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FACT STRIPPING

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ABSTRACT

Appellate fact review in constitutional litigation has never been more important. Whether someone's rights were violated often turns on what happened—matters of fact—and not solely on matters of law. That makes it all the more striking that the U.S. Supreme Court has increasingly reversed rulings of lower courts based on factual disagreement, given that such factfinding is typically entitled to significant appellate deference. Scholars and would-be reformers have noted many problems with appellate factfinding, but have tended to assume that the Court itself has final say on the applicable standard of review.

Yet as a matter of constitutional law, the Supreme Court is not the factfinder in chief. Article III gives Congress power to define the Court's "appellate jurisdiction, both as to Law and Fact" and Article I gives Congress power to "constitute" the inferior federal courts. Congress can, by statute, require Supreme Court Justices and appellate judges to view the factual record with some level of deference. We call this approach "fact stripping." It is different than the more familiar jurisdiction stripping—the much-discussed power of Congress to take away the federal courts' power to hear certain kinds of cases—and raises fewer constitutional or legitimacy concerns. And if done properly, it can instead protect rights by shifting power from appellate judges to trial judges and jurors better able to find the facts.

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Our focus is on use of fact stripping regarding constitutional claims in lower federal courts, but Congress has already regulated the review of constitutional facts—with the Supreme Court's approval—in other important areas of law. For example, in federal habeas corpus, Congress has mandated more *deference by restricting appellate factual review, while in some areas of administrative adjudication, such as immigration, it has required* less *factual deference (that is, more review) than the constitutional floor would require.*

How Congress should exercise this constitutional power is primarily a question of how best to allocate power within the judiciary, and thus raises questions of institutional competence, including the role of appellate courts in law development and establishing uniformity, as well as the importance of robust factfinding in constitutional cases. Congress, however, need not agree with where the Supreme Court has drawn those lines, and might want to re-allocate factfinding power to the trial courts. Our goal here is not to prescribe a particular form of fact-stripping legislation, but to suggest that congressional regulation of appellate constitutional factfinding is one of many possible responses to a Supreme Court that has increasingly arrogated factfinding power to itself.

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INTRODUCTION

It is "hardly earth-shaking" that judges make constitutional law based on facts, as Kenneth Karst famously noted.[1] And yet the ways in which judges perform that task can be earth-shaking indeed.[2] The scope and strength of constitutional rights depend in large part on whether judges—including appellate judges, and especially Supreme Court Justices—credit facts regarding abortion,[3] voting rights,[4] same-

1. Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75 (1960).

2. Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1187 (2013) ("Social facts are now an intrinsic part of both defending a law (by justifying its social value) and attacking it (by showing its harmful effects)."); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 178 (2018) [hereinafter Larsen, *Alternative Facts*] ("Modern constitutional debates in the United States often turn on questions of fact.").

3. Gonzales v. Carhart, 550 U.S. 124, 178–79 (2007) (Ginsburg, J., dissenting) (criticizing majority for not deferring to factual findings of three district courts, arguing that those findings "merit this Court's respect" and that the majority "supplies no reason to reject those findings"); A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684, 712–13 (7th Cir. 2002) (Wood, J., dissenting) (criticizing majority for not deferring to district court's factual findings regarding the burdens imposed by a mandatory waiting period for abortions).

4. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199 (2008) (denying relief in challenge to photo ID rules, based on "evidence in the record and facts of which we may take judicial notice"); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 493–94 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (criticizing majority for not deferring to factual findings of three-judge district court panel);

sex marriage,[5] *Brady* disclosures,[6] race discrimination,[7] affirmative action,[8] methods of execution,[9] and the like. Likewise, building factual records in litigation—whether civil or criminal, and under varying local, state, and federal rules—presents significant costs for litigants, including both persons asserting constitutional claims and government actors defending against those claims.[10]

Reams of scholarship and decades of debate about constitutional interpretation have been devoted to such questions as when, how, and from which sources courts should find facts.[11] Constitutional

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Easley v. Cromartie, 532 U.S. 234, 235–45 (2001) (conducting "extensive review . . . for clear error" and finding district court erred in finding congressional redistricting plan racially motivated); *id.* at 259 (Thomas, J., dissenting) (criticizing majority on this point).

5. Perry v. Brown, 671 F.3d 1052, 1075–76 (9th Cir. 2012) (discussing whether district judge's factual findings in case striking down California's ban on same-sex marriage should be reviewed for clear error), *vacated and remanded sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

6. Kyles v. Whitley, 514 U.S. 419, 433–51 (1995) (reviewing facts extensively, including matters of witness credibility, and granting habeas petition because state failed to disclose evidence that "would have made a different result reasonably probable"); *id.* at 457 (Scalia, J., dissenting) (criticizing majority for rendering "new findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction").

7. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979) (reviewing for clear error a district court's finding with regard to whether a school board intentionally operated a segregated system); *see also* Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & C.R. L. REV. 629, 638–46 (2004) (discussing and criticizing Sixth Circuit's use of de novo review in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *rev'd*, 539 U.S. 306 (2003)).

8. Fisher v. Univ. of Tex., 570 U.S. 297, 313–15 (2013) (remanding in challenge to affirmative action in admissions for "close analysis to the evidence of how the process works in practice"); *see also infra* notes 24–27 and accompanying text (discussing the Court's treatment of facts in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023)).

9. Glossip v. Gross, 576 U.S. 863, 881 (2015) ("We also affirm for a second reason: The District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution.").

10. The Supreme Court, in a series of doctrines, including qualified immunity rulings, has emphasized costs of discovery to government actors. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (noting "the burdens of broad-reaching discovery" in Section 1983 cases); *see also infra* Part I.B. (describing the various tasks involved in building the factual record). Regarding the challenges civil plaintiffs and criminal defendants face in developing facts, see Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015).

11. *See generally* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008) (describing a theory of constitutional fact development, focusing on review of constitutionality of legislation, and how legislative facts are identified and adjudicated); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011) (criticizing non-adversarial, extra-record factfinding by appellate courts

formalism, for example, emphasizes mechanically applying the text of legal rules to facts, as in Chief Justice John Roberts' description of the judicial role as simply calling balls and strikes.[12] But the problem of constitutional factfinding becomes even more difficult when embedded in a system of appeal where—to continue Roberts' metaphor—the relevant perspective is not just the umpire making the initial call, but the subsequent instant replay review.[13] Once that review is introduced, a new question arises: What deference is due to the factual findings of the original decisionmaker? The standard answer is that factual findings are given great deference on appeal, generally being reviewed only for clear error, while questions of law are reviewed de novo.[14] Like all standards of review, these rules—deferential and plenary—allocate

and suggesting reforms); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) [hereinafter Larsen, *Confronting Supreme Court Fact Finding*] (describing the Court's "in-house" legislative fact finding and how it has been transformed by the digital revolution).

12. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States) ("I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat."); *see generally* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012) (discussing then-nominee Roberts' balls and strikes metaphor).

13. For how such review works and mirrors issues posed by the federal appellate review process, see *Replay Review*, MLB.COM (2023), https://www.mlb.com/glossary/rules/replay-review [https://perma.cc/8ZD9-X4HK] ("Replay officials review all calls subject to replay review and decide whether to change the call on the field, confirm the call on the field or let stand the call on the field due to the lack of clear and convincing evidence."); Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683, 1690 (2011); Joseph Blocher, *Why Aren't Instant Replays Reviewed De Novo?*, PRAWFSBLAWG (Dec. 1, 2009, 2:28 PM), https://prawfsblawg.blogs.com/prawfsblawg/2009/12/why-arent-instant-replays-reviewed-de-novo.html [https://perma.cc/HL8X-SN5F] (arguing for deference to trial court factfinding, but for de novo review of instant replay calls).

14. Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion').").

power among levels of the judiciary,[15] generally giving trial courts primary authority over facts.[16]

It is striking, then, that in a number of prominent recent cases the Supreme Court has elided standards of deference to factual findings. Consider *Kennedy v. Bremerton School District*,[17] a Free Exercise case in which the Court found that a high school football coach was not acting "ordinarily within the scope" of his duties as coach while engaged in "quiet" private prayer after games,[18] and there was no "evidence . . . in this record" that players would feel any coercion to participate.[19] This was, as leading religious rights scholar Douglas Laycock called it, a "systematic gerrymander" of the factual record found by the lower court.[20] In dissent, Justice Sonia Sotomayor painted a very different scene, and noted that the district court had found "direct record evidence that students felt coerced to participate."[21] Indeed, she included photographs to prove the point.[22]

15. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 997 (1986) ("Scope of review, therefore, is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels."); *see also* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 105 (2005) ("There is nothing inherent or immutable about the way our system divides decisionmaking authority.").

16. Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 208 (1937) ("This is a canon of decision so well accepted that it is scarcely necessary to cite specific instances."); Samuel H. Hofstadter, *Appellate Theory and Practice*, 15 N.Y. CNTY. LAWS. ASS'N BAR BULL., May 1957, at 34 ("The principle that the trier of the facts . . . is in a far better position to determine where the truth lies than an appellate court with only the cold trial record before it has been stated and restated so often that it has become a truism.").

17. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

18. *Id.* at 2424, 2430.

19. *Id.* at 2430–31.

20. Mike Fox, *Faculty Available for Comment on 2021 Supreme Court Term*, UNIV. OF VA. SCH. OF L. (June 30, 2022) (statement of Douglas Laycock on *Kennedy v. Bremerton School District*), https://www.law.virginia.edu/news/202206/faculty-available-comment-2021-supreme-court-term [https://perma.cc/SJ6J-BGL9].

21. *Bremerton*, 142 S. Ct. at 2452 (Sotomayor, J., dissenting).

22. *Id.* at 2436; *see also* Aaron Blake, *Gorsuch and Sotomayor's Extraordinary Factual Dispute*, WASH. POST: THE FIX (June 29, 2022, 9:39 AM), https://www.washingtonpost.com/politics/2022/06/29/gorsuch-sotomayor-praying-coach [https://perma.cc/U96B-YQAG] ("[Justice Sotomayor] even took the extraordinary step of using photos that she estimated undercut [Justice Gorsuch's] summary of the case.").

In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[23] which struck down affirmative action in undergraduate admissions, the trial courts conducted separate bench trials for the cases filed against Harvard and the University of North Carolina.[24] In dissent, Justice Sotomayor—as she had done in *Bremerton*—emphasized that the majority failed to engage with the "detailed findings of fact" in the case: "These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs."[25] The plaintiffs, "by contrast, did not introduce a single fact witness and relied on the testimony of two experts."[26] Justice Gorsuch, concurring, addressed the dissent's statements regarding factfinding and explained that he, at least, did not "purport to find facts," instead repeating "what [the plaintiff] has argued."[27]

The majority in *National Federation of Independent Business v. OSHA*[28] seemed to similarly disregard the applicable standards of review, as the dissenting Justices noted.[29] There, the Court stayed an OSHA emergency protective order requiring COVID-19 vaccination or weekly testing in workplaces of more than one hundred employees.[30] The statute under which OSHA acted authorizes the agency to issue standards to protect employees from "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."[31] The relevant federal statute regarding "judicial review" states that a challenge to such a regulation may be filed with a U.S. Court of Appeals, but that OSHA's determination is "conclusive

23. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

24. *Id.* at 2157, 2176.

25. *Id.* at 2240 (Sotomayor, J., dissenting).

26. *Id.*

27. *Id.* at 2215 n.4 (Gorsuch, J., concurring).

28. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022) (per curiam).

29. *Id.* at 672 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("Their decisions, we have explained, should stand so long as they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (quoting Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 522 (1981))).

30. *Id.* at 663.

31. 29 U.S.C. § 655(c)(1).

if supported by substantial evidence."[32] That statutory standard of review was not applied or discussed in the majority opinion.[33]

In other "shadow docket" and per curiam rulings of the Supreme Court, it is unclear why the lower court factual record did not suffice. In overturning a stay regarding election districts in Alabama, the Supreme Court issued a summary opinion.[34] As the dissent pointed out, the factual record was "massive"[35]—the kind of record that should typically garner significant deference on appeal, absent some change in the law, which would require "full briefing and argument" to consider.[36] Concurring, Justice Kavanaugh argued it was not enough that the lower court "issued a lengthy opinion after considering a substantial record," calling that record the "starting point, not the ending point, for our analysis of whether to grant a stay."[37] It was left unclear why, without a claim of a legal error, those facts were not enough to enjoin the Alabama redistricting plan.[38] And in fact when the Court did ultimately review the case fully, it affirmed the District Court's determination that plaintiffs had shown a reasonable likelihood of success on their claim that the Alabama redistricting plan violated the Voting Rights Act.[39]

The lack of fact deference in constitutional cases is not limited to the Supreme Court. Consider the Sixth Circuit's decision in *DeBoer v. Snyder*,[40] which upheld bans on same-sex marriage in Michigan and three other states[41] just one year before *Obergefell v. Hodges.*[42] At trial, the state relied primarily on a study by Mark Regnerus, a University of

32. *Id.* § 655(f).

33. *See generally Nat'l Fed. of Indep. Bus.*, 142 S. Ct. 661 (not discussing the deferential standard of review).

34. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

35. *Id.* at 883 (Kagan, J., dissenting).

36. *Id.*

37. *Id.* at 882 (Kavanaugh, J., concurring).

38. One explanation offered by Steve Vladeck is that in these cases, "a majority of the Justices now appear to believe that the [federal] government suffers an irreparable injury militating in favor of emergency relief *whenever* a statute or policy is enjoined by a lower court." Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 126 (2019) (emphasis in original). Perhaps such a presumption, if the Court's decision in *Milligan* is any indication, now extends to state and local government.

39. Allen v. Milligan, 143 S. Ct. 1487, 1498 (2023).

40. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015).

41. *Id.* at 405–06.

42. Obergefell v. Hodges, 576 U.S. 644 (2015).

Texas sociologist who found that children of same-sex couples were disproportionately likely to experience a variety of bad life outcomes.[43] In striking down Michigan's ban, the district court found that the study was "entirely unbelievable and not worthy of serious consideration,"[44] and heard extensive scientific evidence from multiple studies debunking the idea that same-sex marriage is harmful to children.[45] And yet the Sixth Circuit majority reversed, referring to the importance of "creat[ing] and maintain[ing] stable relationships within which children may flourish"[46]—effectively adopting Regnerus' view.

What legal doctrines or practices could justify departures from standard appellate deference in constitutional cases? One has to do with the type of facts at issue. Deference to trial court factfinding is most strongly associated with "adjudicative" facts—the who, what, where, why facts—and not "legislative" or "social" facts, which provide general or background information with significance beyond the immediate case.[47] By treating particular facts as legislative, appellate courts can sidestep the typical deference to lower courts.[48]

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43. WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 554–71 (2020).

44. DeBoer v. Snyder, 973 F. Supp. 2d 757, 766 (E.D. Mich. 2014), *rev'd*, 973 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015).

45. Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249, 2268–70 (2023) (discussing case and citing ESKRIDGE & RIANO, *supra* note 43, at 555–57).

46. DeBoer v. Snyder, 772 F.3d 388, 405 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015).

47. Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016) ("[A]ppellate courts generally grant clear error deference *only* to adjudicative facts.") (emphasis added). For contrasting views on whether this is desirable, compare Borgmann, *supra* note 2, at 1190–91 (describing and partially critiquing the lack of deference for legislative facts), with John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 514 (1986) (arguing that legislative facts should generally be reviewed de novo).

For a helpful overview of the literature and argument that the category of legislative fact should be divided into those facts that provide a promise for a rule of decision those facts that a court uses to apply the rule to the parties before it, see Haley N. Proctor, *Legislative Facts*, 99 NOTRE DAME L. REV. (forthcoming 2024), https://ssrn.com/abstract=4392025 [https://perma.cc/4NSG-TBH2].

