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THAYER, HOLMES, BRANDEIS: CONCEPTIONS  
OF JUDICIAL REVIEW, FACTFINDING,  
AND PROPORTIONALITY

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Three Harvard Law School alumni — James Bradley Thayer, Oliver Wendell Holmes, Jr., and Louis D. Brandeis — have had outsized impacts on judicial review, how it is conducted and conceived. Part I of this Essay provides a brief overview of Thayer’s theories of judicial deference, Holmes’s value skepticism and deference to “dominant opinion,” and Brandeis’s efforts, through improved understandings of facts, to bring “legal justice” closer to “social justice.” Their influences endure in (at least) rhetorical commitments to judicial deference to legislatures and a certain “value skepticism” that, as Part II suggests, help explain why “proportionality review,” though widely used in other constitutional democracies, has not been adopted here.

Part III argues that proportionality review, in some areas, would improve the transparency of constitutional analysis and enable constitutional law to better approach constitutional justice. It further argues that, in an age of “truthiness,” “fake news,” and “kabuki theater” in legislative hearings, courts are most likely, among major institutions of government, to provide publicly transparent and impartial decisionmaking about facts relevant to the constitutionality of laws, whether under proportionality review or other doctrines. Deference may be appropriate, as Thayer, Holmes, and Brandeis in different ways urged, but it should be deployed in ways responsive to the social facts about different governmental decisionmaking processes.

I. THAYER, HOLMES, BRANDEIS

*A. Thayer*

Thayer was on the faculty of Harvard Law School when he wrote perhaps the most famous essay in U.S. constitutional law, arguing that courts should not understand their role as making a first-order judgment about the constitutionality of legislation.<sup>1</sup> Rather, he argued, legislation

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<sup>1</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see also MARK SILVERSTEIN, CONSTITUTIONAL FAITHS 22 (1984)

should be upheld unless there was no “reasonable doubt” that it was unconstitutional.<sup>2</sup> His essay canvassed several reasons for this conclusion.

*Interpretive Pluralism/Departmentalism/Backlash:* First, he advanced an argument from interpretive pluralism: “[I]n dealing with the legislative action of a co-ordinate department, a court cannot always . . . say that there is but one right and permissible way of construing” the provision; rather, “the constitution often admits of different interpretations . . . [and] there is often a range of choice and judgment . . . .”<sup>3</sup> Second, he advanced the departmentalist view that it was as much the duty of legislators as of judges to consider the constitutionality of legislation<sup>4</sup>: the legislature has the duty of “putting an interpretation on the constitution,” a “primary authority to interpret.”<sup>5</sup> Third, he suggested, too active judicial review might result in backlash to control the courts and undermine their independence: judicial “interference . . . with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power . . . as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution.”<sup>6</sup> These three arguments anticipate whole schools of contemporary theory and contestation.

*Sapping Political Responsibility:* Thayer also argued that more aggressive judicial review would lead legislators not to think about what was just and right, but only about legality, and even then, not to take responsibility because courts would.<sup>7</sup> The people, he argued, needed to be more aware of the harms that legislation can create, because “[u]nder no system can the . . . courts go far to save a people from ruin.”<sup>8</sup> It is this sapping-political-responsibility argument that is most often associated with Thayer in contemporary literature.<sup>9</sup>

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(“At least since [Thayer’s work], the Court’s role in the American political system has been the subject of much scholarly debate.”).

<sup>2</sup> Thayer, *supra* note 1, at 151.

<sup>3</sup> *Id.* at 150, 144.

<sup>4</sup> For discussion of legislators’ roles, see Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

<sup>5</sup> Thayer, *supra* note 1, at 136.

<sup>6</sup> *Id.* at 142 (quoting Chancellor Waties from South Carolina).

<sup>7</sup> See *id.* at 155–56 (“[O]ur doctrine of [judicial review] has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. . . . [E]ven in [questions] of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.”).

<sup>8</sup> *Id.* at 156; see also *id.* at 146 (providing an example of legislators voting for a law whose constitutionality they believed was doubtful, but where the court “held [the legislature] to its own duty” and upheld the challenged legislation).

<sup>9</sup> See, e.g., Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 200 (1952); Mark Tushnet, *Thayer’s Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 24 (1993); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247 (1995); Glenn H. Reynolds

*Forgotten Caveats; Implications:* But Thayer did not argue for deference to *state* legislation, where a different approach is required: “The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation.”<sup>10</sup> Because concerns for interpretive pluralism and for not sapping legislative responsibility would seem as applicable to state legislatures as to Congress, Thayer’s distinction can be better accounted for by the idea that states lack direct capacity to undermine federal judicial independence and that Congress is a co-ordinate branch, more deserving of judicial deference.<sup>11</sup>

In introducing the idea of different standards of review in constitutional law, Thayer made a major contribution. Although the possibility of different branches reaching different interpretive judgments was long contemplated by departmentalists, including President Andrew Jackson,<sup>12</sup> Thayer sought to link departmentalism with the standard of review, thereby making an important contribution in formalizing and theorizing the basis for different standards of review.

