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## JUDICIAL REVIEW OF CONGRESSIONAL FACTFINDING

### I. INTRODUCTION

Although judicial review still has its challengers,<sup>1</sup> their critiques have largely focused on the practice itself. Less prevalent in the literature, although certainly no less of a component of judicial review, is sustained treatment of the measure of deference owed to congressional factfinding.<sup>2</sup> That is, where constitutional doctrines are predicated on open, fact-dependent rules of decision, can the Supreme Court, consistent with its constitutional authority, independently weigh congressional evidence? To the extent that the Court refuses to do so, congressional factfinding becomes outcome-determinative. Historically, the Court has given deference to such findings, contenting itself with answering only the procedural question of whether Congress has presented sufficient facts.<sup>3</sup> Such deference has recently waned, however, as the Court has increasingly asserted, and broadened, its *Cooper v. Aaron*<sup>4</sup> prerogative to be the supreme expositor of the Constitution.<sup>5</sup> Underlying this shift is a desire to ensure that the courts retain final authority to define the meaning of the Constitution by minimizing the outcome-determinative effects of congressional factfinding.<sup>6</sup>

The Court's lack of solicitousness to congressional factfinding is indefensible on both constitutional and prudential grounds; indeed, insofar as the question of proper deference to Congress is the handmaiden

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<sup>1</sup> Compare Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 319 (2003) (“[J]udicial review is a unitary doctrine under the Supremacy Clause that requires courts to treat all parts of the Constitution as ‘the supreme Law of the Land’ and to disregard both state and federal law to the contrary.” (citation omitted)), with MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (preferring an iteration of popular constitutionalism to judicial supremacy in interpreting the Constitution).

<sup>2</sup> See Neil Devins & Keith E. Whittington, *Introduction*, in *CONGRESS AND THE CONSTITUTION* 1, 1 (Neil Devins & Keith E. Whittington eds., 2005) (noting that “[t]here has been little sustained attention to congressional treatment of the Constitution and constitutional issues”).

<sup>3</sup> Cf. *United States v. Lopez*, 514 U.S. 549, 562 (1995) (striking down the Gun-Free School Zones Act because neither “the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone” (quoting Brief of the United States at 5–6, *Lopez* (No. 93-1260), 1994 WL 242541) (internal quotation marks omitted)); *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (holding that although the law at issue may have been “needless,” it was “for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement”).

<sup>4</sup> 358 U.S. 1 (1958).

<sup>5</sup> *Id.* at 18.

<sup>6</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (discussing its review of congressional factfinding and policy judgments); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (same); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (same); cf. *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J.) (upholding review of facts to ensure that judicial review does not turn into “an elaborate farce”).

of a larger separation of powers concern regarding the proper constitutional scope of congressional power,<sup>7</sup> the Court's attitude does not square with its current separation of powers jurisprudence. The Court's separation of powers decisions not only preclude one branch from arrogating power to itself, but also recognize a limitation on the judiciary's competence to effectively police some interbranch boundaries.<sup>8</sup> Viewed against this backdrop, the Court's lack of deference to congressional factfinding is troubling: From the nonarrogation perspective, not only is deference the historical norm, but the Constitution also assigns to Congress the factfinding role.<sup>9</sup> From the institutional competence perspective, the legislature's superior capacity to collect evidence — stemming from its committee system, larger staffs, and research arms — gives it a comparative advantage over the judiciary in the generalized factfinding that informs legislation.<sup>10</sup> Prudentially, not only does judicial review of congressional factfinding undermine Congress's prerogatives and thus democracy, but the Court can also rely on other mechanisms to limit the outcome-determinativeness of factfinding. Given this foundation, this Note argues that courts should always defer to congressional factfinding.

Part II of this Note summarizes the history of the Court's treatment of congressional factfinding, revealing that the Court's current belief that factual findings are subject to judicial review is inconsistent with historical practice. Part III examines the constitutional case for deference in two parts: First, it argues that nondeference is incompatible with the Court's current separation of powers jurisprudence. Second, it draws a parallel to the Court's treatment of enrolled bills to show that reweighing congressional factfinding conflicts with general separation of powers values. Part IV engages the prudential argument, contending that there are process and structure values that

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<sup>7</sup> Such an argument can take many forms: from the broad claim that "it is the duty of legislators as well as judges to consult [the Constitution] and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest," James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 142 (1893), to the narrower claim that the "constitutional design . . . does not require the judiciary to supply the substantive content of all the Constitution's provisions," Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002).

<sup>8</sup> Compare *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (striking down transfer of authority to the MWAA because the legislation required creation of a Board of Review composed of congressmen and that would have veto power over the MWAA directors' decisions), with *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (upholding delegation to the EPA).

<sup>9</sup> See *United States v. Lopez*, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (stating that factfinding is "expressly assigned to [Congress] by the Constitution").

<sup>10</sup> See Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, in CONGRESS AND THE CONSTITUTION, *supra* note 2, at 64.

deference protects. Moreover, it explains how, insofar as the Court wishes to limit the outcome-determinativeness of congressional factfinding, both the Court itself and the political process can reach that goal without trampling on separation of powers values. Part V concludes.

## II. MAPPING THE SUPREME COURT'S CURRENT TREATMENT OF CONGRESSIONAL FACTFINDING

The Court has historically deferred to congressional factfinding, as is most evident in the Court's Commerce Clause jurisprudence and Fourteenth Amendment section 5 jurisprudence.<sup>11</sup> In the context of the Commerce Clause, following the end of the *Lochner* era and the beginning of the New Deal, the Court refused to review congressional evidence underlying commerce legislation.<sup>12</sup> Thus, in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>13</sup> the Supreme Court upheld a provision in the National Labor Relations Act of 1935<sup>14</sup> that permitted the federal government, through the National Labor Relations Board, to regulate labor-management disputes.<sup>15</sup> In doing so, the Court rejected the therefore controlling conception of the Commerce Clause that had drawn a distinction between direct and indirect effects of intrastate activity on interstate commerce.<sup>16</sup> Compelling this conclusion was the Court's recognition that "no court was capable of drawing such a line in terms appropriate for continuing judicial administration."<sup>17</sup> Judicial administration of the line was difficult precisely because the inquiry was a factual one; without the capacity to generate and weigh evidence, determining the difference between direct and indirect effects became a difficult judicial task. As a result, subsequent Supreme Court Commerce Clause jurisprudence deferred to congressional findings that a particular activity affected interstate commerce.<sup>18</sup> Although *National League of Cities v. Usery*<sup>19</sup> may suggest a counterpoint to the claim of

<sup>11</sup> The practice is by no means limited to these contexts, however. See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239-47 (1985) (discussing judicial review of facts in the First Amendment context).