48. *See, e.g.*, Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404–05 (1942) (detailing times the Court "did not limit itself to the record" in reviewing legislative facts). The Advisory Committee Notes to the Rules of Evidence emphasize that there is not, for legislative facts, "any requirement of formal findings at any level," but that while there are also not "any formal requirements of notice," there

A second, related, justification is the Supreme Court–created doctrine scholars have termed constitutional fact review, under which appellate courts review de novo factfinding relating to certain constitutional claims.[49] The apparent, and largely uncredited, resurgence of that doctrine has contributed to a remarkable transfer of power between trial and appellate courts—a power shift that has significantly shaped legal, and particularly constitutional, rights.[50]

Finally, so-called mixed questions of law and fact are often (but not always) subject to de novo review[51] and, as the Court has recognized, the distinction between questions of fact and of law is "vexing," to say the least.[52] The prevalence of those questions in any particular area of law depends in large part on the doctrines the Supreme Court has fashioned.[53]

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must be notice, "already inherent in affording opportunity to hear and be heard and exchanging briefs." *See* FED. R. EVID. 201.

49. *See infra* Part I.D. Constitutional fact review is also known as the doctrine of constitutional fact, or independent review.

50. *See* Adam Hoffman, Note, *Corralling Constitutional Fact:* De Novo *Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1459 (2001) ("One could say that the Supreme Court has used its power to reclassify questions of fact as questions of constitutional fact to ensure that it has the final word.").

51. Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 922 (1992); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 238–47 (1991); *see, e.g.*, United States v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989) ("On mixed questions of fact and law, there is no bright-line standard but rather a sliding scale depending on the 'mix' of the mixed question."); Miller v. Fenton, 474 U.S. 104, 114 (1985) ("[T]he fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.").

52. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (citing Baumgartner v. United States, 322 U.S. 665, 671 (1944)); *see also* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) ("[T]he concepts 'law' and 'fact' do not denote distinct ontological categories . . . ."). Though the line between the two is undoubtedly complicated, we agree with Henry Monaghan that "any distinction posited between 'law' and 'fact' does not imply the existence of static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience." Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) [hereinafter Monaghan, *Constitutional Fact Review*]. As Monaghan notes, the categories are not only "crucially important constructs," but they "find expression in the constitutional text." *Id.* We discuss the fact component of the Supreme Court's appellate jurisdiction, outlined in U.S. CONST. art. III, § 2, cl. 2, in Part III.

53. *See infra* notes 318–40 and accompanying text (explaining how the Court's choice of doctrinal tests influences the proportion of appeals involving mixed questions of law and fact, which are typically subject to de novo review).

All of these justifications reflect doctrines crafted *by* the Supreme Court, tying facts to questions of constitutional interpretation and generally arrogating power to itself—sometimes in the face of procedural rules and constitutional rights that would otherwise counsel deference to lower court factfinding.[54] It is striking that Supreme Court factfinding in constitutional cases has not received much attention at a time when the structure and power of the Supreme Court are subject to criticism[55] and amid proposals for fundamental changes,[56] including Court-packing,[57] jurisdiction stripping,[58] and term limits.[59] Many of these proposals are explicitly premised on the notion that the Justices have claimed too much power,[60] including vis-à-vis the lower courts.[61]

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54. *See infra* notes 131–38 and accompanying text (discussing the Supreme Court's decision in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984)).

55. As we discuss further, the Presidential Commission on the Supreme Court of the United States issued a detailed report in 2021 that "identifies prominent proposals for reform and provides a critical evaluation of the strengths and weaknesses of the proposals." *See* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 1 (2021) [hereinafter PRESIDENTIAL COMMISSION].

56. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How To Save the Supreme Court*, 129 YALE L.J. 148, 181 (2019) (proposing both a "Supreme Court Lottery" consisting of panels randomly selected "from a large pool of potential Justices" also serving as circuit judges and a "Balanced Bench" whereby the Court would have to be balanced based on political affiliation of Justices).

57. *See* Michael J. Klarman, *The Supreme Court 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 10, 247–48 (2020) (advocating for partisan court packing in response to partisan failures to consider nominees to the Court). *But see* Neil S. Siegel, *The Trouble with Court Packing*, 72 DUKE L.J. 71, 75 (2022) (identifying a constitutional norm against court-packing and an analytical framework for considering Court-packing proposals).

58. *See generally* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020) (arguing that Congress can, largely without Article III constraint, remove the Supreme Court's appellate jurisdiction over particular cases or issues). *But see* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has To Teach Us*, 69 DUKE L.J. 1, 16–17 (2019) [hereinafter Monaghan, *Jurisdiction Stripping*] (arguing that a textual analysis of the Exceptions Clause reveals that Congress probably cannot restrict Supreme Court review of legislation).

59. *See generally* Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021) (outlining "a framework for designing a complete term-limits proposal"); *see also* Suzanna Sherry & Christopher Sundby, *The Risks of Supreme Court Term Limits*, SCOTUSBLOG, (Apr. 5, 2019, 1:29 PM), https://www.scotusblog.com/2019/04/academic-highlight-the-risks-of-supreme-court-term-limits [https://perma.cc/C3SD-87E8].

60. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1725–28 (2021) (surveying "disempowering" Supreme Court reform proposals).

61. *See* Mark A. Lemley, *The Imperial Supreme Court,* 136 HARV. L. REV. F. 97, 108 (2023) (arguing that the Supreme Court is "hamstringing [lower federal courts] by bypassing longstanding procedural and substantive rules and its own doctrine in order to reach out, take,

The voluminous (and often critical[62]) scholarly literature on factfinding in particular is largely focused on older cases, and—more significantly—tends to assume that the Court itself has the final say on how constitutional claims are factually developed.[63] And indeed, responding in part to scholarly critiques,[64] the Court has in various ways trimmed its own sails, particularly with regard to constitutional jury trial rights under the Sixth and Seventh Amendments.[65]

The central argument of this Article is that there is another approach to addressing how the Supreme Court, and appellate courts more generally, review the factual record: Congress can, by statute, shape the deference that appellate courts give to lower court factfinding. This is what we call *fact stripping*. It is similar to but distinct from its better-known cousin, jurisdiction stripping. And the metes and

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and decide major legal questions that either are not presented at all or have not proceeded through the courts to establish a record."). For the argument that lower federal courts are "indispensable" to the Article III system, see Theodore Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 528–29 (1974). For the argument that it is the "essential role" of the Supreme Court to declare law in our constitutional order, see Monaghan, *Jurisdiction Stripping*, *supra* note 58, at 7–11.

62. George C. Christie, for example, writes:

> As a practical matter, if the Court is unwilling to accept the limited scope of review provided by the actual language of Rule 52(a), the only intellectually coherent solution is one that quite openly breaks the shackles of Rule 52(a) rather than one that ostensibly accepts that rule, but then carves out exceptions by utilizing notions like "constitutional fact," "mixed questions of law and fact," or "questions of law application." The latter solution is intellectually indefensible.

George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 55–56 (1992); Monaghan, *Constitutional Fact Review*, *supra* note 52, at 276; Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 289 (2017).

63. *See* Redish & Gohl, *supra* note 62, at 291 (describing this as "accepted" practice). Henry Monaghan's influential article is the exception here, and Monaghan explicitly bracketed the issue. Monaghan, *Constitutional Fact Review*, *supra* note 52, at 239 n.56.

64. Miller v. Fenton, 474 U.S. 104, 114 (1985) (citing Monaghan, *Constitutional Fact Review*, *supra* note 52, at 237, and focusing justification for constitutional fact review not on the nature of the substantive right at issue, but rather the nature of the question—i.e., whether the rule is one that is given meaning through repeated application in particular circumstances).

65. *See* Monaghan, *Constitutional Fact Review*, *supra* note 52, at 233–34; *see, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 567 (1995) (citing Bose Corp. v. Consumers Union, 466 U.S. 485 (1984)), and noting that independent of review "does not limit our deference to a trial court on matters of witness credibility"); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 689 n.35 (1989) (reading *Bose* as accepting the trial court's credibility determination but—unlike the trial court—declining "to infer actual malice from the finding that the witness 'refused to admit [his mistake] and steadfastly attempted to maintain that no mistake had been made—that the inaccurate was accurate'") (alterations in original); *Miller*, 474 U.S. at 114–15 (accepting that, notwithstanding independent review, deference might be justified with regard to matters like witness credibility and juror bias where a trial court is better situated).

bounds of this legislative power vary depending on which federal court is at issue. As to the U.S. Supreme Court, Congress has Article III power to regulate "appellate jurisdiction, both as to Law and Fact," under the Exceptions and Regulations Clause.[66] Supreme Court jurisdiction-stripping proposals to date have focused on the "Law"; here, we explore the "Fact." Regarding lower federal courts, the analysis focuses on Article I, since Article III references and Article I grants Congress the specific power to "constitute" such "inferior" tribunals.[67]

Our goal is not to limit the importance of questions of fact, but rather to emphasize sound fact development and to encourage new thinking about how to promote it legislatively. There is nothing necessary or desirable about having the Supreme Court review facts de novo, or determine standards for fact development and review. As we develop, it can undermine rights if the Court or appellate courts do not respect the factual record. Congress can respond to such concerns.

In Part I, we briefly define the problem and show how various doctrines of review aggrandize the power of appellate courts, and in particular the Supreme Court, vis-à-vis lower federal courts. We describe the basic steps of identifying facts and applying law to those facts at trial, then discuss some of the deference doctrines that typically insulate factual findings on appeal. We then explain the challenge of legislative facts and the doctrine of constitutional fact review, and the ways in which the latter—by denying deference—transfers power from trial courts to appellate courts, and ultimately to the Supreme Court.

In Part II, we describe how this problem is also one that admits of congressional solution: legislation defining fact development and review standards for federal courts, including but not limited to the U.S. Supreme Court. We do so by considering both constitutional constraints and existing statutory models. As to the former, we show that fact stripping is not precluded by Article III, Article I, or

66. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

67. *See id.* § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* art. I, § 8, cl. 9 (Congress shall have the power "[t]o constitute Tribunals inferior to the supreme Court").

constitutional rights such as due process.[68] As to the latter, we recount a variety of examples showing that Congress *can* statutorily regulate the deference due to factfinding, either by requiring or limiting fact deference. Indeed, Congress already establishes various rules regarding fact development when it comes to review of state convictions and agency adjudication, and the Supreme Court has largely deferred to those regulations. In federal habeas corpus, a careful review of the factual record has long been important in identifying constitutional violations.[69] However, Congress has limited the ability of federal courts to look behind state court factfinding. In response, the Court has not only acquiesced but buttressed those statutes.[70] In other key areas, Congress has provided for more robust factual review than the constitutional minimum. Thus, while the Court has held due process requires administrative decision-making to be supported by some evidence, that test has been supplanted by statute to require more searching substantial evidence review.[71] Our proposal is different because we focus on factfinding by federal district courts rather than state courts or agencies, but these examples nonetheless show the basic legitimacy of statutorily regulating appellate deference to factfinding.

In Part III, we discuss in more detail the promise, the possibilities, and limitations of fact-stripping legislation. Standards of review—whether set by courts or by Congress—are ultimately about allocating power within the judiciary, and thus raise basic questions about comparative institutional competence as between trial and appellate courts. These questions include the role of appellate courts in law development and establishing uniformity, and the importance of robust factfinding in constitutional cases—factors that the Court itself

68. We are primarily focused here on the deference due to factfinding by Article III courts, not by administrative agencies or even state courts, though of course those are important sites of fact development as well. As we note below in Part II, those settings do provide important examples of situations where Congress has regulated federal court deference due to factfinding.

69. For example, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court concluded that race explained prosecutors' choices to strike jurors in a death penalty case, which contradicted the state court's factual findings. In the Court's view, "[t]he strikes correlate with no fact as well as they correlate with race." *Id.* at 266.

70. For example, in *Cullen v. Pinholster*, 563 U.S. 170 (2011), the Court interpreted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 as confining review under 28 U.S.C. § 2254(d)(1) to the factual record developed in state courts. *Id.* at 181. For further discussion, see *infra* Part II.D.

71. *See infra* Part II.C.

has invoked in establishing existing standards of review. But Congress need not agree with where the Court has drawn those lines, and in particular it might want to reallocate factual power to the trial courts. In central areas, such as § 1983, the Supreme Court has played the dominant role in defining the applicable standards of review.[72] That need not be the case, but as reformers understand, undoing doctrines like qualified immunity requires careful thought about the possible replacement. Fact stripping offers a solution.[73] Of course, as with jurisdiction stripping, we would expect to see continuing push and pull between Congress and the courts.[74] Appellate courts wanting to maintain their power over factfinding might attempt to do so in a variety of ways, including by designating more issues as mixed questions of law and fact demanding de novo review, or by labeling facts as legislative rather than adjudicative.

At its heart, our proposal is another approach to federal court reform—helping to ensure the primary and longstanding role of trial courts in finding facts, including crucially in constitutional cases. Debates regarding qualified immunity and § 1983, as well as court-made doctrines in a range of other areas of constitutional law, can benefit from consideration of congressionally established fact development and review. Congressional regulation of appellate constitutional factfinding is of course not an unalloyed good, any more than constitutional fact review by appellate courts is unambiguously bad. Our more limited goal is to describe and defend it as one of many possible responses to an appellate judiciary that has in many constitutional cases arrogated factfinding power to itself.

I. THE PROBLEM OF CONSTITUTIONAL FACTS

Judicial review in constitutional cases has emphasized, since Chief Justice John Marshall's famous words in *Marbury v. Madison*,[75] the

72. Regarding what this balance of factual power might eventually look like, and addressing the concern that absent qualified immunity there would not be sufficient pretrial screening of claims, see Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 345 (2020). For an account of the Court's dominant role thus far, see *infra* Part II.B.

73. *See infra* Part III.B (identifying and evaluating considerations of sound judicial policy relating to fact-stripping).

74. *See e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 572–84 (2006) (interpreting jurisdiction stripping provisions of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739).

75. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

power "to say what the law is."[76] Alexander Hamilton hit a similar theme in Federalist 78: "The interpretation of the laws is the proper and peculiar province of the courts."[77] In keeping with this emphasis on law declaration—and by focusing on Supreme Court cases that themselves often elide the factual record—constitutional scholarship tends to focus on questions of law and legal tests.[78]

But it is the factual record that creates a live dispute, defines the constitutional issues to be resolved, and requires interpretation of the constitutional right in the context of the claim raised.[79] Developing that record is typically the occupation of the lower courts, involving lay jurors, trial court judges, and administrative factfinders.[80] And the development of facts in lower courts is shaped more by rules of civil and criminal procedure, as well as evidence law, than by constitutional rules. Our focus in this Article is on the intersection of those bodies of rules: standards of review that are familiar from appellate procedure, the court-created exceptions to those rules, and Congress's power to help shape the balance.

Before doing so, it will be helpful to briefly describe the process of applying constitutional rules to facts. This involves three discrete steps that are useful to set out conceptually, even if in practice they do not necessarily occur sequentially.[81] First, in federal courts, the rules of evidence, civil procedure, and criminal procedure set out standards for discovery and development of a factual record. The relevant facts must be identified, and there must be a process for developing that record so that the parties have notice and an opportunity to contribute to it.

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76. *Id.* at 177.

77. THE FEDERALIST NO. 78, at 439 (Alexander Hamilton).

78. There are notable exceptions, of course, on which we draw throughout this Article. But in broad terms, much more attention is given to matters of law than fact. For a wonderful discussion of *Marbury*'s influence in establishing the role of federal courts in deciding constitutional law issues, see generally Richard H. Fallon, Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1 (2003).