*Sources of Interpretation:* Within the framework of the presumption of constitutionality, Thayer also called for a combination of “a lawyer’s rigor with a statesman’s breadth of view.”<sup>13</sup> He held up for particular critique mechanical, formalist approaches to interpretation, calling the idea that one simply lays the text of the statute next to the Constitution a “perverted” and “petty method,” one resulting in a wrongful “disregard of legislative considerations.”<sup>14</sup> Invoking *McCulloch v. Maryland*’s<sup>15</sup> approach to the scope of national power,<sup>16</sup> Thayer implied that a generous interpretive space was required, one in which the rigor of the lawyer and the statesman’s breadth of vision could work together.

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& Brannon P. Denning, *National Federation of Independent Business v. Sebelius: Five Takes*, 40 HASTINGS CONST. L.Q. 807, 827 (2013).

<sup>10</sup> Thayer, *supra* note 1, at 155; see also *id.* at 153–55.

<sup>11</sup> Thayer’s later writing casts some doubt on his commitment to this distinction. See JAMES BRADLEY THAYER, JOHN MARSHALL (1901), reprinted in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 86 (1967) (praising *Munn v. Illinois*, 94 U.S. 113 (1877), for not striking down state legislation, even if “we should have been saved some trouble and some harm” from “ill-advised” and “unconstitutional” legislation).

<sup>12</sup> See President Andrew Jackson, Veto Message (July 10, 1832), [http://avalon.law.yale.edu/19th\\_century/ajvetoo1.asp](http://avalon.law.yale.edu/19th_century/ajvetoo1.asp) [https://perma.cc/WB6F-WVCG] (rejecting binding force of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); “[m]ere precedent is a dangerous source of authority”).

<sup>13</sup> Thayer, *supra* note 1, at 138.

<sup>14</sup> *Id.*

<sup>15</sup> 17 U.S. (4 Wheat.) 316.

<sup>16</sup> See Thayer, *supra* note 1, at 151–52 (approving of *McCulloch* while suggesting that more deference to Congress is required to invalidate a statute).

*B. Holmes*

Holmes is well known for his important insight, “[t]he life of the law has not been logic . . . [but] experience” — a central argument for rejecting common law doctrines as responding to past historical circumstances that should no longer control.<sup>17</sup> Deconstructing visions of law as deducible from invariable natural propositions or as the embodiment of good morality, Holmes advanced two other ideas: the “predictive” theory of law as simply a prediction of what courts would do, and the “bad man” theory that law should be understood from the perspective of someone who cares only about avoiding adverse personal consequences.<sup>18</sup> Although scholars disagree about what he actually meant, a common reading of Holmes — as insisting on the separation of law and morality — has had significant consequences for U.S. constitutional discourse and doctrine.<sup>19</sup>

In constitutional law, Justice Holmes’s well-known dissent in *Lochner v. New York*,<sup>20</sup> observing that the majority decided the case on “an economic theory” that many disagreed with, argued that choosing theories of what economic liberty was protected by the Due Process Clause was not the judge’s role. Rather, “state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”<sup>21</sup> Unlike Justice Harlan’s *Lochner* dissent,<sup>22</sup> Justice Holmes did not review or detail the facts supporting the reasonableness of the legislation; the error was at a conceptual level in imagining that the Due Process Clause affords special protection to contractual liberty.

Holmes supported deference to legislatures, but for reasons different than Thayer’s, resting on epistemological skepticism and a procedural conception of democracy under a constitution made for people of different views. While Thayer believed that there were multiple reasonable

<sup>17</sup> O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>18</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458–59 (1897).

<sup>19</sup> Compare Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 542 (1951) (arguing that Holmes’s critics miss the purpose of his distinction between law and morality), with ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 133, 135–37, 176–80 (2000) (arguing that *The Path of the Law* “has molded American legal consciousness for more than a century, and lawyers now carry gallons of cynical acid to pour over words like *duty*, *obligation*, *rights*, and *justice*,” *id.* at 176), and Henry M. Hart, Jr., *Holmes’ Positivism — An Addendum*, 64 HARV. L. REV. 929 (1951) (arguing that Holmes’s essay has two incompatible parts, the first of which argues the disconnect between law and morality, while the second suggests that law should involve morality).

<sup>20</sup> 198 U.S. 45, 74, 75 (1905) (Holmes, J., dissenting).

<sup>21</sup> *Id.* at 75.

<sup>22</sup> *Id.* at 65–74 (Harlan, J., dissenting).

constitutional interpretations, he also believed that there were “just and true” interpretations, enforceable against state legislation. But with respect to the Fourteenth Amendment’s limits on state power, Holmes did not necessarily agree<sup>23</sup>: what was most important was that popular majorities and their legislatures not be constrained in reaching conclusions about contested matters and embodying them in statutes.<sup>24</sup>

Holmes’s majoritarian interpretation of the Due Process Clause led him to write that “the word liberty in the Fourteenth Amendment is perverted when it is held to *prevent the natural outcome of a dominant opinion*, unless . . . a rational and fair man necessarily would admit that the statute . . . would infringe fundamental principles as . . . understood by [popular and legal] traditions.”<sup>25</sup> His skepticism about the trumping quality of “liberty” claims was foreshadowed in his 1897 essay in this journal: most propositions of law “are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.”<sup>26</sup> If there is no enduring meaning to constitutional protection of “liberty,” there is little reason for the Court to “prevent the natural outcome of a dominant opinion.”<sup>27</sup> His view that law results from experience may have contributed to his reluctance to overturn legislation under the Fourteenth Amendment. Yet Holmes came to be a defender of freedom of expression under the First Amendment. His reasons for doing so, however, link his skepticism about permanently correct answers to his commitment to democratic decisionmaking. The “best test of truth,” he wrote, “is the power of the thought to get itself accepted in the competition of the market.”<sup>28</sup>