<sup>12</sup> See Barkow, *supra* note 7, at 311-12.

<sup>13</sup> 301 U.S. 1 (1937).

<sup>14</sup> 29 U.S.C. §§ 151-169 (2006).

<sup>15</sup> *Jones & Laughlin Steel*, 301 U.S. at 37.

<sup>16</sup> *Id.*

<sup>17</sup> Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 225 (1971).

<sup>18</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding constitutional Title II of the Civil Rights Act of 1964's preclusion of racial discrimination by local businesses that provide public accommodations where Congress determined that these businesses affected interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same).

<sup>19</sup> 426 U.S. 833 (1976). *National League of Cities* was the midpoint in a series of cases exploring the scope of the Fair Labor Standards Act specifically, and the nature of federal-state relations

an unbroken chain of deference, the fact that the Court overruled this decision a mere nine years later on the grounds that the political process adequately protected the state interests at stake reaffirms the force of this conclusion.<sup>20</sup>

The Court was equally deferential in cases encompassing section 5 of the Fourteenth Amendment. As the Court noted in *Katzenbach v. Morgan*,<sup>21</sup> “[i]t was for Congress . . . to assess and weigh the various conflicting considerations . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”<sup>22</sup> Although implicit in this holding is the conclusion that the Supreme Court would look at the factual record in order to ensure there is a basis for the legislation, the Court explicitly disavowed any role in weighing the substance of the evidence for itself. Any tilt toward the courts in this balance of authority risks errors inherent in judicial evaluation, given the vast disparities in factfinding capability between Congress and the courts.<sup>23</sup>

The practice of deference to congressional findings of fact all but disappeared during the Rehnquist Court, such that questions previously beyond the scope of judicial review now fell within it. Thus, in *United States v. Lopez*,<sup>24</sup> the Supreme Court for the first time since the New Deal struck down legislation predicated on the Commerce Clause.<sup>25</sup> At issue there was the Gun-Free School Zones Act of 1990,<sup>26</sup> which made it illegal for “any individual knowingly to possess a fire-

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more generally. A mere eight years earlier, in *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Supreme Court had held that the Fair Labor Standards Act applied to state schools and hospitals, and thus that states must pay a minimum wage and overtime. *Id.* at 194–95. The Court had occasion to hear *National League of Cities* due to a congressional amendment to the Fair Labor Standards Act regulating minimum wage and overtime pay for state and local government employees. *National League of Cities* rejected *Wirtz*’s broad assertions of federal power, instead acknowledging the fears of unchecked federal authority over the states expressed in Justice Douglas’s *Wirtz* dissent. See *National League of Cities*, 426 U.S. at 855 (citing *Wirtz*, 392 U.S. at 205 (Douglas, J., dissenting)).

<sup>20</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* because a subjective determination of “integral” or “traditional” governmental functions provided the Court no guidance and instead relying on the structure of the federal system itself to justify protecting state sovereignty). *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is not to the contrary. There, the creation of clear statement rules was an extrinsic control on the effect of congressional factfinding of the type discussed in section IV.B, and thus does not implicate the deference issue. See *infra* p. 785.

<sup>21</sup> 384 U.S. 641 (1966).

<sup>22</sup> *Id.* at 653.

<sup>23</sup> See Bradford R. Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1986 (1984) (noting that “courts lack Congress’s vast factfinding capacity”).

<sup>24</sup> 514 U.S. 549 (1995).

<sup>25</sup> *Id.* at 551.

<sup>26</sup> 18 U.S.C. § 922(q) (2006).

arm at a place that [he] knows . . . is a school zone.”<sup>27</sup> Although Congress had presumably predicated this legislation on an indirect effect on commerce, the Court rejected this contention, in part because Congress had not provided any factual findings in either the statute or the legislative history that confirmed a linkage between guns in school zones and interstate commerce.<sup>28</sup> One may wish to cabin *Lopez* as an exception to deference precisely because Congress provided no factual findings; this explanation, however, was refuted five years later in *United States v. Morrison*.<sup>29</sup> There, the Court struck down the Violence Against Women Act<sup>30</sup> as going beyond Congress’s Commerce Clause power despite evidence gleaned from numerous hearings and reports confirming that violence against women had a substantial effect on interstate commerce.<sup>31</sup> Indeed, Justice Souter noted in dissent that in comparison to both *Heart of Atlanta Motel, Inc. v. United States*<sup>32</sup> and *Katzenbach*, the evidence Congress provided of the link between violence against women and interstate commerce was “far more voluminous.”<sup>33</sup>

Congressional lawmaking under section 5 faced the same upsurge in Supreme Court fact-review during this period. For example, in *Board of Trustees of the University of Alabama v. Garrett*,<sup>34</sup> the Court refused to give determinative weight to Congress’s evidentiary findings that prompted enforcement of the Americans with Disabilities Act<sup>35</sup> under section 5 of the Fourteenth Amendment.<sup>36</sup> Despite a factual record that included evidence from not only congressional hearings but also hearings in every state,<sup>37</sup> the Court nevertheless found that Congress had failed to establish a history and pattern of discrimination; the Court independently weighed Congress’s factual findings, concluding that “[i]t is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination . . . .”<sup>38</sup> The Court rejected congressional abrogation of

<sup>27</sup> *Id.* § 922(q)(1)(A).

<sup>28</sup> *Lopez*, 514 U.S. at 562.