79. *See* Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to* Originalism: Standard and Procedure, 135 HARV. L. REV. 133, 149 (2022) ("[L]egal reasoning involves the distinct steps of (1) deriving a legal norm from the fundamental 'standard' and whatever factors the standard makes legally relevant and (2) applying the legal norm to the facts of the case.").

80. *Marbury* itself is a high-profile exception, given that the Supreme Court called live witnesses in a trial concerning the writ of mandamus sought. 5 U.S. (1 Cranch) at 139.

81. HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374–75 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958) (identifying the three judicial steps of judicial "law declaration," "fact identification," and "law application").

Second, the standard for recognizing such facts, once in the record, must be identified. That standard can vary depending on what prior factfinding has been conducted and by whom—federal or state courts, for example, or for that matter an agency adjudicator. Further, the doctrinal tests associated with the right at issue will determine which facts are relevant and what degree of evidence is necessary.[82] Therefore, third, constitutional law must be applied to the set of facts that is established to determine whether a constitutional rule was violated.

This Part begins with the problem of defining constitutional facts: What facts are relevant to a constitutional claim? Next, we discuss how the factual record is developed. Then we discuss the usual practice of appellate deference to facts found at trial, and how some Supreme Court rulings—including shadow docket and other preliminary rulings—have undermined that longstanding consensus approach. Finally, we discuss a significant exception to the deference typically accorded to lower court factfinding: the controversial doctrine or concept of constitutional fact review, under which appellate courts conduct plenary review even of adjudicative facts in the context of certain constitutional rights claims. This doctrine, which may undergird recent shadow docket and summary approaches by the Supreme Court, increases the power and authority of the appellate courts, including the Supreme Court, sometimes in problematic ways.[83]

A. Defining Constitutional Facts

The process of identifying the types of facts relevant to a constitutional dispute is quite familiar to constitutional litigators and trial court judges, and has been the subject of substantial scholarly attention for decades—much of it focusing on the foundational but fuzzy line between law and fact.[84] It is not our goal here to wade into

82. *See id.* at 375.

83. *See infra* Parts I.D, III.B.

84. *See* Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 899 (1943) ("[C]riteria for ascertaining confidently [whether a question is one of fact or law] prior to court decision have not yet developed."); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1303 (1942) (noting that "[t]he assumption" that the "difference between the facts of a case and the law which is applied to them" is "clear and simple" is "unwarranted and blinding"); *see also supra* note 52.

that debate, except to note that—artificial or not—the distinction is one that is deeply embedded in legal practice.[85]

Some constitutional claims involve more factfinding than others, generally because of underlying doctrinal choices. Broadly speaking, constitutional claims involving brighter-line rules tend to hinge on relatively few facts, while other constitutional claims require application of the law to a broader set of facts.[86] The former tend to correspond to formalist constitutional approaches; the latter to more pragmatic theories. This is all very familiar from the foundational debates between rules and standards, which are in part about what bodies of facts should be relevant to constitutional decision-making.[87]

Further, scholars have often observed, and courts themselves have sometimes explicitly said, that changing the constitutionally defined right also affects the factual inquiry. Daryl Levinson describes the relevant body of facts as a constitutional "transaction," and the framing of a factual claim—including which timing, which harms, and which government conduct is deemed relevant—shapes what information can be used to evaluate whether a constitutional right was violated.[88] As Levinson summarizes, "It all depends on how you slice it."[89] Indeed, the level of constitutional scrutiny itself, when it demands greater fit between a constitutional rule and evidence justifying compliance with it, can be seen as a demand for a higher quality factual record in a constitutional case.[90] As we discuss in more detail below, the fact that the distinction between law and fact can be one of degree does create complications for the regulation of deference.[91] Partly this is because courts can evade statutory mandates of factual deference by declaring

85. *See infra* Part III.A.1 and sources cited therein. Thus, the Supreme Court has called the law/fact distinction as sometimes "vexing," in the context of Rule 52, and adding, "[n]or do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

86. *See* Akhil Reed Amar, Frank H. Easterbrook, John Harrison & William Kuntz, *Panel on Rules Versus Standards in Constitutional and Statutory Interpretation,* 53 TULSA L. REV. 539, 545 (2018) (describing how rules allow a judge to "throw out some facts").

87. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985).

88. *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002).

89. *Id.* at 1314.

90. *Id.* at 1353 ("The development of modern race equal protection jurisprudence traces a shrinking transactional frame that has left vanishingly little room for government allocation of benefits or burdens on the basis of race.").

91. *See infra* Part III.A.1.

a question to be legislative or "mixed" and thus subject to de novo review.[92]

B. Creating the Factual Record

In developing the record, a trial court must determine what the historical facts are—what happened. There may be further work involved in drawing conclusions, weighing, and finding facts based on evidence that may be circumstantial or conflicting. Thus, "what happened?" is a question of fact, but whether the evidence is legally sufficient to assign liability is typically a question of law, or a mixed question of application of the legal standard to the factual record.

An additional body of law defines how facts are developed by the parties in constitutional litigation. That body of law is set out by rules of civil and criminal procedure, but also by court-made rules and constitutional law itself.[93] Those rules may reflect a tension between deference to government interests and the need to ensure adequate opportunities to preserve and develop constitutional claims. Some evidence rules themselves are impacted and defined by the constitutional rights of litigants.[94] Relatedly, courts generally must not foreclose constitutional claims by denying an adequate opportunity to develop a record. Constitutional rights, such as due process rights, ensure such an opportunity.[95]

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92. *See infra* Part III.C.

93. In civil cases, due process more generally regulates the adequacy of the discovery process, and in "access to courts" rulings, the Supreme Court has struck down schemes that deny litigants access to transcripts or other records needed to potentially vindicate important rights-based interests. For an overview, see generally Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019).

94. *See, e.g.*, Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 71 CORNELL L. REV. 57, 61 (2015) (providing an overview of constitutional rules that regulate evidence).

95. In criminal cases, the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), for example, provides a defense right to material evidence. *Id.* at 87. Conversely, Supreme Court doctrines have sometimes limited fact development for constitutional claims. A range of constitutional and civil rights claims were impacted by the Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which requires strict pleading under Federal Rules of Civil Procedure 8(a)(2) and 12(b)(6), in part due to the concern that a lenient pleading requirement "unlock[s] the doors of discovery" for plaintiffs. *Id.* at 678. For critiques, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 879 (2010); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 120 (2011). *But see* Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 503–15 (2010). We discuss qualified immunity doctrine and fact review *infra* Part II.B.

Next, the Constitution and statutes may require a baseline level of factual support for government decisions. The Administrative Procedure Act ("APA") sets out requirements for formal adjudications by administrative agencies, including rules regarding submissions of facts, rebuttal evidence, and hearings.[96] In the same administrative context, the Due Process clauses require minimal factual support: "some evidence" is required to avert arbitrary decision-making in individual cases.[97]

Finally, standards may set out the burden of proof for showing a constitutional violation. In general, a preponderance of the evidence is required in civil cases, but a particular constitutional claim might require specific facts that amount to a heightened showing of "clear and convincing evidence" or a "material" error.[98] Other constitutionally mandated burdens of proof require a stronger showing to support a civil commitment (clear and convincing evidence[99]), a criminal conviction (beyond a reasonable doubt[100]), or a weaker showing for administrative decision-making (some evidence[101]). The Constitution—and particularly the Sixth[102] and Seventh Amendments[103]—also governs when a jury must serve as factfinder.

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96. 5 U.S.C. § 556(d).

97. *See generally* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631 (1988) (explaining the "some evidence" requirement). For early engagement with this question, see generally Frank R. Strong, *The Persistent Doctrine of Constitutional Fact*, 46 N.C. L. REV. 223 (1968).

98. For a discussion of fact identification for constitutional claims, see Monaghan, *Constitutional Fact Review*, *supra* note 52, at 235–36.

99. *See* Addington v. Texas, 441 U.S. 418, 433 (1979).

100. *See In re* Winship, 397 U.S. 358, 364 (1970).

101. *See infra* Part II.C.

102. The Sixth Amendment jury trial right does not always arise in the same posture in criminal cases, where a constitutional claim would be raised on appeal or postconviction. However, Sixth Amendment claims concerning jury trial rights and sentencing arise in the context of the federal sentencing guidelines. Appellate review of district court factfinding related to sentencing, and the appropriate level of deference due to district court sentencing, raises important Sixth Amendment questions. *See generally* Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 N.C. L. REV. 1195 (2021) (answering some of these questions). The Court permits a less deferential appellate approach in that context because "judicial fact-finding in aid of judicial sentencing discretion has historically been understood to stand outside of the Sixth Amendment." *Id.* at 1230. We discuss this issue further *infra* Part III.

103. The Seventh Amendment was enacted for a range of reasons, including due to a concern that the U.S. Supreme Court, with appellate jurisdiction over law and fact, might not respect jury determinations (with a special concern regarding suits by debtors against creditors). *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670–72, 682 (1973). Thus, the Seventh Amendment provides that "no fact tried by a jury, shall be

Thus, as the Supreme Court explained in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[104] the Seventh Amendment jury trial right applies where § 1983 cases "sound in tort."[105]

C. Appellate Deference with Regard to Factfinding

Once facts have been found at trial in accordance with the rules recounted above, an appeal might follow. The standard for recognizing and reviewing facts on appeal varies depending on what prior factfinding has occurred and who conducted it. Our primary focus is on factfinding by lower courts in cases with constitutional claims.[106] And here, the rules are familiar. If a party appeals an adverse decision, a variety of doctrinal rules kick in, generally insulating the initial factfinding by mandating some degree of deference, which is calibrated based on the issue area, the type of fact, and the identity of the decisionmaker. There is no constitutional concern with a federal trial court bearing primary factfinding responsibility. In fact, that role is preferred, unless the primary factfinding authority is assigned to a different Article III court, like a Court of Appeals, or a magistrate serving as an adjunct to a trial court.[107] The Federal Rules of Civil Procedure provide that a trial court judge's findings of fact should not be disturbed unless they are "clearly erroneous."[108] This is a very deferential standard, as the Court has emphasized: "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[109] And the standard for

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otherwise re-examined . . . than according to the rules of the common law." U.S. CONST. amend. VII.

104. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

105. *See id.* at 709. For discussion of the Court's historical approach to the Seventh Amendment, see Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 872–86 (2013).

106. To be specific, we mean lower courts within the U.S. system. Factfinding by a foreign court might raise issues of comity, but those are beyond our remit.

107. *See* United States v. Raddatz, 447 U.S. 667, 673–74 (1980) (finding Article III constraints and due process rights satisfied, where a judge makes a de novo determination, but does not need to conduct a de novo hearing, after a magistrate makes factual findings).

108. FED. R. CIV. P. 52(a)(6).

109. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). In *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), the Court said:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. . . . This is so even when the district court's findings do

granting a new trial where a jury has found for a party is more demanding, requiring a finding as a matter of law that "a reasonable jury would not have a legally sufficient evidentiary basis" for its verdict.[110]

These typical rules seem short-circuited by prominent recent Supreme Court cases,[111] including some that are part of the shadow docket—the Supreme Court's growing tendency to rule on emergency writs of injunction or to vacate injunctions granted in lower courts, rather than after a full factual record has been developed in a district court.[112] Such rulings, often not accompanied by reasoning, do not explain whether they adequately considered the factual record below.

In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[113] for example, the Court—without briefing or argument—invalidated a COVID-19 restriction that limited occupancy for a category of gatherings that included religious services, stating: "Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten."[114] In other cases, and again without providing reasons, the Court overturned and stayed preliminary injunctions granted by district courts based on substantial records against a jail and a federal prison regarding unconstitutionally dangerous conditions during COVID-19.[115] Was it that the Court favored ruling promptly without a factual record in the case of religious rights, but favored disregarding the factual record in

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not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Id. at 573–74 (internal citations omitted).

110. FED. R. CIV. P. 50(a).

111. *See supra* notes 17–38 and accompanying text.

112. For an overview, see *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/P983-QBKN] (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. of Tex. Sch. of L.).

113. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

114. *Id.* at 68.

115. *See, e.g.*, Barnes v. Ahlman, 140 S. Ct. 2620 (2020); Williams v. Wilson, 207 L. Ed. 2d 168 (2020) (mem.) (blocking lower court orders requiring federal prison to evaluate inmates for transfer due to pandemic risk).

the case of prisoner's rights? One cannot say given the summary rulings and lack of discussion of applicable standards of fact review.[116]

Similarly, in an Eighth Amendment challenge to execution methods, the Court vacated a preliminary injunction that itself cited disputed expert reports,[117] instead conclusorily resolving that expert dispute in favor of the government.[118] Was this because the Court thought it was clear error to credit the challenger's experts, or because of the underlying demanding legal standard? While the Supreme Court often says it is a "a court of final review and not first view,"[119] these early-stage interventions disregard district court factfinding.

The Court's avoidance of fact deference in these cases runs against the grain of standard arguments grounded in comparative institutional competence.[120] Waiting for a full district court disposition "guarantees that a factual record will be available to [the Court], thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances."[121] More colloquially, trial courts are "closer to the facts," while appellate courts are left only with the "cold" record. Conversely, appellate courts are thought to have a comparative advantage with regard to stating and applying the law—or, at the very least, no *dis*advantage as compared to the trial courts—and thus questions of law can be decided without deference to the original decision. As Charles Allen Wright summarizes, criticizing appellate courts for avoiding standards of deference: "The principal consequences of broadening appellate review are two. Such a course impairs the confidence of litigants and

116. For extended discussion of the effect these rulings had on lower courts during the pandemic, see generally Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117 (2022).

117. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 218 (D.D.C. 2020), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).

118. Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020) (per curiam).

119. *See, e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (internal citations omitted).

120. *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759 (1982) ("The most notable exception to full appellate review is deference to the trial court's determination of the facts. The trial court's direct contact with the witnesses places it in a superior position to perform this task."). *But see* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 506 (2004) (asserting that there is too little appellate fact review undertaken in criminal cases); *id.* at 439 (arguing there are "many respects in which appellate courts enjoy substantial advantages over trial judges and juries when it comes to the evaluation of historical facts").

121. Illinois v. Gates, 462 U.S. 213, 224 (1983).

the public in the decisions of the trial courts, and it multiplies the number of appeals."[122] In constitutional cases, the need for confidence in federal trial court decisions, and in avoiding unnecessary appeals, may be heightened.

Much more can be, and has been, said about the texture and function of standards of review, including with regard to questions of fact.[123] We will revisit some of the relevant commentary in Part III, in the course of discussing congressional fact stripping and considerations of sound judicial policy. Our point so far is simply to establish and explain the baseline: factfinding is crucial to constitutional rights litigation, and while trial court factfinding involving protected jury trial rights typically gets deference on appeal, that norm has been threatened by recent Supreme Court rulings.

D. Denial of Deference on Appeal: The Doctrine of Constitutional Fact Review

The story until this point has been a relatively simple one: appellate deference to lower court factfinding is supported by constitutional jury trial rights, the Federal Rules of Civil Procedure, and statutes, and has been emphatically endorsed by the Supreme Court. Why, then, is there any need to consider legislative mandates in the form of fact stripping? The short answer is that, in a variety of contexts, the Supreme Court and appellate courts do *not* defer to lower court factfinding. Sometimes this lack of deference is implicit, as in the shadow docket cases discussed above. In other situations, however, the Court explicitly rejects fact deference. The most prominent example of this is the doctrine of constitutional fact review.[124]

Constitutional fact review functions as a substantial exception to the deference doctrines described above and is our main focus in this

122. Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779 (1957).

123. *See generally* HARRY T. EDWARDS & LINDA ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS (3d ed. 2018).

124. There are, of course, other situations in which appellate deference might not be warranted—for example, if the facts underlying the earlier opinion are simply no longer valid. *See* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 287–96 (1999) (providing examples of facts changing between trial and appeal and arguing appellate updating of the facts is the least imperfect option).