<sup>23</sup> For Holmes, different constitutional issues called for different interpretive approaches. *Compare* *Buck v. Bell*, 274 U.S. 200, 208 (1927) (rejecting equal protection challenge to forced sterilization as “the usual last resort of constitutional arguments”), *with* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (finding that a statute banning removal of below-surface coal so as to cause others’ habitations to collapse was an unconstitutional exercise of the police power, in effect, taking property without just compensation), *and* *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting) (arguing that the defendant’s conviction under a state law that prohibited advocating overthrow of government by force should be reversed as unconstitutional).

<sup>24</sup> *See* *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting) (declaring that “a Constitution . . . is made for people of fundamentally differing views,” and courts cannot rely on their own sense of whether something is “novel and even shocking” in deciding its constitutionality).

<sup>25</sup> *Id.* at 76 (emphasis added).

<sup>26</sup> Holmes, *supra* note 18, at 466 (also suggesting that much “law is open to reconsideration upon a slight change in the habit of the public mind”).

<sup>27</sup> *Cf.* *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 521 (D.C. Cir. 2015) (“‘Whatever is right’; an aphorism that would be as final as it is lazy, did it not include the troublesome consequence, that nothing that ever was, was wrong.” (quoting CHARLES DICKENS, *A TALE OF TWO CITIES* 65 (Signet Classic ed., Penguin Books 1997) (1859))).

<sup>28</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Although Holmes referred to this idea as an “experiment,” *id.*, he was more of a skeptic than Brandeis, whose “laboratories of democracy” were designed to help identify better solutions to contemporary problems.

*Interpretive Implications:* Unlike Thayer's arguments for deference to Congress, Holmes's arguments seem for the most part to call for across-the-board restraint in reviewing state or federal legislation.<sup>29</sup> And his "rational and fair man" would evidently "not need research to show" that most challenged laws should be upheld.<sup>30</sup> Although Holmes had famously insisted on the relevance of history and experience in explaining the current shape of law,<sup>31</sup> in his judicial opinions under the Fourteenth Amendment Holmes largely eschewed detailed analysis of the facts. This corresponded to his temperamental disinterest in the detailed facts of contemporary American life.<sup>32</sup>

This lack of knowledge or interest is palpable in his dissent in *Bailey v. Alabama*,<sup>33</sup> where the Court invalidated Alabama's criminal breach of contract statute, which was being used to perpetuate a system of involuntary servitude for African American laborers in violation of the Thirteenth Amendment. Holmes began his dissent with the assertion "that this case is to be considered and decided in the same way as if it arose in Idaho or New York."<sup>34</sup> Displaying apparent indifference to the world in which such laborers worked, Holmes argued that the system was not one of slavery because states may criminalize fraud and the statute established only a prima facie presumption of intent to defraud by not completing a labor contract; "a fair jury would acquit, if the only evidence were a departure after eleven months' work . . ."<sup>35</sup> The idea that a black laborer would have a "fair jury" in Alabama at this time was totally implausible. The facts of the statute's actual and "natural

<sup>29</sup> In *Otis v. Parker*, 187 U.S. 606, 608–09 (1903), he referred obliquely to possible differences among states and localities as a reason for judicial deference, and in *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914), he referred to "local conditions" in upholding a law. See also OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (1920) (stating that the Union could survive without judicial review of national laws, but would be "imperiled" without judicial review of state laws). But the distinction between review of state and federal laws did not play a major role in his best-known judicial opinions or his *Path of the Law* essay.

<sup>30</sup> *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

<sup>31</sup> See *supra* p. 2352.

<sup>32</sup> Cf. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 309–10 (1984) (describing Holmes finding material on the textile industry recommended by Brandeis too boring to read).

<sup>33</sup> 219 U.S. 219, 245 (1911) (Holmes, J., dissenting); see also *Giles v. Harris*, 189 U.S. 475, 488 (1903) (arguing that since a majority of the white population were determined to prevent black people from voting, the Court could not provide effective equitable relief). With such examples, Holmes has been accused of confounding questions of power and majority sentiment with questions of law. See ALSCHULER, *supra* note 19, at 61–62 (describing Holmes's effort "to substitute power metaphors for normative analysis").

<sup>34</sup> *Bailey*, 219 U.S. at 245 (Holmes, J., dissenting). (The majority also asserted that sectional differences were not relevant, *id.* at 231 (majority opinion), but went on to refer to various Alabama enactments in explaining the effect of the statute, *id.* at 237–38.). But cf. *Patsone*, 232 U.S. at 144 (Holmes, J.) (referring to legislature's knowledge of "local experience" and "local conditions" as a basis for upholding a law discriminating against aliens).

<sup>35</sup> *Bailey*, 219 U.S. at 248 (Holmes, J., dissenting).

operation” were deducible by the majority.<sup>36</sup> The “life of the law,” then, did not include black laborers’ “experience” in the South.