<sup>29</sup> 529 U.S. 598 (2000); *see id.* at 629–37 (Souter, J., dissenting); *see also* Barkow, *supra* note 7, at 312.

<sup>30</sup> Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.).

<sup>31</sup> *Morrison*, 529 U.S. at 629–34 (Souter, J., dissenting).

<sup>32</sup> 379 U.S. 241 (1964).

<sup>33</sup> *Morrison*, 529 U.S. at 635 (Souter, J., dissenting).

<sup>34</sup> 531 U.S. 356 (2001).

<sup>35</sup> Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

<sup>36</sup> *Garrett*, 531 U.S. at 374.

<sup>37</sup> *Id.* at 377 (Breyer, J., dissenting).

<sup>38</sup> *Id.* at 370 (majority opinion). Justice Breyer in dissent criticized the Court’s foray into fact-finding, noting that it reversed a longstanding mode of deference to Congress in these matters. *Id.* at 386–87 (Breyer, J., dissenting).

state sovereign immunity under the Act. Although *Garrett* is only the most recent example of the Court's nondeference to congressional fact-finding under section 5, it is by no means an outlier; during the Rehnquist Court, Supreme Court review of Congress's evidence was the norm.<sup>39</sup>

Judicial review of Congress's factual determinations is dubious in the context of section 5 given that the language of the amendment seems to confer "a unique interpretive role for Congress based on Congress's special position in the federal scheme."<sup>40</sup> To be sure, as Professor Rachel Barkow argues, this interpretation of the amendment need not mean that the Court has no role to play in reviewing legislation passed under the aegis of section 5; rather, it simply means that "once the Court has set the 'substantive parameters' of what rights exist under the Fourteenth Amendment, 'the preservation of Congress' enforcement power requires that Congress have the freedom to exercise discretion within those boundaries, and have remedial authority at least as broad as that of the judiciary."<sup>41</sup> Whatever the reasons for the Court's newfound willingness to review factual determinations under section 5, as well as evidence underlying Commerce Clause legislation, it certainly represents a break with historical practice.

### III. THE CONSTITUTIONAL ARGUMENT: SUPPORTING CONSTITUTIONAL VALUES?

The constitutional argument in favor of the Court deferring to congressional findings of fact proceeds in two parts: First, deference is consistent with the Supreme Court's current separation of powers jurisprudence.<sup>42</sup> Second, deference to factual findings is a functional analogue to the enrolled bill rule, according to which the Court does not look to extrinsic evidence to determine whether a bill's passage is procedurally deficient. To be sure, although there is no specific textual provision granting Congress the power to engage in factfinding, the Court nevertheless has recognized that this power is implicit in the

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<sup>39</sup> See cases cited *supra* note 6; see also Barkow, *supra* note 7, at 304–07 (highlighting this trend).

<sup>40</sup> Barkow, *supra* note 7, at 303; see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

<sup>41</sup> Barkow, *supra*, note 7, at 304 (quoting Clark, *supra* note 23, at 1979).

<sup>42</sup> Current Supreme Court separation of powers doctrine is concerned both with ensuring that one branch does not arrogate power to itself and with ensuring that the Court only engages questions that it is institutionally competent to adjudicate. See Bradford R. Clark, *Separation of Powers As a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1372–93 (2001); see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 327 (2000) (noting the institutional competence concern).

structure of the Constitution.<sup>43</sup> Given this structural imperative, the Court's review of congressional evidence violates separation of powers.

A. *Inconsistency with Current Separation of Powers Jurisprudence*

1. *Nonarrogation of Power.* — Although scholars have criticized the Court's separation of powers jurisprudence as excessively formal, precluding one branch from taking power at the expense of another seems to "reflect an appropriate solicitude for the constitutional restraints on how the branches may act."<sup>44</sup> Indeed, Professor Bradford Clark makes an analogous argument regarding federalism. He concludes that judicial maintenance of federal lawmaking procedures "serves not merely to allocate functions among the various branches of the federal government, but also to preserve the governance prerogatives of the states."<sup>45</sup> The formal constitutional arrangement of separation of powers functionally protects federalism values.<sup>46</sup> Although this Note does not engage questions of federalism, Professor Clark's conclusion regarding the functional results of formalism is equally applicable to separation of powers itself.

For example, in *INS v. Chadha*,<sup>47</sup> the Supreme Court found unconstitutional Congress's use of the one-house legislative veto as a means of controlling its delegations of power to executive agencies.<sup>48</sup> The Court reasoned that "[t]o accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both houses and presentment to the President."<sup>49</sup> The legislative veto effectively allowed one house of Congress to circumvent the Constitution's lawmaking procedures; in doing so, either the House of Representatives or the Senate would be able to legislate more easily than the Constitution envisioned.<sup>50</sup>

Similarly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,<sup>51</sup> the Court struck down legislation transferring authority over two D.C. airports from the Department of Transportation to the Metropolitan Washington Airports

<sup>43</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process.").

<sup>44</sup> Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1273 (1988).

<sup>45</sup> Clark, *supra* note 42, at 1393.

<sup>46</sup> See *id.* at 1325 (noting that because of cumbersome federal lawmaking procedures "the federal government's inability to adopt 'the supreme Law of the Land' leaves states free to govern").

<sup>47</sup> 462 U.S. 919 (1983).

<sup>48</sup> *Id.* at 959.

<sup>49</sup> *Id.* at 958.

<sup>50</sup> *Id.* at 952-53.

<sup>51</sup> 501 U.S. 252 (1991).

