciously about the assumptions underlying their decision-making, including their instincts about facts.<sup>397</sup>

To this extent, a more aporetic rhetoric could operate as a modest but important speed bump. The Justices' enjoy vast discretion in their exercise of judicial review, and ultimately it is up to them to police the exercise of that discretion themselves.<sup>398</sup> But if the Justices were to attempt a more aporetic rhetoric, they would be more likely to force themselves to engage with inconvenient facts and to justify more carefully their decision to treat a constitutional challenge as facial or as-applied. We could not realistically expect a sea change in judicial practices, but we could expect some improvement.

## 2. *Candor*

Just as the Court could more honestly acknowledge strong arguments on the other side, so too could it more candidly explain the norms underlying the Justices' decisions. A common thread running through these decisions is that the five conservative Justices, over the dissents of the four liberals, struck down parts of federal legislation with minimal regard for what Congress was trying to do and why. To be sure, the majority had plausible legal arguments on

---

397. See Berger, *Rhetoric*, *supra* note 18, at 754.

398. Cf. Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495 (2017) (discussing lawmakers' incentives to acquiesce to judicial decisions).

its side. In each case, however, there were also strong arguments for why Congress's factual findings should have mattered a great deal.

The Court's rejection of Congress's worldview ultimately had less to do with the clear doctrinal requirements and more with underlying normative principles.<sup>399</sup> As we have seen, constitutional first principles in these cases trumped Congress's policy-based facts. Contrary to the majority's insistence, the Constitution did not require the outcome in any of these cases. Rather, the outcomes were constitutionally plausible, and the majority of Justices' normative preferences guided their decision-making.

It may be inevitable for norms to guide these kinds of decisions.<sup>400</sup> Most judges cannot easily separate their own normative views from their judicial decisions, especially in constitutional cases where there are few clear rules limiting judges' discretion.<sup>401</sup> That said, judges could try to do a better job recognizing and admitting the ways in which norms shape their own decision-making processes.<sup>402</sup>

The opinions in these cases are written as though norms played no role in the decision to jettison congressional findings. While it may be difficult to adopt new practices, the Justices should encourage themselves and each other to explain more candidly the true reasons for their decisions.<sup>403</sup> Some Justices may believe that the underlying norms are baked into our constitutional structure, but their opinions would be stronger if they admitted that their preferred constitutional principles are contestable. As Professor Powell puts it, only if we "understand the true grounds of a decision can we assent to its correctness or . . . to its validity as the outcome of our system even though we think it wrong in substance."<sup>404</sup>

---

399. See *supra* Section II.A.

400. See *supra* notes 251–65 and accompanying text.

401. See POSNER, *supra* note 249, at 272 ("The Court is awash in an ocean of discretion.").

402. See *id.* at 289 (encouraging Justices to acknowledge "to themselves the essentially personal, subjective, political, and . . . arbitrary character of most of their constitutional decisions").

403. See, e.g., Crane, *supra* note 120, at 673.

404. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 90 (2008).

Judicial candor also can be a way of encouraging the Justices themselves to become more aware of their own implicit biases.<sup>405</sup> Indeed, part of the problem in these cases is that the majority Justices confidently assumed that they were correct and failed to question the premises underlying their decisions.<sup>406</sup> To this extent, more transparency and candor might produce greater introspection among some Justices. It is not clear that the Justices are themselves aware of the extent to which their own factual assumptions and underlying normative biases drive their legal or factual analyses, or the extent to which this phenomenon may undermine their credibility. Increased transparency might help the Justices more readily identify their own biases.

#### CONCLUSION

The Court's penchant for ignoring seemingly vital facts in constitutional cases speaks to its considerable power to direct and alter the shape of constitutional law. *Shelby County*, *NFIB*, and *Citizens United* were each significant decisions with important practical and legal implications. While the Justices' opinions in each case were fairly convincing on their own terms, they seem woefully lacking in light of the facts the Justices refused to discuss.

This disregard of facts confuses constitutional doctrine, aggrandizes the judiciary, disrespects Congress, and contributes to the demise of facts in our society. To be sure, it is ultimately up to the judiciary to determine which facts have constitutional salience. But in these cases, the Court did not explain adequately why it brushed aside these facts. Before deeming irrelevant facts that prompted legislative action, the Court owes us all a more careful explanation.

These issues get to the heart of the uneasy line between law and politics in constitutional law. It is impossible for the Court to separate politics from constitutional law completely. It is also nearly impossible to always draw a clear distinction between law and fact, or between facial and as-applied challenges. Greater attention to these

---

405. See Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 389–90 (2012).

406. See McAward, *supra* note 346, at 380.

issues, however, would yield more careful, candid, thorough, and convincing constitutional opinions.