### C. Brandeis

In contrast to Holmes and Thayer, Louis Brandeis made his reputation as a lawyer for what he saw as the public interest, emphasizing detailed knowledge of the facts in progressive legislative campaigns. Such detailed compendia of facts — about new technologies and their attendant harms, about the laws of other jurisdictions — also formed the backbone of the “Brandeis briefs” that he popularized.<sup>37</sup> In the words of a leading biographer, such briefs reflected Brandeis’s view that “it was the attorney’s duty to bring courts the facts available to the legislature, which was the social information judges had to have if they were to make the right decision . . . .”<sup>38</sup> Constitutional law needed to change in response to new social facts on the ground, just as tort law needed to change in response to new prospects for invading privacy.<sup>39</sup> Brandeis’s judicial philosophy, as another biographer put it, entailed “a commitment to judicial deference to legislative experimentation and states’ rights . . . and a determination to translate the text of the Constitution and the values of the framers into concepts and rulings that were demanded by an era of social and technological change.”<sup>40</sup>

Brandeis developed his approach as advocate and judge in an era when many legislatures actively sought to protect workers and regulate business harms. In his briefs, he argued for deference to state legislation whose constitutionality he was defending. On the Court, he favored deference to state laws dealing with economic and social conditions. In *New State Ice Co. v. Liebmann*,<sup>41</sup> Brandeis’s dissent articulated a basis to defer *more* strongly to state legislatures than to Congress: that the states could serve as “laborator[ies]” of “experimentation.” Philippa Strum characterizes Brandeis as long having believed in “using a relatively small institution to experiment [as] the only rational way to approach social engineering; hence his fervent support for the American federal system, with the concomitant ability of the states to experiment

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<sup>36</sup> *Id.* at 244–45 (majority opinion) (“Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question . . . . [I]t is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims.”).

<sup>37</sup> On predecessors, see David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1495 (2005) (noting appendix to brief in *Lochner*).

<sup>38</sup> PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 63 (1993); see also *id.* at 59–64.

<sup>39</sup> See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>40</sup> JEFFREY ROSEN, *LOUIS D. BRANDEIS: AMERICAN PROPHET* 100 (2016).

<sup>41</sup> 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

and to learn from each other's successes and failures."<sup>42</sup> For Brandeis, a better understanding of facts would lead to more ethical laws and to better judicial decisions. In this sense, he was an optimist, not a cynic, about the possibilities of improving law.

Brandeis's commitments required reading and synthesizing works beyond the customary materials of law to understand social facts (sometimes called "legislative facts").<sup>43</sup> In contrast to Holmes's abstract theorizing (and catchy phrases), Brandeis was focused on understanding the implications of new factual developments for the law. In *The Living Law*,<sup>44</sup> Brandeis argued that "legal justice" needed to move closer to "social justice," to cure a "waning respect for law."<sup>45</sup> "New dangers to liberty," he argued, arose out of contemporary conditions; while legislatures were attentive to these dangers, judges were not, either construing away statutes or, if any doubt arose, declaring them unconstitutional, invoking constitutional law "to stop the natural vent of legislation."<sup>46</sup> This problem, he argued, could be addressed through bringing courts to a better understanding of the facts of modern life that undergirded reformist legislation.<sup>47</sup> As his own examples indicated, however, adverse decisions did not necessarily reflect want of information but different ideological views.<sup>48</sup> Yet Brandeis held out hope that reasoned factual argument could change minds. The "struggle for the living law"<sup>49</sup> — to increase the capacity of courts to understand the bases for upholding progressive legislation designed to ameliorate social and economic ills — continued.

Brandeis's arguments for deference to legislatures were premised on a belief that legislatures would be willing and able to investigate the conditions of contemporary life and, if well enough informed, respond

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<sup>42</sup> STRUM, *supra* note 38, at 80 (describing his 1905 work on new instruments for insurance through savings banks).

<sup>43</sup> Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) (distinguishing "legislative" from "adjudicative" facts).

<sup>44</sup> Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 461 (1916) (tracing the development of views about law over the lifetime of the United States — from "[a] government of laws and not of men" at the Founding, to a "government of the people, by the people and for the people" in Lincoln's time, to "[d]emocracy and social justice"). (Imagine a Supreme Court Justice today being confirmed after publishing such a work!)

<sup>45</sup> *Id.* at 463, 461.

<sup>46</sup> *Id.* at 463–64. For an echo of Thayer's concern about backlash, see *id.* at 464.

<sup>47</sup> See *id.* at 464–65 (noting two cases in the Illinois Supreme Court, the earlier one invalidating and the later one upholding work-hours limits, and describing them as differently decided because in the first, the court reasoned too abstractly, while in the latter, the court "reason[ed] from life").

<sup>48</sup> See *id.* at 467–68 (discussing *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adair v. United States*, 208 U.S. 161 (1908), as illustrating the effect of "mental prepossessions"). As Brandeis noted, the Court had previously recognized inequalities in employer-employee relations as justifying ameliorative legislation. It thus does not seem likely that mere lack of knowledge of those inequalities could account for the decisions.