Authority (MWAA).<sup>52</sup> At issue was a provision requiring the MWAA, upon accepting the transfer of authority, to create “a unique ‘Board of Review’ composed of nine Members of Congress and vested with veto power over decisions made by MWAA’s Board of Directors.”<sup>53</sup> Although the Court recognized Congress’s broad power to set policy for the airports, it nevertheless found that the structure of the Board of Review violated the separation of powers doctrine because it made the Board essentially an agent of Congress.<sup>54</sup> Whatever the particulars of the power the Board exercised, it was anathema to the Constitution’s design: “If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.”<sup>55</sup> In both cases, then, the Court revealed that where Congress attempts to aggrandize its power at the expense of the other branches, thus circumventing the structures of the Constitution, the separation of powers doctrine renders this aggrandizement unconstitutional.<sup>56</sup>

Where these concerns about arrogation of power are absent, however, the Court has more readily accepted functional separation of powers arrangements. Indeed, the Court’s treatment of the nondelegation doctrine seems to contour this conclusion, as the Court has been quite solicitous of even broad delegations of power to executive agencies.<sup>57</sup> Importantly, where these delegations are accepted, the legislature has not ceded to other branches its core constitutional authority to make the laws; rather, the agency’s organic statute always contains an intelligible principle that limits agency discretion and cabins enforcement.<sup>58</sup> Thus, the Court likely worries less when power is shared

<sup>52</sup> *Id.* at 255.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 269.

<sup>55</sup> *Id.* at 276. The focus on the precise manner in which Congress can exercise its legislative power recalls *Chadha*.

<sup>56</sup> *Cf.* *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (noting “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment”).

<sup>57</sup> *See, e.g.*, *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (upholding a delegation to the SEC to modify the structure of holding companies that it finds to be “unduly or unnecessarily complicate[d]”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 215–16 (1943) (permitting delegation to the FCC based on concern for the “public interest, convenience, or necessity”) (internal quotation marks omitted); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (permitting delegation to the Interstate Commerce Commission based on the “public interest”). To be sure, nondelegation jurisprudence may have fictionalized Congress’s grants of authority as something other than legislative power in order to maintain that they do not violate separation of powers. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 758–59 (1996); *Touby v. United States*, 500 U.S. 160, 164–65 (1991). *But see* *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (describing the delegated power as legislative); *id.* at 489 (Stevens, J., concurring in part and concurring in the judgment) (same).

<sup>58</sup> *See* *Whitman*, 531 U.S. at 474 (collecting cases).

among branches of government, where interbranch competition mitigates collection of power. In these cases, ceding some penumbral authority raises few constitutional worries.<sup>59</sup>

Court deference to congressional findings of fact does not implicate any of these arrogation concerns. Indeed, factfinding is within the wide scope of authority Congress is granted by the Constitution to facilitate policymaking.<sup>60</sup> The Supreme Court has noted the Constitution's structural imperative granting Congress the power to find facts: "The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process."<sup>61</sup> Where the judiciary seeks to reweigh congressional evidence, however, it impinges on a core power of Congress; this action inexorably raises arrogation concerns.<sup>62</sup> By choosing to conduct its own factual review, the Court necessarily exercises power assigned by the Constitution to Congress, thereby enhancing its own authority; moreover, it is an infringement that the legislature is largely powerless to mitigate. As such, the situation is unlike the nondelegation cases, in which Congress has consented to the derogation of its own penumbral power.

2. *Institutional Competence.* — The Supreme Court has also been unwilling to find separation of powers violations where it cannot fairly map the boundary between a constitutional and an unconstitutional exercise of power. This focus on the Court's own limited institutional capacity informs another strand of the Court's separation of powers jurisprudence. Thus, in *Whitman v. American Trucking Associations*,<sup>63</sup> the Court, in upholding a delegation of power to the EPA, concluded that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"<sup>64</sup> In fact, resolution of many of the Court's nondelegation cases has implicitly turned on a be-

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<sup>59</sup> *But see* *Clinton v. City of New York*, 524 U.S. 417 (1998). In *Clinton*, the Court struck down the Line Item Veto Act, which granted the President the ability to cancel items in spending bills before signing the bills into law. *Id.* at 421, 436. Although it is true the Act did not represent arrogation on the part of the President — Congress granted him this power — the fact that the provision explicitly circumvented constitutionally required lawmaking procedures informed the holding of unconstitutionality. *Id.* at 438–39; *see also* Clark, *supra* note 42, at 1386–90 (discussing these implications of *Clinton*). In *Clinton*, unlike in the other cases discussed above, the Act infringed on core constitutional requirements.

<sup>60</sup> *Cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

<sup>61</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997).

<sup>62</sup> Although perhaps a different kind of self-arrogation than was at issue in *Chadha* or *Metropolitan Washington Airports Authority*, it is not different in effect.

<sup>63</sup> 531 U.S. 457.

<sup>64</sup> *Id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

lief that the Court is not equipped to weigh the guidance given to executive agencies through the various intelligible principles underlying the delegations.<sup>65</sup>

Although questions about institutional capacity seem at best to be prudential considerations, in the separation of powers context they take on a constitutional dimension. Given the fact that the Constitution is silent on the precise boundaries of each branch's authority, and the fact that the branches often have overlapping responsibilities, issues of capacity necessarily inform the Court's mapping of the outer dimensions of a particular branch's power. As such, these questions of competence are a gloss on the Constitution's requirement of separation of powers.<sup>66</sup> As a pure matter of resources, Congress is better equipped to collect evidence and hold hearings in order to determine the best policy in a particular case. Organs such as the Government Accountability Office, the Congressional Research Service, and the Congressional Budget Office, as well as congressional committees and their staffs, imbue Congress with the institutional capacity to engage in data collection and analysis.<sup>67</sup> Indeed, the Court itself has noted this resource disparity, offering that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions."<sup>68</sup> Such institutional capacity concerns, insofar as they inform the Constitution's requirement of separation of powers, suggest that the Court owes deference to congressional factfinding.<sup>69</sup>

The Court's concern with questions of institutional capacity in its core separation of powers decisions has a deep pedigree in norms of structural due process.<sup>70</sup> Under this theory, because of features of institutional design, a particular branch may be uniquely suited to make

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<sup>65</sup> See, e.g., *Mistretta*, 488 U.S. at 373 (majority opinion) (discussing the numerous broad conditions that have satisfied the intelligible principle requirement); see also cases cited *supra* note 57.

<sup>66</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

<sup>67</sup> See *Fisher*, *supra* note 10, at 64.

<sup>68</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks omitted).