Article.[125] It describes a set of practices in which appellate courts engage in de novo review of the facts underlying the application of a constitutional standard—an "independent examination of the whole record,"[126] which would otherwise be insulated under Rule 52(a) in civil cases absent clear error.[127]

This doctrine may be the unstated rationale in shadow docket rulings in which the Supreme Court has intervened at a very preliminary stage without addressing the factual record developed in the trial court. In *Roman Catholic Diocese*, the Court commented on the strength of the First Amendment claim at issue and granted emergency relief based on its review of the hearing record in the district court and "no evidence" the plaintiffs had contributed to the spread of COVID-19.[128] While the Court did not discuss standards of review, Justice Gorsuch's concurrence referred to applying "our usual constitutional standards" even during a pandemic.[129] Only the dissenters pointed out that the district court had heard the evidence, held hearings, and denied a preliminary injunction.[130] Without being explicit, the majority may have meant to apply a de novo standard of review to the constitutional claim and preliminary injunction in question.

Whether or not the majority in *Roman Catholic Diocese* was consciously applying the doctrine of constitutional fact review, the case is a good demonstration of how the doctrine works—including that it is something of a misnomer in that it permits disregard of (lower court) factfinding. As the Supreme Court put it in *Bose Corp. v. Consumers Union of United States, Inc.*,[131] in some situations the independent

125. *See* Hoffman, *supra* note 50, at 1431 ("Constitutional fact doctrine represents one of the few points of resistance to this trend of ever-greater deference to the findings of the trial court.").

126. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (internal citation and quotation marks omitted).

127. *See* FED. R. CIV. P. 52(a); Anderson v. City of Bessemer City, 470 U.S. 564, 573–74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."); Monaghan, *Constitutional Fact Review*, *supra* note 52, at 238 ("Constitutional fact review presupposes that appellate courts will render independent judgement on any issues of constitutional 'law' presented. Its distinctive feature is a requirement of similar independent judicial judgment on issues of constitutional law 'application.'").

128. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

129. *Id.* at 71 (Gorsuch, J. concurring).

130. *Id.* at 76 (Breyer, J. dissenting).

131. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984).

examination approach "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."[132] Such plenary review includes adjudicative facts—the kinds of facts generally entitled to the most deference on appeal.[133]

Bose helps to shed light on the underlying rationale for this de novo review approach to facts underlying certain constitutional claims. *Bose* was a defamation case that turned on whether a statement was made with actual malice under the rule of *New York Times Co. v. Sullivan*.[134] In *Sullivan*, the Court had said "[w]e must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[135] In *Bose*, the Court held that this need for independent review was not precluded by Federal Rule of Civil Procedure 52(a)'s requirement that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[136] Although the Court would later seemingly limit the scope of its holding,[137] *Bose* effectively stated a strong version of constitutional fact review: that appellate courts can—and sometimes must—engage in plenary (that is, total and nondeferential) review of lower court factfinding in certain constitutional contexts.[138]

The scope, justifications, and drawbacks of constitutional fact review have been the subject of extensive scholarly examination and criticism.[139] Perhaps most prominently, Henry Monaghan explores the issue in the First Amendment context, and concludes that "it may be assumed that at least the federal appellate courts have authority to exercise independent judgment with respect to adjudicative facts

132. *Id.* at 501.

133. *See supra* note 47 and accompanying text.

134. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

135. *Id.* at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

136. FED. R. CIV. P. 52(a) (as amended to Jan. 3, 1989).

137. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 689 n.35 (1989) (disagreeing with Petitioner's reading that the *Bose* Court rejected the trial court's credibility determination).

138. This has been particularly prominent in First Amendment cases. *See* Benjamin, *supra* note 124, at 334–35 (discussing examples). *See generally* Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229 (1996).

139. *See supra* note 52.

decisive of constitutional law application. But it goes too far to convert this competence into a duty."[140] Indeed, it could not be an absolute duty, given the authority that the Seventh Amendment entrusts to juries.[141] To the degree that explanations and justifications for constitutional fact review have been offered, they tend to fall into three categories: first, the importance of providing substantive protection for certain constitutional rights (in particular the First Amendment[142]); second, the role of appellate courts in law development[143]; and third, the need for independent review on appeal where there is reason to believe that the original factfinder is biased or incompetent.[144] A fourth could be whether a question was traditionally allocated to judge or jury.[145]

These are primarily arguments about sound judicial policy and comparative institutional competence. It is therefore striking the degree to which the treatment of a question as involving constitutional fact transfers power to appellate courts and away from trial courts—which as noted, have a legally protected factfinding role.[146] The potential breadth of this transfer is especially notable considering that the Supreme Court itself not only created the doctrine of constitutional fact review but also has broad control over how that doctrine applies—it can, for example, effectively denote something as a matter of constitutional fact and thereby avoid the deference that would typically be due to a lower court determination.

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140. *See* Monaghan, *Constitutional Fact Review*, *supra* note 52, at 276.

141. U.S. CONST. amend. VII (providing in part that "no fact tried by a jury, shall be otherwise re-examined . . . than according to the rules of the common law").

142. FAIGMAN, *supra* note 11, at 127 (noting that it is "less clear" whether the doctrine applies "[i]n cases outside free speech").

143. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501–02 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law . . . .").

144. Miller v. Fenton, 474 U.S. 104, 114 (1985) (explaining that "the Court has justified independent federal or appellate review as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor'" (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 518 (Rehnquist, J., dissenting))).

145. *Id.* at 113–14.

146. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1984) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); *see also* Larsen, *Alternative Facts*, *supra* note 2, at 181, 240–47 (providing "examples of federal district court judges (judges appointed by Presidents of both parties)" and distinguishing between "good facts" and "alternative facts").

II. REGULATING CONSTITUTIONAL FACTFINDING

The prior Part demonstrated the essential role of factfinding in constitutional litigation and the importance of understanding which court—trial or appellate—bears primary responsibility for that role. Supreme Court–created doctrines like constitutional fact review transfer much of that power from trial courts to appellate courts in a potentially wide range of cases and contexts. Particularly at a time when other claims of power by the Supreme Court have prompted serious calls for significant judicial reform, this doctrine deserves to be fully interrogated, since it raises hard questions regarding the role of constitutional claims, appellate review, and the institutional roles of federal courts. Of course, the degree and details of that deference are themselves nuanced questions, and the answers might be context-specific. Our focus here is less on *what* the deference should be than on *who* should get to delineate it.

The debates over constitutional factfinding recounted above tend to assume that the Supreme Court has the final word on how constitutional claims are factually developed. The target of criticism is thus Court-made doctrine, and the presumptive hope is that the Court will revisit it.[147] But that is not the only option. In his discussion and critique, Monaghan notes an important caveat:

> I do not consider here the judicial duty under statutes or rules that *enlarge* the scope of appellate review. For example, the ancient practice in equity appeals opened all questions of law and fact (not resting on credibility) to the independent judgment of the appellate court. Nor do I consider whether distinctive issues are implicated in appellate review of federal statutory claims.[148]

Monaghan ultimately concludes that "appellate courts, including the Supreme Court, have the authority to engage in constitutional fact review . . . *at least absent restrictive legislation*."[149] Thus, he implicitly suggests, Congress has power to narrow the scope of appellate review regarding the Supreme Court and inferior courts under Article I and Article III. Perhaps Congress can also enlarge the scope of such appellate review.

In the remainder of this Article, we argue that the shape of constitutional fact review and the deference given to lower court

147. Monaghan, *Constitutional Fact Review*, *supra* note 52, at 239 n.56.

148. *Id.*

149. *Id.* at 264 (emphasis added).

factfinding should not begin or end with the Supreme Court. In Part III, we evaluate constitutional constraints and considerations of sound judicial policy. In this Part, we show that while our proposal is novel, Congress has in various ways *already* regulated the development and review of facts in a range of areas involving initial factfinding done by agencies or state courts. And while our focus here is on constitutional cases originating in federal district courts, these other contexts are instructive in that the Court has largely deferred to the statutory rules. In some cases, those rules provide for more robust factual review than the constitutional minimum; in other areas, Congress has limited the factfinding power of appellate courts. In canvassing some illustrative examples here, our goal is to show that various forms of fact-stripping legislation already exist with the Court's blessing.

A. Article III and Article I Limits

Before discussing specific examples of fact stripping, we set out what precedent can tell us about Article I and Article III limits on Congress' power over federal court factfinding.

1. *Article III and the Supreme Court.* In defining the power of the Supreme Court, Article III provides that Congress has the power to regulate the Court's "appellate Jurisdiction, both as to Law and Fact," under the Exceptions and Regulations Clause.[150] Congress has sometimes done so, and the Court has indicated that this did not raise larger constitutional concerns where other avenues for review remained in place.[151] The first Congress set a precedent for limiting fact review by the Supreme Court in the Judiciary Act of 1789, when it chose not to give the Court jurisdiction over every federal question case. Section 25 of that Act provided a limited power to review state supreme court rulings involving questions of federal law through writ of error review, a type of review confined to questions of law that only permitted correcting errors of law preserved on the record.[152] To be

150. *See* art. III, § 2, cl. 2.

151. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 105–06 (1869) (reading the Act of March 27, 1868 narrowly only to repeal appellate jurisdiction under the Habeas Corpus Act of 1867, not habeas corpus more generally).

152. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86. Congress later provided for appeals in equity and admiralty cases. For a forthcoming article exploring the history of these developments regarding writ of error under the original Judiciary Act, see Aaron-Andrew P. Bruhl, Equity on Appeal 32–33 (Jan. 18, 2023) (unpublished draft) (on file with authors).

sure, over time, the Court interpreted that writ to permit examination of the application of federal law to the factual record.[153] Nevertheless, it was clear that Congress had the power, which the Court repeatedly upheld, to restrict the Supreme Court to writ of error and cases at law.[154] Whether or not such generous interpretation of legislation is warranted, Congress has sometimes spoken with clarity on the topic.

Supreme Court–focused jurisdiction-stripping proposals to date have focused on the "Law" and whether such legislation would raise Article III concerns regarding the ability of the Court to perform its essential law-declaring functions[155] or, as Henry Hart famously puts it, "the essential role of the Supreme Court in the constitutional plan."[156] Both the caselaw and the scholarship concerning the "essential" functions of the Supreme Court focus on its ability to review questions of law raised by Cases and Controversies.[157] Here, we explore the "Fact."

2. *Article I, Article III, and Inferior Federal Courts*. As compared with the large literature on jurisdiction-stripping statutes, far less attention has been given to the constitutional role of lower federal courts in developing *facts*. The latter involves analysis of both Article I and Article III, as well as other constitutional rights, where Article III refers to congressional power to establish the "inferior" federal courts, and Article I enumerates Congress' power to "constitute" such "inferior" tribunals.[158]

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153. *See* Henry P. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1935–36 n.65 (2003) [hereinafter Monaghan, *Supreme Court Review*].

154. The Supreme Court upheld these statutes even though doing so was quite contrary to the traditional practice in equity and admiralty that permitted review of facts. *See* Bruhl, *supra* note 152, at 32.

155. *See, e.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038–39 (1982) (arguing, although Exceptions Clause permits Congress to strip the Court's appellate jurisdiction over any class of cases, such law would "violate the spirit of the Constitution" because the Constitution "contemplate[s] . . . a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law").

156. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

157. For the classic discussion, see *id.*; see also the discussion below in Part II.A.2.

158. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* art. I, § 8, cl. 9 (Congress shall have the power "[t]o constitute Tribunals inferior to the supreme Court").

There are constitutional limits on the degree to which Congress may assign cases raising federal issues to non–Article III courts. And while that nuanced topic is largely separate from our focus on fact review by federal courts, we briefly discuss it here because it helps to shed light on Congress' power regarding fact review by inferior federal courts. In the key case of *Crowell v. Benson*,[159] the Supreme Court emphasized "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."[160] However, the *Crowell* Court set out that where private rights and constitutional rights are implicated, Congress cannot fully assign adjudication to non–Article III courts, and must at least provide an opportunity for de novo review of constitutional claims in an Article III court.[161] Thus, Congress may assign factfinding power to adjunct courts, but only so long as certain "essential attributes" of judicial power are retained by an Article III court, as the Court later put it in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[162] Indeed, in drafting the APA, as developed in Part II.C, Congress provided *more* judicial review of facts than the bare minimum the Due Process Clause might require.[163]

Thus, Congress's Article I power over factfinding by lower federal courts may reflect the interest in preserving the essential role of federal courts, under Article III, and the interests protected by underlying constitutional rights, such as due process rights of litigants. In the following sections, we further develop these complex constitutional considerations in specific settings.

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159. Crowell v. Benson, 285 U.S. 22 (1922).

160. *Id.* at 51–52.

161. *See, e.g.*, *id.* at 56 (finding that constitutional facts must be found by courts, or reviewed de novo, rather than be exclusively placed in an administrative process). The Court later held that the holding regarding the distinction between jurisdictional and constitutional facts has been "undermined by later cases," though its "general principle . . . remains valid." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982).

162. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79–81 (1982).

163. *See supra* Part II.C. For present purposes, we do not focus on debates concerning the scope of the independent fact review doctrine concerning administrative agencies, a topic which is well-developed in the literature. For an excellent summary, see Judah A. Schechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483 (1988).

B. Section 1983 and Factfinding

Our focus in this Article is on review of constitutional claims initiated in lower federal courts. Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, has been the main statutory vehicle through which such claims are litigated. The purpose of that statute was to ensure a remedy in federal court for constitutional violations.[164] Under the doctrine of qualified immunity, the Supreme Court has regulated fact development and review in civil cases raising constitutional claims. That doctrine has sharply limited access to discovery and remedies for civil rights plaintiffs.[165] Moreover, the Court has recently given the doctrine pride of place on its docket and frequently used it to overturn lower courts in civil rights cases.[166]

Qualified immunity is particularly salient given the nondeferential manner in which the Supreme Court has reviewed facts in § 1983 cases, and thereby encouraged appellate and lower courts to summarily deny relief as well. The doctrine provides that in order to be liable for damages, government officials must have been on notice that actions taken were unlawful at the time, based on "clearly established law" applicable to similar facts and circumstances.[167] Further, the Court has permitted collateral orders to appeal qualified immunity denials by lower courts.[168] In ruling on such orders, the Court has limited such interlocutory review to questions of law.[169] And yet the doctrine has been used to review factfinding by lower courts even on interlocutory review, as part of applying and answering the legal question whether the law was clearly established at the time of the conduct. For example, in a 2021 per curiam opinion the Supreme Court reversed a denial of qualified immunity without briefing or argument in a case involving police use of force, emphasizing the degree to which the "facts and circumstances of" the case matter.[170] The Court recited "[t]he undisputed facts," and held the plaintiff and lower court had failed to

164. Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 32 DUKE L.J. 987, 1013–14 (1983).

165. *See generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013) (discussing Supreme Court decisions strengthening the qualified immunity defense).

166. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48 (2018).

167. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

168. Mitchell v. Forsyth, 472 U.S. 511, 524–25 (1985).

169. Johnson v. Jones, 515 U.S. 304, 312 (1995).

170. Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021) (per curiam).

identify prior cases with "facts like the ones at issue here."[171] The Court has been emphatic that it closely examines the similarity of facts in prior cases. As the Court stated in *Kisela v. Hughes*[172]: "Precedent involving similar facts can help move a case beyond the otherwise hazy borders between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful."[173]

Yet when the Court is engaging in this type of factual analysis and tasking lower courts with doing the same, the standard of review is never clearly stated. Left unstated is that the Court is legally obligated to view the facts, in a case at the summary judgment stage, in the light most favorable to the nonmovant. In her dissent from the per curiam opinion in *Kisela*, Justice Sotomayor emphasized that the majority "misapprehends the facts," and the unusual remedy of a summary reversal of a lower court was not warranted when "[t]he relevant facts are hotly disputed."[174] Clearly, as with the doctrine of constitutional fact, the Court views its role in qualified immunity cases as paramount, and therefore applies law to fact de novo. The Supreme Court has also suggested it is appropriate, and has in practice acted, to permit interlocutory review of mixed questions of fact and law in the qualified immunity context, policing the application of its "clearly established law" test.[175] Thus, in civil rights cases brought under § 1983, the Supreme Court interprets the statute to permit the Court to closely examine factual questions at preliminary stages of litigation, as well as to review de novo the rulings of lower courts. None of these standards of interlocutory review are set out in § 1983 or any other statute. They are Supreme Court–made.

These rulings and standards of review are not inevitable. They reflect a view that the Supreme Court can determine facts and dismiss cases in summary rulings, and do so counter to factfinding and deferential standards of review that would otherwise apply. However, the qualified immunity doctrine that has been wielded by the Court in this manner reflects a very particular (and controversial[176]) interpretation of § 1983, which is a statute. While the Court engages in a very specific type of fact review in these rulings, analogizing facts

171. *Id.* at 6, 8.

172. Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam).

173. *Id.* at 1153 (internal quotations omitted).

174. *Id.* at 1155, 1162 (Sotomayor, J., dissenting).

175. Mark R. Brown, Q*ualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114 PENN. STATE L. REV. 1317, 1317, 1325 (2010).

176. *See supra* notes 165–66.

from prior precedent to a case in question and demanding that lower courts do the same, that undertaking is not clearly called for by the underlying statute. Congress could amend § 1983 to define and reshape the factual review that federal courts engage in. Therefore, the doctrine could be revisited by Congress, as we will detail in Part III.

C. Agency Fact Review Statutes

Another body of law defines what level of judicial deference is due to factfinding by administrative agencies, which is relevant here because it is another setting in which Congress has provided for enhanced factual review. Early in the history of the administrative state the Supreme Court—and later Congress—faced the question of whether and how much federal courts must defer to agencies' factfinding. The Due Process Clause requires "some evidence" in support of such decisions, a very low standard.[177] However, as Part III discusses in more detail, the APA goes beyond that constitutional floor by requiring that formal agency adjudication decisions be supported by "substantial evidence."[178] Not only does due process structure fact review of agency rulings, but some administrative agency decisions also implicate our focus on constitutional claims, including whether the agency decision was itself constitutionally adequate. Thus, the APA provides for de novo review for certain constitutional claims,[179] a standard like a constitutional fact review doctrine, for agency adjudication. Since its ruling in *SEC v. Chenery Corp.*[180] establishing the "ordinary remand rule," the Supreme Court has relatedly emphasized factfinding normally should be conducted by the agency.[181]

Immigration adjudication provides a useful example in which Congress has repeatedly revisited fact review standards, taking into account shifting policy considerations, but also constitutional constraints. During the "finality era," lasting from 1891 until the enactment of the 1952 Immigration and Nationality Act ("INA"), immigration removal decisions were deemed final in a series of federal

177. *See* Neuman, *supra* note 97.

178. 5 U.S.C. § 706(2)(E) (providing that reviewing courts shall hold unlawful and set aside findings "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute").

179. *Id.* § 706(2)(F).

180. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

181. *Id.* at 95.

statutes, and reviewed based on a "some evidence" standard, reflecting the minimal amount of due process recognized by the U.S. Supreme Court.[182] However, in the 1952 Act, Congress extended the APA substantial evidence standard to immigration removal decisions.[183] More recently, the INA, as amended by the 2005 Real ID Act, bars habeas review in federal district courts of an order of removal of criminal noncitizens, but permits petitions for review filed in courts of appeals regarding "constitutional claims or questions of law."[184]

The jurisdiction-stripping choice centralized review of removal orders in the courts of appeals. But it also affected fact review by removing the ability of federal trial courts to conduct hearings and investigate facts.[185] Congress centered fact review in the courts of appeals, which "shall decide the petition only on the administrative record on which the order of removal is based."[186] Yet it was not clear whether Congress meant to limit the ability to supplement the factual record on appeal.[187] In response, courts of appeals, when the factual record is inadequate to resolve a constitutional claim, follow *Chenery* and remand to the administrative agency to further develop the record.[188]

A range of other types of immigration-related claims were affected by these statutory revisions.[189] One final category of factual determination with special constitutional significance is whether a

182. *See* Act of Mar. 3, 1891, ch. 551 § 8, 26 Stat. 1084, 1085–86; Immigration Act of 1903, ch. 1012, § 25, 32 Stat. 1213, 1220; Immigration Act of 1907, ch. 1134, § 25, 34 Stat. 898, 906–07; Immigration Act of 1917, ch. 29, § 17, 39 Stat. 874, 887; Ekiu v. United States, 142 U.S. 651, 664 (1892). *See generally* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 147 (2006) [hereinafter Neuman, *Adequacy of Direct Review*] (exploring the REAL ID Act's effects on direct review of immigration proceedings).

183. *See* 5 U.S.C. § 706(2)(E).

184. *See* 8 U.S.C. § 1252(a)(2)(A)–(B), (D). Courts have also remanded cases to agencies for factfinding. *See, e.g.*, Rafaelano v. Wilson, 471 F.3d 1091, 1098 (9th Cir. 2006); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 481 (2006).

185. The Supreme Court has clarified, after the circuits had been divided, that mixed questions may be reviewed, and the Court of Appeals may consider "the application of a legal standard to established facts." Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1072 (2020).

186. 8 U.S.C. § 1252(b)(4)(A). Congress also removed the ability, previously available under the Hobbs Act, to remand to an agency for further findings. *Id.* § 1252(a)(1) (reflecting the change).

187. *See* Neuman, *Adequacy of Direct Review*, *supra* note 182, at 147.

188. *Id.*

189. For an overview, see *id.* at 145–49.

person is a citizen. A citizenship claim, if successful, removes any authorization for immigration authorities to detain or remove a person.[190] The Supreme Court has long held that due process requires de novo review of claims regarding citizenship.[191] The amended statute reflects that view, emphasizing that claims regarding nationality must be transferred to the district court for further factfinding if there is a "genuine issue of material fact."[192]

In calibrating these various standards for factual review of immigration determinations, Congress sought to strip both jurisdiction and fact review. And it did so both to achieve policy goals regarding levels of deference to immigration decision-making and to establish the role of federal courts to avoid constitutional questions, including under the Due Process Clause and the Suspension Clause.[193] To be sure, Congress may not have completely avoided constitutional concerns in doing so.[194] Without fully examining the complex questions raised by these immigration statutes or the caselaw that has wrestled with these questions, we aim to describe here how, within constitutional limits, Congress can and has both jurisdiction stripped and fact stripped, calibrating federal courts' role in hearing appeals from agency determinations.

D. Fact-Stripping Statutes

The Supreme Court Commission extensively discussed jurisdiction stripping, focusing on limiting the appellate jurisdiction of the U.S. Supreme Court pursuant to Congress's Article III power. As the commission noted, the Supreme Court has never addressed clearly what, in addition to "Exceptions" to appellate jurisdiction, "regulations" might consist in.[195] Scholars have long debated to what

190. *See* 8 U.S.C. § 1226(a) (only an "alien" may be "arrested and detained" pending a removal decision).

191. Ng Fung Ho v. White, 259 U.S. 276, 283 (1922).

192. 8 U.S.C. § 1252(b)(5).

193. Chen v. U.S., 471 F.3d 315, 326 (2d Cir. 2006) (quoting INS v. St. Cyr, 533 U.S. 289, 300 (2001)) ("The Conference Report makes clear that Congress, in enacting the REAL ID Act, sought to avoid the constitutional concerns outlined by the Supreme Court in *St. Cyr*.").

194. *See* Neuman, *Adequacy of Direct Review*, *supra* note 182, at 158 ("Judges will need to construe both new and existing statutory provisions in light of their place in the revised statutory scheme as a whole, and in light of the constitutional imperative recently recapitulated by the Supreme Court in *St. Cyr*.").

195. PRESIDENTIAL COMMISSION, *supra* note 55, at 137 ("'Exceptions' to appellate jurisdiction involve limiting what cases the Court may hear. But 'regulations' of appellate

degree Congress may limit such jurisdiction.[196] But their focus has been on jurisdiction, and neither the commission nor scholars have taken up the subject of altering the factual review authority of the Supreme Court, much less that of the inferior courts.

1. *Supreme Court Fact Review of State Supreme Courts*. The First Congress, however, did take up that problem. Because of the Court's Article III power to review questions in "Law and Fact,"[197] there was concern that the Court would reverse fact-based jury verdicts.[198] The Seventh Amendment responded to this concern by providing that "no fact tried by a jury, shall be otherwise re-examined . . . than according to the rules of the common law."[199] In addition, as noted, the Judiciary Act engaged in fact stripping by limiting writ of error review of state supreme court rulings to questions of law, a limitation which the Supreme Court resisted over time by interpreting it to include application of law to fact.[200] Those aspects of the first Judiciary Act highlight how the first Congress viewed its power to define the law-reviewing power of the Court, but also how it viewed the role of fact development as an important matter for trial courts with jurors.

Congress can further limit the factfinding and review powers of Article III courts, so long as adequate means exist to preserve the essential role of the Supreme Court and that of the inferior courts, particularly so that litigants can still present constitutional claims. Indeed, Congress' prior efforts to both jurisdiction strip and to fact strip provide models and highlight concerns.

2. *Habeas Fact Review*. In federal habeas corpus, Congress has engaged in fact stripping to narrow the role of federal courts in reviewing state court rulings on constitutional claims asserted postconviction. In enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress set out a series of new standards requiring deference to state court factfinding regarding constitutional claims, as well as standards limiting additional fact

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jurisdiction may also include deciding how the Court hears appeals and *who* hears them. The Supreme Court has never addressed this precise issue.").

196. *See infra* Parts II.A.1 & II.A.2.

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

198. *See* Monaghan, *Constitutional Fact Review*, *supra* note 52, at 233–34.

199. U.S. CONST. amend. VII.

200. *See* Monaghan, *Supreme Court Review*, *supra* note 153, at 1969.

development in federal court.[201] The law represented a substantial change in federal habeas corpus practice, and in altering this series of standards, much of the focus of AEDPA was what we term fact stripping rather than jurisdiction stripping.

First, § 2254(e)(1) instructs that a state determination of fact is presumed correct and a petitioner may defeat such a presumption only by clear and convincing evidence.[202]

Second, § 2254(e)(2) sets forth standards for obtaining a hearing to introduce new facts, limiting the district court's ability to conduct such a hearing, even if it deems it useful to do so to further develop the factual basis for a constitutional claim.[203] The Court has emphasized that a petitioner's failure "to develop the state-court record" by engaging in factfinding should rarely be excused by a federal judge.[204] The Court highlighted the statute's "clear text" as well as federalism concerns in embracing congressional power to fact strip.[205]

Third, AEDPA bars relief on a factual challenge to the constitutionality of a state conviction unless the state proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented."[206]

Finally, the statute sets standards for granting relief based on mixed questions of law and fact.[207] In *Cullen v. Pinholster*,[208] the Supreme Court broadly interpreted § 2254(d)(2) to limit the federal court to consideration only of the factual record developed in the state court.[209]

These statutory provisions primarily affect the lower federal district courts, in which federal habeas petitions are typically filed. But

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201. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

202. The statute reads:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

203. *See id.* § 2254(e)(2).

204. Shinn v. Ramirez, 142 S. Ct. 1718, 1733 (2022).

205. *Id.* at 1737.

206. *See* 28 U.S.C. § 2254(d)(2).

207. *See id.* § 2254(d)(1).

208. Cullen v. Pinholster, 563 U.S. 170 (2011).

209. *Id.* at 181–82.

Congress also set out standards of review for federal appellate courts, establishing a restrictive court of appeals screening procedure for certain second or successive habeas petitions.[210] These fact-stripping statutes could be revisited by Congress in the future.[211]

3. *Jurisdiction Stripping and Fact Stripping in Tandem.* Several statutes have restricted factual review by "inferior" federal courts. One example shows how jurisdiction stripping and fact stripping can accompany each other. In 2005, Congress sought to strip jurisdiction in the lower federal courts regarding noncitizen detentions of persons labelled as enemy combatants with statutory provisions that permitted review of certain questions of law in the D.C. Circuit Court of Appeals, but required deference on factual determinations by non–Article III Combatant Status Review tribunals.[212] The Supreme Court ruled in *Boumediene v. Bush*[213] that the Suspension Clause invalidated this scheme.[214] In discussing the constitutional issues, the Court emphasized the need for meaningful review of facts. A federal court must have "some authority to assess the sufficiency of the Government's evidence against the detainee."[215] That court also "must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."[216] Thus, the fact-stripping aspect was highly relevant to the Court's ruling, not just the jurisdiction-stripping aspect of the statute.

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210. 28 U.S.C. § 2244(b)(3)(A).

211. For an extended argument setting out options for AEDPA repeal and amendment, see generally Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739 (2022).

212. Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1005 (as codified at 10 U.S.C. § 801); *see also* Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 667 (2006).

213. Boumediene v. Bush, 553 U.S. 723 (2008).

214. *Id.* at 798.

215. *Id.* at 786.

216. *Id.* In dissent, Chief Justice Roberts noted that factual review standards are "traditionally more limited in some contexts than in others," suggesting that a standard akin to that used when there has been prior immigration agency adjudication was appropriate. *Id.* at 814 (Roberts, C.J., dissenting). In an earlier ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court had ruled on provisions that would have eliminated jurisdiction for federal habeas review of immigration removal decisions. The Court emphasized that the core of constitutionally-enshrined habeas corpus was to review the "legality" of executive detention, focusing on "pure questions of law," but without emphasis on fact development or mixed questions. *Id.* at 305. Thus, in that context, the Court suggested jurisdiction stripping was actually more problematic than fact stripping. *See id.*

In sum, the essential elements of fact-stripping are already present in the law, across a wide range of issue areas. The next logical question is whether they *should* be, as a matter of either constitutional law or sound judicial policy. We turn to those questions in Part III.

III. IMPLICATIONS AND CONCERNS

Befitting the nuanced nature of the problem, the potential solution we have described here also raises further questions. In this final Part, we evaluate two broad categories of potential limitation—constitutional and prudential—that might guide Congress in drafting fact-stripping statutes. We conclude by outlining some ways that appellate judges might resist efforts to restrict their power over facts. To the degree appellate judges *want* to engage in de novo review of factual determinations (and sometimes they will not), they have a variety of tools available with which to evade a statutory mandate of factual deference.[217] Perhaps the most powerful such tool is the denomination of issues as involving mixed questions of law and fact subject to de novo review. Congress, however, can seek to anticipate this type of judicial resistance.

A. Constitutional Constraints?

Any effort to statutorily alter how federal judges do their jobs must consider constitutional limitations. But we do not think that Articles I and III raise insurmountable obstacles to fact-stripping legislation, nor do the requirements of Due Process or other constitutional rights provisions—at least where the facts are first found by a federal district court.

1. *Article III and Congressional Power Over Supreme Court's "Appellate Jurisdiction, both as to Law and Fact."* The scope of Congress' power to regulate the Supreme Court's jurisdiction has been a scholarly obsession for generations,[218] and is often among the first

217. Such evasion is nothing new. *See, e.g.*, John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L. Q. 409, 426–28 (1981) (noting ways appellate judges have evaded Federal Rule of Civil Procedure 52(a)'s clear error standard in applying de novo review to factual determinations); Wright, *supra* note 122, at 764 (same).