<sup>49</sup> *Id.* at 467.

appropriately. His biographers describe the kind of research he spread on the public record in efforts to obtain regulation or legislation in particular industries. Yet legislatures do not necessarily make written records to support their legislation. Brandeis's innovation in developing legal briefs that cumulate facts about the conditions giving rise to legislation, including practices in other jurisdictions, was designed to remedy this deficiency, by enabling courts to see the kinds of materials on which legislatures might have relied.<sup>50</sup> It was a new approach to legal argumentation, inconsistent with classical legal formalism and emblematic of the "sociological" jurisprudence emerging from Holmes, Roscoe Pound, and other early twentieth-century thinkers. It was Brandeis's devotion to fact gathering and presentation in a legal brief, however, that brought this vision into concrete view.

As Justice Breyer has written, Brandeis's signal contributions were an openness to the significance of changing economic facts; a view that legislatures have a "comparative advantage" over courts in determining facts about economic conditions; and commitment to the idea that the Constitution reflects a "democratic preference for solutions legislated by those whom the people elect."<sup>51</sup> These commitments, Breyer argued, undergirded Brandeis's willingness, for example, in *New State Ice*, to allow legislative experimentation on what *might* be reasonable beliefs about socio-economic conditions — even though economists later came to agree that restricting competition would not be benign and even though Brandeis might have been sympathetic to the company's efforts to break into the ice-supplying business.<sup>52</sup>

Brandeis's commitment to state experimentalism in economic matters was evident in a range of other cases. In *Pacific States Box & Basket Co. v. White*,<sup>53</sup> Brandeis, writing for the Court, rejected a challenge by an out-of-state box manufacturer to Oregon requirements that raspberries and strawberries be offered for retail sale in boxes of speci-

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<sup>50</sup> *But cf.* David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 11 (2011) (noting earlier briefs with some, but not as much emphasis on, sociological data).

<sup>51</sup> Stephen G. Breyer, *2004 Brandeis Lecture: Justice Brandeis as Legal Seer*, 42 BRANDEIS L.J. 711, 718 (2004).

<sup>52</sup> *See id.* at 713–19. *But cf.* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 479 n.12 (1996) (suggesting that Brandeis's dissent has been misunderstood, pointing to his decision in *Buck v. Kuykendall*, 267 U.S. 307 (1925), which involved the same kind of certificate as in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)). Differences in treatment may have been warranted: *Buck* involved licensing in interstate commerce, while *New State Ice* appeared to involve intrastate commerce. And, as Gardner notes, *supra*, at 479, in *New State Ice*, Brandeis emphasized the scope of the economic crisis afflicting the country; *Buck* was decided before the Great Depression began. Finally, in arguing that the legislature acted reasonably, Brandeis sought, through detailed facts, to counter the majority's assumption that most people would have refrigerators. *See New State Ice Co.*, 285 U.S. at 289–300 (Brandeis, J., dissenting).

<sup>53</sup> 296 U.S. 176 (1935).

fied dimensions. Describing the facts in detail, he offered several rational reasons for the regulatory body to have specified the dimensions that it did (for example, the fruit might survive better in the more shallow boxes, or consumers, being used to shallow boxes, might be confused about quantities being offered if differently shaped boxes were used).<sup>54</sup> In another more closely divided case, Brandeis wrote for the majority in rejecting challenges to a state law limiting the rates charged for fire insurance.<sup>55</sup>

Willingness to assume legislative competence with respect to economic conditions challenged under the Due Process Clause did not, for Brandeis, necessarily carry over to more personal liberties protected by the First and Fourth Amendments. Brandeis distinguished between “general limitations . . . embodied in the due process clauses of the Fifth and Fourteenth Amendments, [that] do not forbid [governments] from meeting modern conditions by regulations which ‘[in the past] probably would have been rejected as arbitrary and oppressive,’” and “[c]lauses guaranteeing to the individual protection against specific abuses of power, [which] must have a similar capacity of adaptation to a changing world.”<sup>56</sup> If government power to meet “modern conditions” had to expand, so, too, did “individual protection against specific abuses of power” (there, to cover wire-tapping).<sup>57</sup> Emphasizing that the Constitution should be adapted to changes in technology, Brandeis wrote, “[t]he progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping” but was likely to produce means to intrude into and expose “the most intimate occurrences of the home,” which the Constitution must protect against.<sup>58</sup> For Brandeis, then, legislation trenching on personal liberties raised quite different concerns than legislation dealing with economic regulation.<sup>59</sup>

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<sup>54</sup> *Id.* at 181–82. *But cf.* ROSEN, *supra* note 40, at 57 (arguing that Brandeis’s law clerk had done empirical research and concluded that the plaintiffs’ berry boxes were superior and that the legislation thus had a protectionist purpose). Given Brandeis’s pro-consumer orientation, he may have drawn on a deeper range of life experiences than his young law clerk to assess possible good faith reasons for the requirement.

<sup>55</sup> *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 258 (1931). Brandeis, like Holmes, did not always uphold economic legislation, writing for the Court in striking down provisions of the federal Frazier-Lemke Act that essentially denied the substantive rights of mortgagees under existing mortgages. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). *But cf.* *Wright v. Vinton Branch*, 300 U.S. 440 (1937) (rejecting constitutional challenge to reenacted Frazier-Lemke Act as not going beyond allowing bankruptcy courts to make reasonable modifications).