<sup>69</sup> One is reminded of the political question doctrine, which in its classical iterations precludes judicial review of cases where there is a "textually demonstrable commitment to a coordinate political branch [or a] lack of judicially manageable standards." Barkow, *supra* note 7, at 272. Court review of congressional factfinding would seem to fall squarely within this frame; the same reasons that the Court lacks institutional capacity to find or weigh facts suggest a lack of manageable standards under the political question doctrine.

<sup>70</sup> This notion was originally articulated by Professor Hans Linde, and curls around the belief that government itself, in its decisionmaking, must "act by due process of law." Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222 (1976).

certain decisions; where such decisions are made by another branch or organ of government, they are subject to judicial invalidation.<sup>71</sup> For example, in *Regents of the University of California v. Bakke*,<sup>72</sup> Justice Powell's opinion announcing the judgment of the Court found the affirmative action program at issue unconstitutional, but nevertheless noted that other, more carefully tailored plans might be constitutional.<sup>73</sup> Observing that there were no legislative findings of constitutional or statutory violations by the University of California, Justice Powell concluded that the school was not the proper institution to determine that Bakke was to be harmed in the name of reducing societal discrimination.<sup>74</sup>

These norms of structural due process continue to inform, at least implicitly, the Court's resolution of delegation cases. In *FDA v. Brown & Williamson Tobacco Corp.*,<sup>75</sup> the Court rejected the FDA's classification, and thus regulation, of tobacco as a drug.<sup>76</sup> The Court's decision was striking, in part because it contravened the clear text of the statute; the majority instead relied heavily on a history of legislation that had been passed by Congress under the assumption that the FDA could not regulate tobacco as a drug.<sup>77</sup> Although the decision is partly explainable in terms of base politics, the majority was certainly "guided . . . by common sense as to the manner in which Congress is likely to delegate a policy decision of such political and economic magnitude to an administrative agency."<sup>78</sup> That is to say, even if applying the clear text of the statute would yield the conclusion that the FDA could regulate tobacco, the sheer magnitude of the decision suggested that Congress did not intend to let the FDA make it.<sup>79</sup> The implications of the structural due process approach to lawmaking are readily apparent in the context of congressional factfinding. The Constitution assigns the role of policymaking, and thus of gathering justificatory evidence, to Congress. Because the judiciary lacks this consti-

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<sup>71</sup> See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103–05 (1976) (noting that the Civil Service Commissioner could not predicate discriminatory practices on national security concerns; such decisions had to be made by Congress or the President).

<sup>72</sup> 438 U.S. 265 (1978).

<sup>73</sup> *Id.* at 308–09 (opinion of Powell, J.).

<sup>74</sup> *Id.* at 309 ("isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria").

<sup>75</sup> 529 U.S. 120 (2000).

<sup>76</sup> *Id.* at 161.

<sup>77</sup> *Id.* at 143–56.

<sup>78</sup> *Id.* at 133; see also John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (discussing the implications of *Brown & Williamson* when viewed through the lens of nondelegation).

<sup>79</sup> Cf. *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (noting the unlikelihood of Congress leaving an important aspect of rate regulation to FCC discretion).

tutional mandate and is ill-equipped in terms of expertise and capacity to marshal these facts, it would be inappropriate for the judiciary to undertake this role. Such decisions should be made by a legislature in a democratically accountable, rational, and transparent way.

*B. Analogy to the Enrolled Bill Rule*

The constitutional argument in favor of deference is strengthened by drawing an analogy to the enrolled bill rule, which suggests that a court should not look behind the face of a bill to determine if there is a defect that would render its passage unconstitutional. The rule originated in *Field v. Clark*,<sup>80</sup> in which it was claimed that the bill passed by both Houses of Congress was not the same as the one signed by the President.<sup>81</sup> Although the Court agreed with appellants' contention that in such cases the law would be null and void, it nevertheless refused to look at extrinsic evidence offered in support of appellants' claim.<sup>82</sup> The Court predicated its holding on the notion that a bill's progress through the constitutionally required procedures was conclusive evidence that it had no procedural defects.<sup>83</sup>

If weighing evidence is inappropriate to resolve first-order questions of whether a bill is actually valid as law because it would "manifest a lack of respect due a coordinate branch and produce uncertainty,"<sup>84</sup> then surely weighing evidence to assess second-order questions of policy is also inappropriate. This is not to say that a court cannot ensure that Congress has provided *enough* evidence to satisfy the standard in question — surely heightened scrutiny under, for example, the Equal Protection Clause demands greater factual findings — but rather that a court, consistent with the Supreme Court's separation of powers jurisprudence, cannot undertake its own inquiry into the substance of that evidence. Thus, in *Morrison*, where Congress provided voluminous evidence of the link between violence against women and interstate commerce, the Court should not have reweighed the evidence itself; rather, it should only have asked whether such evi-

<sup>80</sup> 143 U.S. 649 (1892).

<sup>81</sup> *Id.* at 672. The appellants claimed that a section in the version passed by Congress was absent from the version the President signed. *Id.* at 688–89.

<sup>82</sup> *Id.* at 672–73.

<sup>83</sup> *Id.* at 673 ("Judicial action, based upon [the suggestion of a conspiracy in Congress], is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of state, attested by the signatures of the presiding officers of the two houses of congress, and the approval of the president, is conclusive evidence that it was passed by congress, according to the forms of the constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.")

<sup>84</sup> *Id.*

dence on its face was sufficient to satisfy the standard governing Commerce Clause jurisprudence generally. Setting forth this conclusion is not an argument for Supreme Court abdication of judicial review — as will be seen, there are several ways the Court can control the outcome-determinative effect of congressional factfinding — rather it is recognition that once the Court sets a parameter within which Congress is able to pass legislation, the Court should be constitutionally required to defer to the factual findings premising these laws.<sup>85</sup>

#### IV. THE PRUDENTIAL ARGUMENT: ENSURING DEMOCRACY

Although the constitutional arguments in favor of judicial deference to congressional findings of fact provide ample justification for that deference, there are also prudential reasons why courts should practice it. Most importantly, deference protects democratic values by ensuring that the most popularly accountable branch of government is given wide latitude to make policy decisions. If one assumes that courts should declare a statute unconstitutional only when “the law falls outside the range where reasonable people may differ,”<sup>86</sup> then congressional factfinding within the constitutional parameters set by the courts represents popular solutions to problems. Moreover, allowing judicial review of factual evidence threatens to incentivize Congress to leave policy decisions to the courts. Finally, in cases where courts are truly worried about the potential outcome-determinative effects of congressional findings, there exist alternative options for mitigating their effects.