218. Any string cite here will be woefully incomplete, but notable contributions include: Hart, Jr., *supra* note 156; Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); James

topics discussed in constitutional law classes. It is standard to categorize that jurisdiction as being both original and appellate.[219] As to the latter, Article III provides that, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[220] Most scholarship and caselaw on the Exceptions Clause have tested the limits—if any—of Congress' ability to strip federal court jurisdiction over certain classes of cases. In effect, the focus has been on the "Law" part of "Law and Fact," and on whether there are limits to the former aspect of congressional power.[221]

Those concerns do not apply with the same force to congressional efforts to regulate the Supreme Court's appellate jurisdiction with regard to fact alone. The Exceptions Clause permits Congress to make regulations regarding the Court's appellate jurisdiction regarding law and fact. So long as inferior courts can consider the application of constitutional law to fact, there is nothing in Articles I or III that should hinder congressional ability to allocate that type of law application to inferior courts. Reserving law declaration to the Supreme Court should not raise constitutional concerns. Whether a statutory limit by Congress on appellate factfinding by the Supreme Court could be enforced or carefully policed is a harder practical question, which we address in part below.[222]

2. *Article I and Congressional Power over "Inferior" Court Factfinding*. The analysis is different when the question is how Congress may allocate factfinding authority as between lower and appellate inferior courts under Article I. As noted, where Article III gives Congress power to establish the lower and appellate federal courts, Article I then explicitly grants Congress the power to

E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011).

219. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

220. *See* U.S. CONST. art. III, § 2, cl. 2.

221. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 506 (1869); Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) ("So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'") (quoting Bhd. of R.R. Trainmen Enter. Lodge, No. 27 v. Toledo, Peoria & W. R.R., 321 U.S. 50, 63–64 (1944)); Sprigman, *supra* note 58, at 1780 (discussing power over "law," not fact).

222. *See infra* Part III.C (discussing potential judicial responses to statutory fact stripping).

"constitute" all such "inferior" tribunals.[223] The Necessary and Proper Clause further expands the capacious outer bounds of Congress' power to make judgments regarding where factfinding should reside, since it applies to the congressional powers enumerated in Article I, Section 8, including the power to constitute inferior tribunals.[224]

The Supreme Court itself has suggested that Congress may allocate factfinding authority as between lower and appellate inferior courts.[225] If the issue is not clear, the courts themselves may decide. Thus, in *Miller v. Fenton*,[226] the Supreme Court noted that "in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact," there is room for the courts to define the relative roles and levels of deference.[227] In such instances, "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[228] Our argument here is that *Congress* can make that "determination" differently. Indeed, Congress essentially overruled *Miller* by enacting AEDPA.

In short, factfinding is not the constitutionally guaranteed role of appellate courts, even if an independent eye on the facts might at times be useful and important. Further, Congress can reallocate factfinding as between different Article III courts, providing that magistrates conduct factfinding first or that trial proceedings be held in a court of appeals.

As Henry Monaghan puts it, "[l]aw declaration, not law application, is the appellate courts' only constitutionally mandated duty."[229] Martin Redish and William Gohl, arguing against the use of

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223. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* art. I, § 8, cl. 9 (Congress shall have the power "[t]o constitute Tribunals inferior to the supreme Court").

224. U.S. CONST. art. I, § 8.

225. Redish & Gohl, *supra* note 62, at 324 ("As for Article III . . . Congress has near-plenary control over the jurisdiction of inferior federal courts and the standards of review that apply to their judgments where courts are concerned.").

226. Miller v. Fenton, 474 U.S. 104 (1985).

227. *Id.* at 114.

228. *Id.*

229. Monaghan, *Constitutional Fact Review*, *supra* note 52, at 239; *see also* Christie, *supra* note 62, at 56 ("In the end, we would all agree with Monaghan that the primary job of appellate courts is to establish law.").

independent appellate review of factfinding by courts and juries, note that "both the Court and scholars ignore the simple fact that appellate courts can fulfill their supervisory role by engaging in de novo review of determinations of *law*, while still providing appropriate deference to trial courts and juries on findings of *fact*."[230] It is a different question, discussed further below, whether there is some institutional or policy advantage to appellate fact review.

One obvious practical complication here is that many constitutional rights claims involve *mixed* questions of law and fact,[231] which are often reviewed without deference to lower courts. For example, whether a person is deemed to be in custody for purposes of *Miranda v. Arizona*[232] warnings is considered a mixed question of law and fact.[233] Similarly, the Court has held that whether a confession statement is voluntary is not just a question of "psychological fact," but a "dispositive question" involving a "uniquely legal dimension."[234] Likewise, in *Ornelas v. United States*,[235] the Court held that both probable cause and reasonable suspicion are "fluid concepts" that must be applied to the facts in a consistent manner,[236] and therefore receive de novo appellate review.[237] The reasoning seems to be not just that the rights in question are important, but also that the standards are not sufficiently clear that lower courts can be trusted to adequately enforce them and provide sufficiently clear guidance to law enforcement.[238]

What is the scope of Congress's power to legislate deference in cases involving such mixed questions? And assuming that it exists, how should the power be exercised? In general, it would appear that Congress can regulate the treatment of such questions so long as there is an adequate opportunity to assert constitutional claims in some

230. Redish & Gohl, *supra* note 62, at 294.

231. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (defining mixed questions as those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

232. Miranda v. Arizona, 384 U.S. 436 (1966).

233. *See, e.g.*, United States v. Swanson, 341 F.3d 524, 528 (6th Cir. 2003).

234. Miller v. Fenton, 474 U.S. 104, 115–16 (1985).

235. Ornelas v. United States, 517 U.S. 690 (1996).

236. *Id.* at 696.

237. *See id.* at 697 ("Independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles.").

238. *Id.* ("[*D*]*e novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined set of rules . . . .") (citations omitted).

federal court.[239] Thus, a statute like AEDPA that limits factfinding by all federal courts is far more troubling (and the Supreme Court has erred on the side of tightening its requirements) than a statute increasing deference to factfinding by federal district courts.

Separation of powers concerns would be raised if Congress appears to be telling courts *how* to decide cases when applying constitutional law to facts. As Henry Hart suggested in the *Dialectic*, "I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide."[240] That concern is prominent in the debates regarding jurisdiction-stripping proposals and is most evident in the ongoing debate about the scope and meaning of *United States v. Klein*.[241] There, the Supreme Court held that Congress may not limit appellate jurisdiction to dictate a "rule of decision" upon the federal judiciary.[242] However, Congress can alter substantive law in a way that will affect litigation, perhaps even specific and pending litigation.[243] If a fact-stripping proposal altered rules of decision—particularly focusing on a specific case[244]—that would raise heightened concerns, as it would if Congress altered jurisdiction to accomplish similar goals. Similarly, retroactive legislation by Congress would raise special concerns if applied to pending litigation.[245] However, apart from such targeted approaches, Congress can readily set general standards of review. Doing so through fact stripping raises *fewer* Article III concerns than jurisdiction stripping, since the former poses fewer

239. *Miller*, 474 U.S. at 114.

240. *See* Hart, Jr., *supra* note 156, at 1373.

241. United States v. Klein, 80 U.S. 128 (1871).

242. *Id.* at 146; *see also* Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 70 (2010) ("But such blatantly violative enactments seem unlikely, which perhaps explains why no actual laws have been invalidated under this principle."); Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception & the War on Terrorism*, 5 J. NAT'L SEC. L. & POL'Y 251, 252 (2011) ("[V]irtually all observers agree that *Klein* bars Congress from commanding the courts to rule for a particular party in a pending case . . . .").

243. *See* Bank Markazi v. Peterson, 578 U.S. 212, 215 (2016) ("Congress . . . may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.").

244. *Cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 575–76 (2006) (*inter alia*, rejecting claims that the 2005 Detainee Treatment Act, passed during the pendency of the case, stripped the Court of jurisdiction).

245. Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994). *See* J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking* United States v. Klein, 79 CORNELL L. REV. 910, 923 (1994).

threats to the constitutionally guaranteed role of inferior federal courts.

3. *Due Process and Jury Trial Rights*. Fact stripping might implicate fewer structural constitutional provisions than jurisdiction stripping, but it would certainly implicate rights provisions if Congress were to mandate that certain facts be given legal weight by judges. For example, if Congress mandated that judges impose certain sentences based on particular aggravating facts, that would raise independent Sixth Amendment jury trial concerns under *Apprendi v. New Jersey*[246] and its progeny. Further, the Constitution specifically gives some factfinding power to juries.[247]

Thus, the main situation in which we think the Constitution might require nondeferential constitutional fact review—and thus rule out congressional fact-stripping legislation—would be when there is sufficient reason to believe that the initial factfinder was biased or failed to safeguard constitutional rights. In *Miller*, Justice O'Connor pointed to this as one of three factors for determining when de novo review of factfinding is necessary (the other two being stare decisis and "the nature of the inquiry itself").[248] In such cases, the argument in favor of independent factual review is relatively straightforward, and the statutory reforms we have suggested here—congressionally mandating deference to found facts—would have little room to operate. Indeed, such a statute might be unconstitutional as applied in such a case, given that the irreducible minimum requirement of procedural due process is to have one's case heard before a neutral

246. Apprendi v. New Jersey, 530 U.S. 466 (2000).

247. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined . . . than according to the rules of the common law." U.S. CONST. amend. VII. That is why, for example, scholars have expressed Seventh Amendment concerns regarding court-made doctrines that permit judges to grant qualified immunity and summary judgment in constitutional cases, and also why it is fairly clear that Congress may statutorily override the doctrine. *See* Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195, 217–19 (2009) (highlighting potential Seventh Amendment issues raised by summary judgment); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2209 (2003) ("It bears emphasizing that qualified immunity does not appear to be constitutionally required."). In more complex rulings, some federal courts have reasoned that jurors may resolve qualified immunity questions. Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 654 n.224 (1989).

248. Miller v. Fenton, 474 U.S. 104, 115–17 (1985).

decisionmaker.[249] Issues of when due process protections attach[250] and what constitutes impermissible bias[251] are of course contested, and we do not purport to settle them here. Our point is simply that fact-stripping statutes, like all statutes, would be subject to those limits.

Indeed, in *Miller*, the Court noted that the pre-AEDPA statute requiring deference to state court factfinding when a federal court reviews a constitutional claim in a habeas petition operated against a background in which Congress assumed that federal courts would review the voluntariness of a confession statement de novo.[252] The Court emphasized that Congress had specifically patterned the statute after language in *Townsend v. Sain*,[253] a case in which the federal court had reviewed such a Fifth Amendment voluntariness claim de novo.[254] Thus, congressional intent was relevant to whether a statute reallocated decision-making authority, and the Court concluded that fact stripping had not occurred.[255] The Court did not suggest any strong presumption against congressional intent to fact strip by treating voluntariness as a "legal question," but did suggest that in the absence of clear text, the federal court should independently consider the question, given the importance of the constitutional rights at issue.[256]

There are powerful arguments that federal independent fact review is more justified in the context of *state* court factual findings, at least where constitutional rights are not adequately safeguarded at the state and local levels. In *Norris v. Alabama*[257]—the case of the Scottsboro Boys—the Alabama state courts rejected a Fourteenth Amendment challenge to jury selection, finding that African Americans had been excluded from juries for reasons other than race, but the Supreme Court decided to "analyze the facts" itself and reversed:

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249. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("[A]n impartial decision maker is essential."); Morrissey v. Brewer, 408 U.S. 471, 486 (1972) (requiring an "uninvolved person" make parole violation determinations).

250. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

251. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884–85 (2009).

252. *Miller*, 474 U.S. at 115.

253. Townsend v. Sain, 372 U.S. 293 (1963).

254. *Miller*, 474 U.S. at 115; *see Sain*, 372 U.S. at 307 (assuming that the voluntariness of a confession was an issue for independent federal court determination).

255. *Miller*, 474 U.S. at 115.

256. *Id.* at 115, 118.

257. Norris v. Alabama, 294 U.S. 587 (1935).

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.[258]

Today, while *Norris* would govern a similar case on direct appeal, if the Court denied certiorari and it was challenged postconviction using federal habeas corpus, AEDPA would sharply constrain federal review.[259]

Greater appellate involvement will not always protect rights, and might undermine them—including, perhaps most obviously, jury trial rights. One area that exemplifies the tension between uniformity and individual rights is the Sixth Amendment context. The posture in the criminal cases discussed so far has involved postconviction review of criminal convictions where factfinding occurred in state courts and federalism-based doctrines justified reluctance to reexamine state factfinding, but were in tension with the need to vindicate constitutional rights. The posture is different when it is a federal criminal conviction. There, the Sixth Amendment jury trial right has been prominently litigated in challenges to exercises of discretion by federal trial judges under the U.S. Sentencing Guidelines. The Supreme Court has emphasized that the jury trial right is an individual right, and all sentence-enhancing factors must be determined by a jury, not a judge.[260] Nevertheless, following *United States v. Booker*,[261] the Court has permitted appellate scrutiny of sentencing within guidelines ranges, with rulings that have not made clear to what extent judges may

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258. *Id.* at 589–90.

259. *See* Garrett & Phillips, *supra* note 211, at 1759–60 (summarizing a range of limitations on remedies imposed by AEDPA provisions and caselaw interpreting them).

260. Alleyne v. United States, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

261. United States v. Booker, 543 U.S. 220 (2005).

exercise full discretion in reaching sentencing decisions based on the facts before them.[262] The Court's goal in "calibrating" this discretion is to promote sentencing uniformity, consistent with Congress's goals in establishing the U.S. Sentencing Commission and tasking it with promulgating guidelines.[263] As a result, this is yet another area in which Congress has altered the appellate role in reviewing trial factfinding, thereby impacting the manner in which Sixth Amendment rights are litigated and promoting more appellate involvement in sentencing. Congress may continue to recalibrate judicial authority and standards of appellate review in this area.

Administrative agency factfinding raises distinct due process and separation of powers concerns, which may explain the balance Congress has struck in regulating federal court fact review of agency adjudication.[264] As described, the APA provides the ability to obtain de novo review of constitutional rights claims regarding agency adjudications, as well as more review of agency factfinding than the constitutional floor would demand. On the one hand, agencies may have expertise regarding some types of factfinding. On the other, they do not have special expertise in interpreting the Constitution, and inadequate factfinding can raise real due process concerns.[265] Indeed, the doctrine of constitutional fact review first emerged in cases involving agency factfinding.[266] Attempting to strike a balance, the APA simultaneously reflects concerns with preserving agency expertise and the need for a federal forum to vindicate constitutional procedure and other rights.

Thus, as Aziz Huq notes, "[t]o grant such deference would create a special dispensation to violate constitutional rules when their

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262. Peugh v. United States, 569 U.S. 530, 550 (2013).

263. *Id.* ("The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: It is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation.").

264. *See supra* Part II.C.

265. Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1517 (2017) (arguing courts "should not defer to executive agencies when the underlying question is one of constitutional interpretation").

266. Christie, *supra* note 62, at 20–26; *see, e.g.*, Crowell v. Benson, 285 U.S. 22, 56–57 (1922) (identifying "the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend," and holding, *inter alia*, that constitutional facts must be found by courts, not in administrative process).

application turned on questions of disputable fact."[267] Similarly, Redish and Gohl defend constitutional fact review as "truly foundational to our constitutional system and essential to the judicial protection of constitutional rights," whose role is to "police decision-makers whose constitutional fact-finding is most suspect—nonjudicial administrative agencies."[268] But, they argue, "the doctrine has no business being used to justify appellate courts' de novo review of factual findings made by either lower courts or juries."[269] In such situations, both due process and jury trial rights suggest that de novo review is constitutionally problematic and fact stripping may in fact better protect constitutional rights.