<sup>56</sup> *Olmstead v. United States*, 277 U.S. 438, 472 (Brandeis, J., dissenting) (citations omitted).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 474.

<sup>59</sup> *See id.* at 474–75 (praising *Boyd v. United States*, 116 U.S. 616 (1886), as “a case that will be remembered as long as civil liberty lives in the United States” for holding unconstitutional a statute authorizing the compelled production of personal papers).

In *Whitney v. California*,<sup>60</sup> Brandeis's concurrence made clear that he was unwilling to defer to legislative judgments based on "the statute . . . alone establish[ing] the facts which are essential to its validity." Indeed, he emphasized, the state legislature's declaration of an emergency "does not preclude enquiry into the question whether . . . the conditions existed which are essential to validity under the Federal Constitution."<sup>61</sup> Rather, the declaration "creates merely a rebuttable presumption that these conditions have been satisfied."<sup>62</sup> Brandeis thus distinguished between legislative actions based on adequate facts and legislative actions whose inadequate factual basis could not foreclose judicial findings of unconstitutionality.

#### D. *Summing Up*

On deferential approaches to judicial review of legislation: Thayer argued that courts needed to presume competent, enlightened bodies, while acknowledging that this might differ from reality.<sup>63</sup> Holmes did not so presume, but believed that courts ordinarily should not oppose what majorities wanted.<sup>64</sup> Thayer theorized a difference in judicial review of federal and state laws; Brandeis valued state "experimentation;" Holmes less so, despite occasional comments on the relevance of "local conditions."<sup>65</sup>

On interpretive approach and facts: Even if "[g]eneral propositions do not decide concrete cases,"<sup>66</sup> Holmes was less interested in facts than in concepts.<sup>67</sup> Brandeis, by contrast, was prepared to argue, even within

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<sup>60</sup> 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

<sup>61</sup> *Id.* at 378.

<sup>62</sup> *Id.* at 379. Because the defendant did not challenge the existence of a sufficient emergency, Brandeis found the Court lacked power to reverse the state court on this basis. *Id.*

<sup>63</sup> See Thayer, *supra* note 1, at 149 (arguing that courts should attribute "virtue, sense and competen[ce]" to legislatures, asking what such a body "may reasonably think or do," assuming they are made up of persons "competent, well-instructed, sagacious, attentive, intent only on public ends," and not what might "rationally" be done by the actual members of legislatures who are "often . . . untaught, . . . thoughtless, reckless, [and] incompetent").

<sup>64</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 142 (1992) ("[Holmes's] judicial restraint follows from the collapse of his search for immanent rationality in customary law. If law is merely politics, then the legislature should . . . decide.").

<sup>65</sup> See *supra* note 34; see also G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 363 (1993) (arguing that Frankfurter mischaracterized Holmes as supporting experimentation when he did not: "Holmes' deference, as stated in the [*Lochner*] opinion, was to majoritarianism and to state sovereignty, not to 'experimentation.'"). *But cf. id.* at 398-99 (describing Holmes's reference to state experimentation in dissent in *Truax v. Corrigan*, 257 U.S. 312 (1921), as possibly attributable to Brandeis's influence).

<sup>66</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>67</sup> See, e.g., *supra* text accompanying note 22.

prevailing concepts, that facts were important to understand why legislation abrogating common law relationships was constitutional.<sup>68</sup> Brandeis was optimistic about the possibilities of legislatures and courts acting on improved understandings of the relationship between law and social justice. And his broader experience in the practice of law gave rise to a concrete innovation in legal practice, under which lawyers had the obligation to gather and present, and judges the obligation to consider, a wider range of social facts in evaluating the reasonableness of legislation. Brandeis's deferential view toward legislation was motivated by a belief that legislatures were working toward social justice, rather than by a commitment to a merely procedural form of democracy (or Holmesian skepticism).<sup>69</sup>

None of these thinkers were originalists; none believed that decisions should be based primarily on understandings from the time of enactment. All saw constitutional law as involving forces beyond the materials of traditional legal study. For Holmes and Brandeis the beliefs of others — popular beliefs and the beliefs of different jurisdictions as manifested in their laws — had legitimate roles to play in constitutional adjudication.<sup>70</sup> And Thayer envisaged lawyer-statesmen who could determine what was unreasonable,<sup>71</sup> drawing on their knowledge of the world, as the ideal constitutional adjudicators.<sup>72</sup>

## II. AMERICAN EXCEPTIONALISM AND PROPORTIONALITY

Generations influenced by Thayer, Holmes, and Brandeis helped turn the Court away from liberty of contract as a severe constraint on government, toward a more flexible approach to government economic

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<sup>68</sup> See, e.g., *Packer Corp. v. Utah*, 285 U.S. 105, 111 (1932) (Brandeis, J.) (rejecting “liberty of contract” claim because the statute was within the police power and “[n]o facts . . . establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate”); Brandeis, *supra* note 44, at 464–65. Even his famous argument for recognizing an invasion-of-privacy tort drew on existing case law, downplaying its conceptual innovation. See Warren & Brandeis, *supra* note 39, at 193–214.