##### A. *In Praise of Democracy*

There are three situations in which a court that is not deferential to congressional factfinding that supports a statute might find itself: the evidence may clearly support the legislation, the evidence may be indeterminate as to whether it supports the legislation, or the evidence may clearly *not* support the legislation, either because it is demonstrably wrong or because Congress failed to take into account some easily ascertainable fact. A court’s behavior in the first case seems relatively easy to predict. Where evidence clearly supports the legislation according to the court’s own factfinding, there is no reason to undermine democratic choice by substituting the court’s own judgment. Effectively, in this case, the cost of judicial factfinding is nothing, as both

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<sup>85</sup> See Barkow, *supra* note 7, at 304.

<sup>86</sup> Stanley C. Brubaker, *The Court As Astigmatic Schoolmarm: A Case for the Clear-Sighted Citizen*, in *THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM* 69, 80 (Bradford P. Wilson & Ken Masugi eds., 1998).

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Congress and the Court have reached the same outcome. As such, one can expect deference.

The second case — evidence of ambiguous justificatory value — is a harder case, although given the constitutional and prudential concerns associated with nondeference, it too is readily resolved in favor of Congress. In this situation, a court undertaking its own factfinding cannot be certain whether its determination is any better than that of Congress. That the court does not have the institutional capacity of Congress in marshalling evidence and that it is not broadly responsive to democratic concerns<sup>87</sup> means ambiguities in legislative findings of fact should be resolved in favor of Congress. The argument is an analogue to *Chevron* deference: just as courts should defer to reasonable agency interpretations,<sup>88</sup> so too should they defer to Congress where factfinding can be cast as reasonable. In cases of ambiguity, a court considering for itself the facts has necessarily reached the conclusion that Congress's factual record is also reasonable. As such, in this case, like the first one, one should expect deference.

The final case — the evidence does not support the legislation — is a much more difficult case for deference. *Chevron*-like analysis is inapplicable because the court has independently determined that Congress's factfinding is unreasonable. Moreover, the concerns over violating constitutional separation of powers principles are lessened given the ease with which a court can point to the facts that Congress missed. Nevertheless, this situation, like the two previous ones, demands judicial deference. In addition to the positive constitutional argument advanced above, there are two further bases for this conclusion. First, democracy compels it. Even where Congress fails to take into account a readily knowable fact about the world, this decision is likely predicated on advancing the popular will.<sup>89</sup> Second, as argued in section IV.B below, the courts can control the outcome-determinative effect of congressional factfinding by creating fact-independent rules of constitutionality or clear statement modes of statutory interpretation. Both tools ensure that Congress cannot define constitutionality solely by its factfinding.

Although at a general level the deference argument flowing from democracy is clear — by giving the most political branch interpretive space, deference gives voice to the popular will — it becomes more opaque when applied to cases where Congress does not take into ac-

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<sup>87</sup> See Barkow, *supra* note 7, at 240.

<sup>88</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

<sup>89</sup> Even when not so predicated, the small possibility of this occurrence suggests that we should not sacrifice constitutional and democratic values by preparing for it generally. *Cf. Field*, 143 U.S. at 672–73 (noting the “remote” possibility that certain congressional officials will conspire to give the President a bill not passed by Congress).

count a readily ascertainable fact of the world. Imagine a situation in which congressional findings informing environmental regulation fail to consider a certain probabilistic harm. In doing so, Congress passes a statute, the constitutionality of which changes depending on whether that risk comes to fruition.<sup>90</sup> If one presumes that such risks generally should be included in an accounting of a statute's constitutionality,<sup>91</sup> why should courts defer to Congress's decision in this case? Where Congress affirmatively considers and then rejects consideration of the probability, deferring to this decision enacts popular prerogatives; perhaps individuals have a high discount rate for future harms and thus care more about immediate benefits. The courts should not alter this balance if Congress has acted within the parameters of constitutionality the Court has already imposed. Where Congress has failed to take into account probabilistic harm at all, the argument is no different.<sup>92</sup> Indeed, allowing judicial review in this situation ignores the prudential, and constitutional, value in permitting the political branches to act freely within their zone of authority.<sup>93</sup> Moreover, allowing judicial review even in clear cases of mistake risks creating an exception that can be manipulated by courts intent on exercising more vigorous reweighing of facts. Finally, the overlay of democratic elections suggests that any popular disagreement with congressional weighing of probabilistic harms can be mitigated by the people themselves.

To be sure, it may well be the case that neither Congress nor the people are particularly aware of probabilistic harms, or, if they are, they might have a sufficiently high discount rate for future risks to reject consideration of these risks. In these situations, courts are free to create a constitutional jurisprudence that takes into account probabilistic harms; in doing so, they could require congressional factfinding to consider these harms as a matter of constitutional law without impli-

<sup>90</sup> Cf. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1636–37 (2007) (upholding abortion legislation despite uncertainty over whether the statute creates unconstitutional health risks).

<sup>91</sup> See generally CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 322–33 (1993) (discussing courts' reluctance to engage in speculative rulemaking or to take account of probabilistic injuries).

<sup>92</sup> To be sure, one could craft an argument claiming this is a failure of the democratic process and thus review should include congressional factual findings. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–104 (1980) (arguing that judicial review should be used in cases where the democratic process has failed and focusing on the situations in *Carolene Products*'s footnote 4 as prime examples). The values Professor John Hart Ely sought to protect — nondiscrimination and equality — offer a much more fertile substrate on which to craft an exception to deference. Here, the equities lie in favor of Congress, especially given that both elections and the Court itself can cabin the outcome-determinativeness of facts.