B. Considerations of Sound Judicial Policy

Within relatively broad constitutional limits, the question of fact stripping is ultimately one of sound policy: When and how *should* appellate courts defer to lower court decision-making?[270] Recall that the Supreme Court itself has explained that "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[271] Because there are innumerable issues and contexts in which factfinding can arise, there is no transsubstantive answer to whether and how Congress should require (or, for that matter, forbid) appellate deference to lower court factfinding. Here, drawing in part on considerations the Court itself has noted, we identify some of the primary factors Congress might consider in any given context.

1. *Protecting Constitutional Rights*. Congress can enact rules designed to increase the factual development of constitutional claims. These rules could focus fact development in trial courts, enhance fact development and review in appellate courts, and set standards for discovery and review. In general, rules of civil and criminal procedure are transsubstantive, and there are no special rules requiring increased

267. Aziz Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1277 (2018).

268. Redish & Gohl, *supra* note 62, at 291–92.

269. *Id.* at 293.

270. *Cf.* Monaghan, *Constitutional Fact Review*, *supra* note 52, at 238 (arguing that "constitutional fact review at the appellate level is a matter for judicial (and legislative) discretion, not a constitutional imperative").

271. Miller v. Fenton, 474 U.S. 104, 114 (1985).

development of facts for constitutional rights claims. However, in some contexts, Congress has enhanced access to discovery to promote the goal of adequate or robust constitutional fact development.[272] In a 2020 statute, Congress required federal judges to issue and enforce orders reminding federal prosecutors of their obligation under *Brady v. Maryland*[273] to disclose exculpatory evidence in criminal cases.[274] As it did in the *Brady* context, Congress could do far more to increase the quantity and quality of fact development in constitutional cases.

There are strong reasons to think Congress could also improve how constitutional claims are factually developed by refocusing the standards of review using fact-stripping approaches we have discussed. One way to do that would be to not focus on particular types of constitutional claims, but to rethink fact-review standards for § 1983 in a transsubstantive way. In this Section, rather than laying out specific fact-stripping proposals for Congress, we discuss strengths and weaknesses of different approaches, including in important areas such as § 1983.

To revisit fact review for § 1983 claims, Congress would first need to address qualified immunity because of the outsized role that the judicially-created doctrine plays in how such claims are disposed. Congress can readily do so, since that doctrine is an interpretation of a statute.[275] Indeed, the proposed George Floyd Act would have removed qualified immunity legislatively, stating that it "shall not be a defense or immunity" under § 1983 that the officer was acting in good faith, or reasonably believed so, or that rights were not sufficiently clearly established.[276] The Act, however, did not define how facts should instead be developed or reviewed on appeal.

One question scholars have asked is what would happen if qualified immunity were actually removed, and whether courts would be right to fear floodgates would be opened to all manner of frivolous

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272. In 18 U.S.C. § 3599(f), Congress established that federal courts in postconviction capital cases could provide indigent defendants with funding for "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence." Courts apply a similar standard in noncapital postconviction cases, where indigent defendants may receive funding for such services when "necessary for adequate representation." *Id.* § 3006A(e)(1).

273. Brady v. Maryland, 373 U.S. 83 (1963).

274. *See* Due Process Protections Act of 2020, Pub. L. No. 116-182, 134 Stat. 894.

275. *See* Schwartz, *supra* note 72, at 312.

276. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102.

civil rights claims.[277] If so, appellate courts might reintroduce something like qualified immunity through other doctrines, such as heightened pleading. Joanna Schwartz addresses those concerns in great detail.[278] Fact stripping provides a statutory alternative. Congress could do more than make clear that there is no qualified immunity defense in § 1983 cases, as the proposed Floyd Act would have done,[279] but could articulate an alternative. Congress could clarify entitlement to discovery to address whether disputed facts exist at the summary judgment stage, and it could set the level of review by appellate courts—for example, requiring clear and convincing evidence of an error in factfinding or in application of constitutional law to the facts. What standard of review is appropriate in civil rights case is a crucial question, and we do not seek to detail reform proposals here, but merely to describe how Congress can set out, in statutes like § 1983, what a cause of action entails for violations of constitutional rights. This type of approach to fact stripping would avoid some of the concerns raised by various jurisdiction-stripping proposals that have focused on particular issues or subject matter.[280]

The lack of a consistent, neutral, and transsubstantive approach is a central concern with what the Supreme Court has already done in its constitutional fact rulings by establishing de novo review for certain favored constitutional claims it deems important or deserving of a higher-court focus. In some cases, the argument in favor of constitutional fact review has been premised on the significance of the type of constitutional interest at stake and the role of appellate courts in protecting it.[281] In *Bose*, the Court gestured in the direction of the law development values described above, saying "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication . . .

277. *See* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1775–76 (2022) (noting these concerns).

278. *See* Schwartz, *supra* note 72, at 312.

279. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102.

280. *See* Monaghan, *Constitutional Fact Review*, *supra* note 52, at 247–48 (noting difficulties of issue-specific approaches to constitutional fact review). For arguments favoring issue-specific jurisdiction stripping, see Sprigman, *supra* note 58, at 1791–1831, and for examples of such proposals, see *id.* at 1796–97 n.81 (citing EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION (1989)).

281. Childress, *supra* note 138, at 1235 (arguing that constitutional fact doctrine in First Amendment cases "finds its source not in law-declaration but rather in a separate protectionist role placed on the courts under a heightened due process standard").

[and] the constitutional values protected by the rule make it imperative that judges . . . make sure that it is correctly applied."[282] But "commentators on the case have argued that the *Bose* Court was truly concerned with only the immediate issue of rights protection."[283] This argument in favor of constitutional fact review is the subject of Henry Monaghan's influential *Constitutional Fact Review*, which in the First Amendment context argues (persuasively in our view) that there is simply no way to justify de novo review for some constitutional claims but not others.[284]

Indeed, there are also good reasons to prefer a neutral and consistent approach to fact review for *all* constitutional claims, rather than specifying deference just for certain ones based on generalizations about their importance and institutional roles relevant for particular types of constitutional rights. Congress could add greater consistency and legitimacy, then, if it focused on an entire category of cases, like it has done in setting out fact review and development standards for habeas corpus in federal courts.

To be sure, Congress could also choose to fact strip to accomplish narrower policy goals, just as Congress has done with jurisdiction stripping. We are cognizant that many of the cases that we have canvassed here call into question whether appellate fact review is necessarily rights-protective. In the immigration context, Congress redirected review of administrative agency decision-making to the courts of appeals rather than having district courts hear habeas petitions, making judicial fact development less common, and as a result, limiting judicial review of factual questions raised in immigration claims.[285]

In contrast, other examples involve enhancing fact review to better vindicate constitutional rights. Recall that in *Sullivan*, regarding First Amendment freedom of speech claims, the Court suggested that "[w]e must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden

282. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 502 (1984).

283. Hoffman, *supra* note 50, at 1456 (first citing Childress, *supra* note 138, at 1256–62; then citing Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 35 (1985)) (seemingly endorsing this view).

284. Monaghan, *Constitutional Fact Review*, *supra* note 52, at 264–65.

285. *See supra* Part II.C.

intrusion on the field of free expression."[286] In *Bose*, the Court again invoked this argument, saying that independent fact review "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."[287] This is a statement about the importance of *vindicating* constitutional claims.[288] As Monaghan notes, "[t]he cases reflect a special judicial concern that the claim of federal right not be incorrectly *denied*."[289]

Thus, we are not convinced by the rights-protectionist argument for broader constitutional fact review by appellate courts. Some constitutional rights might indeed be best vindicated at the trial court level, particularly when the focus is on adjudicative facts. There are larger concerns, discussed already, that the higher-court focus in constitutional law has led to a weakening of discovery and fact-development rights, making it far more difficult for litigants to access information that may provide powerful proof of constitutional rights violations. Congress can alter those doctrines to enhance the role of lower courts in developing and adjudicating constitutional facts, as the George Floyd Act would have done.[290] While that Act would have enhanced litigation of constitutional claims, one could also imagine Congress could instead undermine constitutional rights through legislation, by encouraging appellate courts to limit the discretion of trial judges to consider constitutional claims.

Finally, it is worth emphasizing that constitutional controversies often have constitutional interests on all sides.[291] Mandating factual deference in such a setting would not mean disfavoring a constitutional claim so much as favoring one over another. But *if* constitutional fact review is predicated on the importance of vindicating constitutional values, then appellate courts confronted with disputed facts should err on the side of the constitutional claim. And they seem to be doing the

286. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

287. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984).

288. *See* Dennis v. United States, 341 U.S. 494, 513 (1951) (plurality opinion) ("When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law.").

289. Monaghan, *Constitutional Fact Review*, *supra* note 52, at 245.

290. *See supra* note 276 and accompanying text.

291. *See, e.g.*, Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30 (2018) (describing the "paradigmatic conflicts of a modern, pluralistic political order").

opposite, making congressional intervention worth serious consideration.

2. *Efficiency and Accuracy*. Many of the standard arguments in favor of the trial court's primary role in fact development come back to values of efficiency and accuracy, and the ways that those values are perceived by litigants and the general public. Those arguments can support reinvigorating fact development in the trial courts and limiting fact review. Indeed, there is evidence in the jurisdiction-stripping context that Congress often has aimed not to accomplish partisan or ideological goals, but rather to respond administratively to federal docket management concerns.[292] Yet fact stripping offers a different approach towards those goals. Many, including several Supreme Court Justices, have described how inefficient and unproductive qualified immunity doctrines are.[293] A greater focus on the factual and legal merits of constitutional claims could be far more efficient than the current highly proceduralized and complex system that current doctrine sets out. Based on detailed examination of district court dockets, Joanna Schwartz suggests that if qualified immunity doctrine were discarded, the overall cost and time associated with litigation of constitutional claims would decrease and litigation success rates would remain largely constant.[294] Similarly, real efficiency and accuracy gains could result if Congress revisited the statutory and court-made doctrines that regulate fact review in federal habeas corpus.[295]

For example, the Advisory Committee Note accompanying Rule 52(a)(6)—which mandates clear error review of facts found by district courts—suggests that "recognizing that the trial court, not the appellate tribunal, should be the finder of facts" promotes the "public interest in . . . stability and judicial economy" and "the legitimacy of the district courts in the eyes of litigants."[296] And in emphasizing the trial courts' primary role in fact development, the Supreme Court itself noted, "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to

292. *See* Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053, 1063 (2008).

293. For a detailed discussion, see Schwartz, *supra* note 72, at 312–14.

294. *Id.* at 316.

295. *See* Garrett & Phillips, *supra* note 211, at 1764–68.

296. FED. R. CIV. P. 52(a) advisory committee's note to 1985 amendment.

persuade three more judges at the appellate level is requiring too much."[297]

We have thus far been considering the question of constitutional fact review from the perspectives of trial and appellate judges, and Congress. How does it look from the perspective of a prospective litigant?

Independent fact review on appeal undoubtedly raises the incentives for a losing party to appeal,[298] but also the overall costs of litigation. A plaintiff bringing a constitutional challenge already faces significant hurdles—low probability of success,[299] potentially high attorney's fees, and a basic problem of incentives, as the plaintiff will bear the costs of litigation but only capture a portion of the benefits for prevailing (since, at least for facial challenges, a victory will also vindicate the rights of others). Obviously there are exceptions, and a large scholarly literature addresses the question of whether and how certain constitutional rights are "underenforced."[300] Our more limited point here is that litigating *facts* is a big part of this cost, and thus a substantial obstacle to vindicating constitutional rights in court. The traditional doctrines of appellate deference—clear error review for factual findings—mitigate that cost somewhat, by relieving a plaintiff of the need to relitigate facts on appeal.

A system of constitutional fact review designed to vindicate constitutional rights, as *Sullivan* suggests,[301] likewise favors the plaintiff—even if an appellate court engages in de novo review of the facts, the plaintiff will not have to redefend them. The government, of course, will. But it has substantial advantages as a repeat player with significant resources. By contrast, a system of constitutional fact review that reviews facts underlying *successful* constitutional claims de novo effectively raises the costs of constitutional rights litigation.

Such costs might perhaps be justifiable if they resulted in greater accuracy. But however one defines accuracy, there are good reasons to

297. Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985).

298. Nangle, *supra* note 217, at 426 ("[T]he proposition appears self-evident that litigants appeal trial court decisions much more frequently in view of the broadened range of appellate fact review.").

299. Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 67 & n.38 (2018) (noting probability of success).

300. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

301. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

question whether more appellate factfinding is better in constitutional cases—and, in particular, whether factfinding at the appellate level is likely to be particularly robust.[302] As many scholars have noted in recent years, appellate judges, including Supreme Court Justices,[303] might in fact be more likely than trial court judges to cherry-pick factual assertions—which themselves have not been subject to the rules of admissibility, let alone trial—to support an outcome.[304] But where the issues involve issues of legislative fact, trial-level expertise may not be as relevant to the task.

In federal criminal cases, the policy arguments are more complex. There are reasons to be concerned, as Carissa Hessick describes, with federal appellate courts undermining Sixth Amendment rights at sentencing, by restricting trial court and jury factfinding and ability to depart from sentencing guidelines.[305] Similarly, federal courts long played a crucial role, quite sharply limited by AEDPA and Supreme Court caselaw, in assuring that state courts adequately safeguard constitutional rights during criminal trials. In both contexts, the rights of criminal defendants have been limited by fact-review standards: for persons convicted in federal court, more independent review has limited Sixth Amendment sentencing rights in the trial court. For persons convicted in state court, a reduction in independent review by all federal courts has limited federal habeas remedies for violations of constitutional rights. Whatever the right balance is, again, we emphasize that Congress can recalibrate, as it has done in the past.

3. *Law Development and Comparative Judicial Advantage*. In discussing adjudication by necessarily resource-constrained judges, Lewis Kornhauser valuably describes judicial actors at different levels

302. Gorod, *supra* note 11; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1777–1802 (2014) (challenging the Supreme Court's reliance on amicus briefs to supplement the factual record).

303. Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 11, at 1262 (arguing the Court's "new approach to fact finding," which involves "easier, faster, and more convenient" in-house research, is "troubling").

304. *See e.g.*, Borgmann, *supra* note 2, at 1216 (describing "serious concern" with "the integrity of the evidence introduced on appeal," a problem that "is vividly illustrated by Justice Kennedy's declaration in *Gonzales v. Carhart* asserting, admittedly without 'reliable data,' that women are emotionally traumatized by abortion").

305. *See generally* Hessick, *supra* note 102, at 1208–10 (arguing that appellate review constrains the ability of jurors to find facts at sentencing and the ability of judges to conduct individualized sentencing determinations).

as a "team" with a common goal, to facilitate sound adjudication.[306] Hierarchy and division of labor favors trial court factfinding, while law development should be centered in appellate courts.[307]

Where, perhaps, plenary appellate constitutional fact review can add limited value would be in areas of law subject to a common-law type development of legal rules through the repeated and incremental application of law to facts.[308] This is how the *Bose* Court justified de novo review of actual malice determinations: "[T]he content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication . . . [and] the constitutional values protected by the rule make it imperative that judges . . . make sure that it is correctly applied."[309] *Miller v. Fenton* said much the same in concluding that the voluntariness of confessions should be subject to de novo appellate review, emphasizing the appellate courts' "primary function" as "expositor[s] of law" where "legal principle[s] can be given meaning only through . . . application to the particular circumstances of a case."[310]

Of course, common-law development could occur at the trial level, with the rules and principles emerging from initial factfinding rather than independent appellate review.[311] But such trial-by-trial development would not be effective if it resulted in chaos—different and conflicting decisions being reached across the country, with no discernable rules or principles emerging.

The law development argument thus often goes hand in hand with a second and closely related argument that constitutional fact review

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306. Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1605–07 (1995).