<sup>69</sup> See SILVERSTEIN, *supra* note 1, at 44–45. Thus, when Holmes embraced categorical reasoning, giving great weight to the state's failure to reserve subterranean property rights in *Mahon*, and struck down legislation forbidding coal mining that imperiled above-ground homes, see *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), Brandeis's attention to social justice and the reasons for regulating underground mining to protect existing structures led him to dissent, justifying upholding the law, see *id.* at 416–22 (Brandeis, J., dissenting).

<sup>70</sup> See *Muller v. Oregon*, 208 U.S. 412, 419 & n.1 (1908) (summarizing Brandeis's amicus brief, which assumes that practices adopted by other jurisdictions bear on the statute's reasonableness and hence constitutionality); *supra* text accompanying notes 23–25.

<sup>71</sup> See *supra* note 63.

<sup>72</sup> See *supra* text accompanying note 13; cf. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 279–80 (Boston, Little, Brown & Co. 1898) (“In . . . judicial reasoning . . . not a step can be taken without assuming something which has not been proved; and the capacity to do this, with *competent judgment and efficiency*, is imputed to judges and juries as part of their necessary mental outfit.” (emphasis added)).

regulation and a differentiated (tiered) approach to rights protection.<sup>73</sup> After World War II, judicial review spread as more countries, at times inspired by the Warren Court, sought to erect barriers to human rights horrors. Proportionality review, a method of analyzing alleged rights violations, came to be embraced by many constitutional courts.

Proportionality is both a legal principle and a particular legal doctrine.<sup>74</sup> Doctrinal approaches vary, but a common analytical structure is found in Canada. First, the court determines if a *prima facie* rights infringement has been stated. If so, it considers whether there is a legitimate government interest asserted to support the rights-infringing statute. If so, the court then asks whether the means rationally advance the government interest; whether they do so in ways that ‘minimally impair’ interests protected by the right; and finally, whether the intrusion on rights is ‘proportional as such.’<sup>75</sup> If so, then the infringement is deemed justified such that no constitutional violation exists.

The normative appeal of proportionality doctrine accounts for some of its spread.<sup>76</sup> Robert Alexy argues that proportionality review is the best way to optimize those constitutional rights expressed as principles, while giving due regard to competing constitutional values.<sup>77</sup> Mattias Kumm argues that proportionality helps maintain constitutional rights within a self-governing democracy, by providing structured questions to counteract predictable democratic pathologies: “thoughtlessness based on tradition, convention and preference”; failure to “respect the limits of public reason”; “hyperbole and ideology”; and “capture of the political process by rent-seeking interest groups.”<sup>78</sup> I have argued that proportionality review imposes disciplined transparency in constitutional rights

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<sup>73</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>74</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3097–98, 3102–05, 3147–48 (2015).

<sup>75</sup> See *R. v. Oakes*, [1986] 1 S.C.R. 103, 139–40 (Can.).

<sup>76</sup> For more positive accounts, see David S. Law, *Generic Constitutional Law*, 89 *MINN. L. REV.* 652 (2005) (focusing on heuristics for resolving normative conflict); and Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT’L L.* 72, 77 (2008) (focusing on judicial power and need to “rationalize and defend rights review”).

<sup>77</sup> See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 66–69 (Julian Rivers trans., 2002) (1986). *But cf.* Jackson, *supra* note 74, at 3152–65, 3168–69 (disagreeing that proportionality is the only way to implement constitutional principles, while noting its many benefits); *id.* at 3130–66 (summarizing proportionality review’s advantages and disadvantages). Others argue that proportionality is the most objective approach because it rests on the parties’ factual perspectives. See DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 166–71 (2004). *But cf.* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 *CONST. COMMENT.* 803 (2004) (reviewing BEATTY, *supra*) (disagreeing with the claim of greater objectivity).

<sup>78</sup> Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 *LAW & ETHICS HUM. RTS.* 140, 143 (2010).

adjudication, while in some areas moving the law closer to constitutional justice and building bridges between courts and legislatures.<sup>79</sup>

Elements of “proportionality” doctrine are found in U.S. “tiered” scrutiny (in equality, substantive due process, and First Amendment cases), and in dormant commerce clause case law,<sup>80</sup> as well as in some Brandeis and Holmes opinions.<sup>81</sup> Proportionality as a principle, moreover, is found in certain other discrete areas of U.S. constitutional law.<sup>82</sup> But despite calls from Chief Justice Rehnquist and others for U.S. courts to learn from constitutional developments elsewhere,<sup>83</sup> and despite widespread use around the world,<sup>84</sup> proportionality doctrine is not viewed as a general measure of rights violations in the United States, nor is proportionality treated as a general principle of U.S. constitutional law.

Below I describe proportionality doctrine in more detail, and discuss the possibility that Thayerian, Holmesian, and Brandeisian ideas of deference to legislatures, as well as Holmes’s value skepticism, have contributed to U.S. resistance to proportionality review.

#### A. Proportionality Doctrine Described

Analysis begins with the concept of prima facie rights infringement. A “prima facie” infringement means a government action intrudes on an area presumptively protected by a right,<sup>85</sup> even though in the end the action may be justified such that no constitutional violation exists. U.S. discourse does not generally distinguish between a “right” and the justifications for its infringement. But, applying this idea, one might say

<sup>79</sup> See Jackson, *supra* note 74, at 3142–52; see also *id.* at 3173–83 (describing the benefits of a more proportional approach to disparate impact claims). On the necessary relationship between proportionality and justice, see Bernhard Schlink, *Proportionality*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 719 (Michel Rosenfeld & Andras Sajó eds., 2012).