<sup>93</sup> Cf. Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983) (arguing the canon of avoidance risks creating a “constitutional ‘penumbra’” that unjustifiably restricts political branch action). Similarly, Professor Alexander Bickel has noted that majoritarianism expressed through legislative enactment is the precondition for constitutional democracy. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–20 (2d ed. 1986).

cating either constitutional or prudential concerns.<sup>94</sup> The argument advanced here merely offers that where the parameters of constitutional law have been set by the courts, they should defer to congressional activity within these bounds.

Judicial review of congressional factfinding undercuts democracy in another way. Any time a court reweighs congressional evidence it signals to Congress that its policy choices count for less than judicial discretion in the constitutional calculus. The response is either for Congress to take its job less seriously and pay scant attention to evidence when passing legislation, or for it to simply shirk its constitutional role in making tough policy choices, instead sending the burden to the courts; both situations are suboptimal. In the case of the former, one can expect bad law, less deliberation, or perhaps both. Congress has no incentive to hold the numerous hearings and produce the voluminous reports that accompany much of its legislation if the courts are merely going to ignore these facts.<sup>95</sup> In doing so, Congress may miss information that may otherwise have persuaded them to adopt a different course of action.

In the case of the latter, judicial review of facts may induce Congress to pass along its policymaking role to the courts. This would not be troubling if one believed that constitutional interpretation was an either/or proposition. Insofar, however, as there are zones around particular constitutional provisions within which legitimate debate can occur,<sup>96</sup> permitting these decisions to be made only by the courts does great violence to democracy. Such a system neither provides fair notice to citizens about potential changes in policy nor cabins the discretion of judges; Congress can do both when it takes the lead in enacting legislation.<sup>97</sup>

### B. In Search of Other Limitations

The main concern with judicial deference to congressional evidence seems to curl around the notion that Congress will use its factfinding

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<sup>94</sup> Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibrium*, 99 COLUM. L. REV. 857, 880–84 (1999) (discussing how constitutional rights can be shaped by judicial remedies directed against probabilistic harms).

<sup>95</sup> Cf. *United States v. Morrison*, 529 U.S. 598, 628–34 (2000) (Souter, J., dissenting) (noting the high level of factfinding conducted by Congress).

<sup>96</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (noting the “evolving standards of decency” underlying Eighth Amendment jurisprudence). There is a suggestion that given the uniqueness of religion, contested questions that legitimately may or may not violate the Establishment Clause or Free Exercise Clause should be the province of the people. Cf. TUSHNET, *supra* note 1 (discussing popular constitutionalism); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 16 (2001) (suggesting that the people should have some role in constitutional interpretation).

<sup>97</sup> See Sunstein, *supra* note 42, at 320 (arguing that the nondelegation doctrine promotes rule of law values by maintaining congressional control over the lawmaking process).

capability to insulate laws from judicial scrutiny. Indeed, Justice Thomas has explicitly worried about this problem, arguing that allowing Congress the power to make a statute constitutional through use of its factfinding power would render judicial review “an elaborate farce.”<sup>98</sup> Although the claim above advances the affirmative case for deference within our constitutional regime, it does not fully respond to Justice Thomas’s concern. His worry, however, can be mitigated by recognizing that ample ways exist to control the outcome-determinative effect of congressional factfinding. First, the congressional structure itself makes it difficult to conspiratorially use factfinding as a way to imbue otherwise unconstitutional legislation with the mantle of constitutionality. Second, to the extent that the Court wants to limit the effects of congressional factfinding, it may choose to implement non-fact-based rules of interpretation.

The sheer difficulty of making federal law suggests, in the first instance, a limitation on the ability of congressional factfinding to reshape constitutional law. That “federal lawmaking procedures are generally regarded as ‘integral parts of the constitutional design for the separation of powers’”<sup>99</sup> suggests that these “finely wrought”<sup>100</sup> procedures limit congressional mischief. Thus, the mere fact that federal lawmaking requires “the participation and assent of multiple actors”<sup>101</sup> means that federal law must pass through a series of “veto gates”<sup>102</sup> before enactment. Incipient federal law “will fail if *any* of the veto players specified in the Constitution withholds its consent.”<sup>103</sup> As a descriptive matter, then, the exclusive federal lawmaking power established in the Constitution, which by design is heavily encumbered, means the likelihood of congressional manipulation of factfinding is greatly reduced.

The effectiveness of the structural check on congressional lawmaking authority is enhanced by the overlay of democratic elections. Consider the unlikely example of both houses of Congress with supermajorities of a single political party and a presidency occupied by the same party. One would expect this circumstance to raise the greatest challenge to judicial deference to factfinding given that federal lawmaking procedures are no check in this situation. Manipulation in this instance, however, is backstopped by the electorally responsible character of Congress itself; exploitation at odds with constitutional values

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<sup>98</sup> *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J.).

<sup>99</sup> Clark, *supra* note 42, at 1324 (quoting *INS v. Chadha*, 462 U.S. 919, 946 (1983)).

<sup>100</sup> *Chadha*, 462 U.S. at 951.

<sup>101</sup> Clark, *supra* note 42, at 1339.

<sup>102</sup> *Id.* (citing McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 & n.5 (1992)).

<sup>103</sup> *Id.*

may be checked during elections. Indeed, that the House of Representatives holds elections for its entire body every two years suggests that any problems will be swiftly met.