307. *Id.* at 1623–24.

308. Monaghan, *Constitutional Fact Review*, *supra* note 52, at 273 ("To my mind, the perceived need for case-by-case development of constitutional norms is likely to be the single most important trigger for constitutional fact review.").

309. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 502 (1984).

310. Miller v. Fenton, 474 U.S. 104, 114 (1985).

311. As Redish and Gohl put it:

> This justification . . . is not constitutionally dictated. Rather, it derives from the vague notion that appellate courts possess residual power not only to state what the Constitution requires, but also to second-guess fact-finders to ensure they apply the Constitution properly. A host of concerns, however, ranging from pragmatic limits on the Court's supervisory ability to the theory's susceptibility to both confusion and unprincipled result orientation, demonstrate that this justification is not only not dictated by the Constitution but also ill-conceived as a matter of judicial policy.

Redish & Gohl, *supra* note 62, at 294.

permits appellate courts to police lower court compliance, ensuring some degree of consistency and uniformity.[312] That appellate duty is not particularly implicated by findings of adjudicative fact. As Judge Richard Posner notes, appellate courts' "main responsibility is to maintain the uniformity and coherence of the law, a responsibility not engaged if the only question is the legal significance of a particular and nonrecurring set of historical events."[313] That appellate courts should share this consensus about the extent of their own power is perhaps not surprising, given what we have seen about their willingness to assert authority over fact development of various kinds. Whether that consensus is justifiable is a harder question, and the answer might vary from context to context.

We briefly note that quite distinct issues are raised by review of findings regarding questions of legislative fact, used to inform law and policy, which Kenneth Culp Davis famously distinguishes from "adjudicative" facts relevant to the parties to a case.[314] While arguing for de novo review of legislative facts, John Monahan and Laurens Walker note that they share characteristics of both law and fact.[315] Given that legislative facts are generally applicable and can have an impact beyond an individual trial court, however, there is a strong case that appellate review is more justified. By contrast, for case-specific facts it is all the more important that robust trial level factfinding occur, and the justification for appellate fact review is far less compelling.

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312. The Court has asserted a "responsibility" to:

> [E]xamine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger . . . . [W]e give most respectful attention to [the state courts'] reasoning and conclusion but [that] authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines.

Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (citation omitted); A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684, 689 (7th Cir. 2002) ("Th[e] admixture of fact and law, sometimes called an issue of 'constitutional fact,' is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects."). How much uniformity is constitutionally required—or even desirable—is a somewhat difficult question, but it must be noted that the details of constitutional rights *do* vary in their particulars from place to place. *See, e.g.*, Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1487 (discussing how federal constitutional rights nonetheless have difference contours across the country); Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. 855, 870–88 (2020) (illustrating how local law can impact recognition, interpretation, and remediation of various constitutional rights and violations).

313. Mucha v. King, 792 F.2d 602, 605–06 (7th Cir. 1986).

314. *See* Davis, *supra* note 48, at 407.

315. Monahan & Walker, *supra* note 47, at 489–90.

C. Potential Judicial Responses and the Problem of Mixed Questions

Congressional efforts to regulate appellate deference to fact finding will face the standard—and unavoidable—problem that legal standards can be manipulated and avoided. An appellate judge who firmly disagrees with a lower court's factfinding might well find a way to overturn it even under a clear error standard, for example.[316] But the difficulty of enforcing—or even observing—deference is only one challenge.

As we have described, not only is there a strong case that Congress can generally limit and define fact review by lower federal courts, but there is a case that Congress can limit the fact review authority of the Supreme Court under the Exceptions Clause.[317] Yet it is often the Supreme Court that is most engaged with defining the scope of independent review of constitutional claims. What counts as a mixed question of law and fact is determined—at least in part—by the Supreme Court's own doctrinal choices. Indeed, the Supreme Court has repeatedly asserted appellate control over constitutional fact adjudication by defining issues as mixed, and therefore subject to de novo review.[318] The result is to consolidate power in the Court vis-à-vis the lower courts. And the converse is also true: when the Justices wish to rid themselves of such power—perhaps because its exercise is taxing on the docket—they can alter doctrine to minimize prevalence of mixed questions.

Either way, the shape of the governing doctrine is a primary determinant of whether such law development—and thus constitutional fact review—applies, meaning that the Court's choice of rules is especially significant. The ability of Congress to respond, then, perhaps by targeting fact-stripping statutes at the Supreme Court's appellate

316. *Cf.* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1051 (2007) (arguing that "'clearly erroneous' . . . has proven to be the most fugitive of terms to define"); Nangle, *supra* note 217, at 409 (arguing that "appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the Clearly Erroneous Rule").

317. *See supra* Part III.A.1.

318. One important point here is that there is a difference between *protectionist* independent fact review—at least as described in cases like *Sullivan* and *Bose*—and labeling issues as mixed and therefore subject to de novo review. The former, as we describe in more detail above, is designed to vindicate constitutional claims—it operates to the advantage of constitutional litigants. *See supra* Part I.D. By contrast, denominating a question mixed denies deference to findings regardless of who they favor. *See supra* Part III.A.2.

jurisdiction, is similarly significant and a neglected form of Supreme Court regulation.

First Amendment obscenity doctrine provides a good illustration of this pull and push between questions of fact and mixed questions. In *Jacobellis v. Ohio*[319] (in which Justice Potter Stewart famously commented "I know it when I see it"[320]) the Court adopted a vague rule for defining proscribable obscenity.[321] "Such a question would normally be for the jury," as Randall Warner points out, but to "ensure uniform application of constitutional rights," the Supreme Court defined it as a mixed question which appellate courts must review de novo.[322] As a result, for years the Justices—in an effort to give shape to the evolving doctrine—had a steady diet of obscenity cases, including the attendant fact review. In other words, the doctrinal test—or lack thereof—legitimated and even required independent fact review by appellate courts.

This proved almost comically unsustainable,[323] leaving the Court doing exactly what Chief Justice Warren warned about in his *Jacobellis* dissent: "[S]itting as the Super Censor of all the obscenity purveyed throughout the Nation."[324] Finally, in *Miller v. California*,[325] the Court adopted the familiar three-prong test of "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest," and then "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[326] The function—and, likely, purpose—of this rule was to impose order from the top, and to eliminate the need for independent fact review. As Adam Hoffman notes, "It cannot be said that this rule emerged from the process of applying the previous obscenity standard; it was more an attempt to limit the Court's

319. Jacobellis v. Ohio, 378 U.S. 184 (1964).

320. *Id.* at 197 (Stewart, J., concurring).

321. *See id.* at 199–203 (Warren, C.J., dissenting).

322. Warner, *supra* note 15, at 144.

323. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 198 (1979) (describing "[m]ovie day," when Justices and clerks viewed pornographic films from pending cases).

324. *Jacobellis*, 378 U.S. at 203 (Warren, C.J., dissenting).

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

326. *Id.* at 24 (internal quotation marks and citations omitted).

involvement in an area in which application had utterly failed to produce a clearer rule."[327]

The shape of the Supreme Court's governing doctrines is thus a crucial independent factor in determining the degree to which the Justices will be inclined—and perhaps justified—to engage in constitutional fact review. As the development of obscenity law shows, multifactor, fact-intensive tests are likely to generate mixed questions of law and fact, increasing the possible range of independent appellate review in the name of uniformity and law development. By contrast, clear, acontextual rules are likely to free Justices from that task.[328]

At its root, whatever the label—fact, law, or mixed—the assertion of independent review may simply come down to a perception about institutional competence and advantage. Even with regard to mixed questions, courts are not always consistent about whether review should be de novo or deferential.[329] As the Court itself has observed, "the fact/law distinction at times has turned on a determination that . . . one judicial actor is better positioned than another to decide the issue in question."[330] Sometimes this comparative consideration will favor deference, however, even for mixed questions. As the Court has put it: "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[331]

This would seem to bring us back to the original problem: constitutional fact review might be an arrogation of appellate power, and perhaps an unjustified one, but ultimately the balance will be struck by the courts themselves unless lawmakers intervene.[332] If

327. Hoffman, *supra* note 50, at 1454.

328. *See, e.g.*, Keith R. Dolliver, Comment, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. CHI. L. REV. 141, 145 (1990) ("*Miranda* itself can be understood as an effort by the Court to develop a clear rule that would free it from case-by-case determinations of voluntariness.").

329. Lee, *supra* note 51, at 238–47.

330. Miller v. Fenton, 474 U.S. 104, 114 (1985); *see also* Monaghan, *Constitutional Fact Review*, *supra* note 52, at 237 ("The real issue is not analytic, but allocative: what decisionmaker should decide the issue?").

331. Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (citation omitted).

332. Warner, *supra* note 15, at 106 ("This [lack of consistency] is why mixed question jurisprudence can be so maddening. The lack of clarity and consistency regarding mixed questions leaves the impression that courts can choose whatever standard of review they want depending on the outcome they wish to achieve.").

lawmakers do intervene, there is a further question whether Congress' effort to restrict appellate fact review will receive appropriate judicial deference. Rulings such as *Miller v. Fenton* provide mixed guidance on that question, and often emphasize text and congressional intent, as well as the underlying constitutional rights being protected by fact development and review.[333] That said, in several key contexts we have discussed, courts have embraced statutes regulating federal fact review.[334]

Further, while we agree that the Supreme Court's ability to tag questions as mixed gives it substantial leeway to sidestep deference doctrines and permit inferior appellate courts to do the same, there are also some countervailing considerations that might frustrate efforts to redefine constitutional rights in order to evade statutory restrictions. One basic reason for this is that the current lineup of Justices seems inclined to favor brightline rules in constitutional cases—an approach that has the effect of asserting the Court's power in some ways[335] while simultaneously undermining the case for appellate constitutional fact review, since the standard argument in favor of such rules is that they constrain discretion and the balancing of competing facts.[336] The more that the Court adopts rules over standards, the more it will—as in the obscenity cases[337]—free itself from case-by-case adjudication. There is an obvious tension between the Court's apparent preference for rules and its increasingly aggressive use of independent fact review. One or the other of these may have to give. The less fact-dependent a constitutional rule is, the less justification for higher-court plenary fact review.

A particularly interesting and potentially challenging doctrinal trend here is the Court's apparently growing appetite for historical

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333. *See supra* notes 252–56 and accompanying text.

334. *See supra* Parts II.C & II.D.

335. Joseph Blocher, *Roberts' Rules: The Assertiveness of Rules-Based Jurisprudence*, 46 TULSA L. REV. 431, 433 (2011) ("[R]ules are not necessarily minimalist; they constrain discretion, not power" and therefore "tend to increase the power of the rule makers at the expense of rule appliers."); *id.* ("[S]ince within our constitutional system it is the Supreme Court that has the most rule-setting power—a power that extends over time, at least if precedent and stare decisis are taken seriously—Justices who embrace a rule-based jurisprudence effectively assert their power over lower and future courts.").

336. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179, 1182 (1989) (arguing the adoption of clear rules constrains judges from acting on political preferences when "balancing").

337. *See supra* notes 319–27 and accompanying text.

tests in constitutional law.[338] From abortion to gun rights, the Justices seem inclined to move away from tests with tiers of scrutiny—where the relevant facts are likely those contemporary facts needed to show the importance of the government's interest and the degree to which the challenged action serves it—and toward tests that are purely rooted in history.[339] As David Faigman notes, originalism is "almost wholly fact based."[340] Lower courts attempting to, for example, evaluate the constitutionality of gun restrictions based solely on "text, history, and tradition," as the Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*[341] requires, will inevitably have to engage in some historical factfinding. Indeed, lower courts have increasingly noted the degree to which *Bruen*'s test potentially invites reliance on historians as expert witnesses.[342] But what kinds of facts *are* these—legislative, adjudicative, or something else entirely?[343] Will the Court defer to such historical factfinding? Could Congress require it to, thus claiming an increased legislative role in the implementation of constitutional originalism?[344]

The issue of mixed questions raises a further interesting point. There may be constitutional—not to mention prudential—limitations on Congress's ability to mandate judicial deference to its own factfinding in support of legislation. But what if Congress, rather than

338. Joseph Blocher & Brandon Garrett, *Originalism and Historical Fact-Finding*, GEO. L.J. (forthcoming 2023) (manuscript at 1), https://ssrn.com/abstract=4538260 [https://perma.cc/U9A8-MQPS].

339. *See, e.g.*, Adam Liptak, *A Transformative Term at the Most Conservative Court in Nearly a Century*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html [https://perma.cc/UHR3-VKV3] ("The term was a triumph for the theory of constitutional interpretation known as originalism, which seeks to identify the original meaning of constitutional provisions using the tools of historians.").

340. *See* FAIGMAN, *supra* note 11, at 46.

341. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

342. *See, e.g.*, Baird v. Bonta, No. 2:19-CV-00617-KJM-AC, 2022 WL 17542432, at *9 (E.D. Cal. Dec. 8, 2022); United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022).

343. Blocher & Garrett, *supra* note 338, at 10 (arguing that while most originalist facts are legislative facts, hard questions still arise about how they should be found and whether they are entitled to deference, and also that some such facts are "declarative" of law and raise yet further questions); *see also* Proctor, *supra* note 47, at 25 (dividing the traditional category of legislative fact into facts used to find premises of law and facts used to apply that law to the parties' circumstances).

344. *Cf.* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 2 (2016) (comparing the conundrums faced by originalist Justices and originalist lawmakers).

mandating such deference to specific facts, were instead to legislatively define the *categories* of fact and law? Perhaps Congress could essentially resolve by statute a question that has bedeviled courts and scholars, in particular contexts, or more generally. In *Miller v. Fenton*, the Court suggested, at least, that Congress should not be presumed to have done so absent a clear indication.[345] Perhaps Congress would need to speak clearly if redefining how precedent defined these categories. Indeed, to prevent judicial resistance to fact stripping, Congress could do so, and address which issues require factfinding and appellate deference.

To return to our main theme, Congress has a role to play to define the power of federal courts to adjudicate facts, and Congress can limit appellate and Supreme Court review of factfinding. Congress has done so in the past and can consider doing so in the future.

CONCLUSION

It is not "emphatically the province and duty of the judicial department"[346] to say what the facts are. Yet facts deeply matter to constitutional litigation. The enforcement of constitutional rights hinges on how people can show that the facts of what happened to them amount to a law violation. Especially in recent years, the Supreme Court has asserted an active role in reviewing not only the legal conclusions reached by lower courts, but their *factual* determinations—seemingly without the deference typically due to a trial-level factfinder. But despite decades of scholarly criticism and proposals regarding jurisdiction of federal courts, and Congress' use of fact stripping, sometimes alongside jurisdiction stripping, the doctrine of constitutional fact review has not been considered a locus for rethinking the role of courts in constitutional litigation.

Our goal has been to explore a different solution: Congress can regulate the appellate jurisdiction of the Supreme Court and of intermediate appellate courts by defining standards for review of and deference to factual findings. In a range of contexts, fact-stripping statutes have been upheld by the Court, often raising far fewer issues than jurisdiction stripping. Fact stripping does raise issues in cases where jury trial and due process rights counsel less, not more, appellate deference to trial factfinding. Based on this longstanding body of law,

345. *See supra* note 256 and accompanying text.

346. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

we emphasize that it is clear that under its Article I and Article III power, and consistent with other constitutional rights, Congress has broad ability to reallocate factfinding authority and factual review standards for the Supreme Court and inferior courts. In other words, there may be a range of statutory responses to the persistent problems of constitutional fact review.

As with jurisdiction-stripping proposals, some fact-stripping approaches may provide greater benefits to the quality of constitutional litigation than others. When and whether a fix may be warranted is an important policy question, but lawmakers should consider fact stripping, particularly when it can enhance the development and review of constitutional rights.