In addition to the structural limitations on Congress's ability to manipulate factfinding, the courts have at their disposal the ability to limit the outcome-determinativeness of deference. "In choosing between open-ended, fact-dependent standards and fact-insensitive rules, the Court is also deciding whether it *or* Congress should control an issue."<sup>104</sup> The decision to allow some interpretive breadth to Congress concomitantly gives congressional factfinding determinative weight in assessing the constitutionality of a particular piece of legislation. As Professor Neil Devins points out, if, for example, the Court's affirmative action jurisprudence rejected all race-based decisionmaking, then congressional findings of fact as to discriminatory intent or discriminatory history would be irrelevant to the adjudication of constitutionality.<sup>105</sup> On the other hand, standards that are more open-textured necessarily include Congress in determining the question of constitutionality.<sup>106</sup>

Allowing courts to define the outcome-determinativeness of congressional factfinding is no different than the way in which policy choices embedded in legislation and interpretive discretion interact. In other words, the process through which courts control the effect of deference is the same as the process by which Congress can control a court's discretion in implementing a statute. Thus, if Congress decides to legislate through rules, it signals to the judiciary that not only does Congress have sufficient information to tackle a problem, but also that

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<sup>104</sup> Neil Devins, *Congressional Fact-finding and the Scope of Judicial Review*, in CONGRESS AND THE CONSTITUTION, *supra* note 2, at 220, 221 (emphasis added).

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* But see Monaghan, *supra* note 11, at 262–63 (arguing that where constitutional rules turn on questions of fact, appellate courts have authority to independently judge these facts). Professor Henry Monaghan offers a forceful argument that appellate courts have the "authority to exercise independent judgment with respect to adjudicative facts of constitutional law application." *Id.* at 276. Nevertheless, this argument's application to review of congressional factfinding is difficult to map. First, Professor Monaghan's argument is offered in the context of the role of appellate courts in independently judging specific constitutional facts about the case before the court. *Id.* at 230 n.16 (concluding that "[a]djudicative facts tend to be litigation specific"); see also *Cox v. Louisiana*, 379 U.S. 536, 538–44 (1965) (reweighing facts where it was believed that the state court had inadequately protected First Amendment values). Congressional factfinding does not raise specific factual inquiries, but rather focuses on generalized questions of evidence useful in policymaking. Second, although courts may be good at undertaking specific factual inquiries, they are less capable of undertaking the vast data collection and analysis necessary to produce good law. Moreover, there is some value in cases where the Supreme Court, by creating fact-dependent standards, grants the popularly responsible branch of government a role in constitutional interpretation.

Congress wishes to cabin discretion.<sup>107</sup> Under this scenario, the scope of judicial review is lessened, given the lack of discretion in applying the rule set forth by Congress. On the other hand, legislative adoption of a standard suggests the wish to delegate some rulemaking authority, which increases judicial discretion.<sup>108</sup> Each process is a mirror image of the other, and suggests a continuing dialogue between interpreters.

Finally, judicially-created modes of statutory interpretation, especially clear statement requirements, likely have the same effect as fact-independent constitutional rules in reducing the outcome-determinativeness of deference. Consider, for example, the requirement announced in *Gregory v. Ashcroft*<sup>109</sup> that Congress be explicit when it intends to regulate traditional areas of state responsibility.<sup>110</sup> By requiring congressional intent to be clear on the face of the statute, the Court increased the costs associated with passing legislation that implicates federalism values and thus reduced the likelihood that such legislation will in fact be passed.<sup>111</sup> Of course, Congress can still pass legislation regulating the states as states, but such policy choices cannot be done *sub silentio*.

The value of these rules as a means of reducing the effects of deference lies in the difference in the ease with which facts versus legislative language pass through lawmaking procedures. Insofar as it is easier to manipulate facts, either in a statute itself or in the legislative history, clear statement rules and other interpretive presumptions suggest that the evidence will not become outcome-determinative without accompanying legislative language to that effect. Using language as a way of insulating exploited evidence from judicial review is an unlikely prospect given the difficulty in passing that language in the first place. As such, one can presume that by adding judicially created limitations on congressional discretion to the encumbered federal lawmaking process, manipulation of factfinding to produce outcomes will be significantly mitigated if not completely ameliorated. Justice Thomas's worry, then, that deference to factfinding renders judicial review

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<sup>107</sup> See HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAWS* 138–41 (William Eskridge, Jr. & Philip Frickey eds., 1994).

<sup>108</sup> See *id.*; see also, e.g., Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7 (2006)) (granting great latitude to the courts to determine what constitutes an unreasonable restraint of trade or other monopolistic activity).

<sup>109</sup> 501 U.S. 452 (1991).

<sup>110</sup> *Id.* at 469–70; see also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (extending the *Gregory* rule to cases in bankruptcy).

<sup>111</sup> See *Gregory*, 501 U.S. at 460–64.

“a farce” is dubious at best, and holds the potential to reinvent judicial supremacy at worst.<sup>112</sup>

## V. CONCLUSION

Judicial deference to congressional findings of fact implicates important separation of powers concerns. Constitutionally, judicial review of congressional factfinding is inconsistent with the current focus of separation of powers jurisprudence on both nonarrogation of power and institutional capacity. Factfinding is within the core responsibility of Congress and thus raises no concerns about institutional self-dealing as a way around limitations on constitutional authority. Moreover, as the popularly elected branch imbued with a large staff and institutional resources, Congress is supremely capable of gathering evidence; the Court’s “independence from the electorate . . . renders [it] a poor factfinder and policymaker as compared to Congress and the Executive.”<sup>113</sup>

Prudential arguments also counsel in favor of judicial deference. As an exercise in democracy, the mere fact that Congress considers certain information when passing legislation stamps that information with the imprimatur of popular support. Thus, even assuming arguendo that evidence underlying a statute is incorrect or does not take into account certain knowable facts about the world, a lack of judicial deference suggests a Court comfortable with contravening popular will. Circumventing democracy in this way is troubling, especially when courts have at their disposal other options for reducing the outcome-determinativeness of congressional factfinding. By creating closed, fact-independent rules and modes of statutory interpretation that require explicit language from Congress, the courts reduce the possibility of allowing constitutionality to turn on factual findings. On the other hand, the Court has created open-textured, fact-dependent standards of constitutionality and signals to Congress that it has a role in defining what is, in fact, constitutional. Such dialogue between branches is the agar of a vibrant constitutional democracy.

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<sup>112</sup> See Barkow, *supra* note 7, at 241–44 (discussing ways in which the Rehnquist Court decreased the degree of deference the Court showed to the political branches).

<sup>113</sup> *Id.* at 240.