<sup>80</sup> See Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 *EMORY L.J.* 797, 814–22 (2011).

<sup>81</sup> See *infra* p. 2371 (noting descriptions of Holmes as a “balancer”); *supra* pp. 2356–58 (noting Brandeis’s factual demonstrations of the reasonableness of intrusions on liberty to serve public goals).

<sup>82</sup> See Jackson, *supra* note 74, at 3098, 3104–05 (noting role of proportionality or cognate concepts in takings, punitive damages, punishments and fines, and abortion case law).

<sup>83</sup> See, e.g., William H. Rehnquist, *Foreword* to *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, at vii–viii (Vicki C. Jackson & Mark Tushnet eds., 2002) (calling on U.S. judges, in speech given in 1999, to stop being “laggard[ly]” in learning from the constitutional decisions of other countries); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Wise parents do not hesitate to learn from their children.”); cf. STEPHEN BREYER, *ACTIVE LIBERTY* 49 (2005) (discussing proportionality in the context of the First Amendment).

<sup>84</sup> Proportionality review is found across Europe, in Latin America, Israel, South Africa, Canada, and even Australia, with its tradition of formalist reasoning. See *McCloy v New South Wales* [2015] HCA 34 (Austl.) (adopting proportionality review to analyze the implied freedom of political communication).

<sup>85</sup> AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 26–27 (Doron Kalir trans., 2012).

that any police search of a person is *prima facie* within the interests protected by the Fourth Amendment; whether the search or seizure violates Fourth Amendment rights would depend on its justification — whether it was pursuant to a warrant and probable cause or otherwise justified, or was instead “unreasonable.”<sup>86</sup> Or one might say that any gender classification presumptively (*prima facie*) infringes on the rights protected by the Equal Protection Clause, unless it is justified by an important government interest and is substantially related to that interest.<sup>87</sup>

Although some see proportionality review as devaluing rights and shifting analysis to the government’s justifications,<sup>88</sup> reasoning about the scope of interests protected by a right may include important deontological elements;<sup>89</sup> it may exclude limitations entirely.<sup>90</sup> The Canadian Supreme Court, for example, has issued significant decisions addressing the *prima facie* scope of rights, analyzing why choosing one’s language of communication is an aspect of freedom of expression protected by relevant rights charters,<sup>91</sup> or why no *prima facie* Charter violation existed in several equality challenges.<sup>92</sup>

Once a *prima facie* intrusion is identified, the question is whether the statute can be “saved” or justified by Charter Section 1, which per-

<sup>86</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 325 (2001).

<sup>87</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>88</sup> Compare GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 126–30 (2007) (criticizing the idea of a “right to sleep well” as “rights inflation” incompatible with “the morality of rights”), Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 491 (2009) (arguing that considering only proportionality would be “a genuine assault on the very concept of human rights” because it would fail to engage questions of morality), and Grégoire Webber, *Proportionality and Absolute Rights*, in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES* 75, 84 (Vicki Jackson & Mark Tushnet eds., forthcoming 2017) [hereinafter *PROPORTIONALITY: NEW FRONTIERS*] (criticizing expansive view of interests as rights as providing an unstable foundation for understanding rights), with KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 3–4, 73–82 (2012) (arguing for an approach that treats any kind of autonomy interest as *prima facie* protected), and Matthias Kumm, *Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution*, in *PROPORTIONALITY: NEW FRONTIERS*, *supra*, at 51, 57, 73 (defending “rights inflation” as part of the structure of contemporary human rights protection).

<sup>89</sup> See, e.g., *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 748–54 (Can.) (explaining the right to choose one’s language as a means of expressing one’s personal group or group identity).

<sup>90</sup> See WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS* 401 (2014) (discussing the German concept of the “core” or “essence” of rights not subject to limitation); Schlink, *supra* note 79, at 722 (discussing categorical prohibitions); *cf.* *Quebec (Att’y Gen.) v. Que. Ass’n of Protestant Sch. Bds.*, [1984] 2 S.C.R. 66, 85–86 (Can.) (treating certain language rights as not subject to limitation in light of text’s clarity and framers’ purpose).

<sup>91</sup> *Ford*, [1988] 2 S.C.R. at 748–54.

<sup>92</sup> See, e.g., *Gosselin v. Quebec (Att’y Gen.)*, [2002] 4 S.C.R. 429 (Can.) (finding no infringement in challenged social welfare legislation); see also Vicki Jackson, *Proportionality and Equality*, in *PROPORTIONALITY: NEW FRONTIERS*, *supra* note 88, at 171, 186.

mits intrusions on rights “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>93</sup> The “demonstrably justified” limits are determined by application of a proportionality test,<sup>94</sup> which asks first whether the government has a legitimate and sufficiently important end.<sup>95</sup> Ordinarily, in well-run constitutional democracies, the answer will be yes. But not always. Thus, in *R. v. Big M Drug Mart Ltd.*,<sup>96</sup> the court found the Lord’s Day Act intruded on Charter Section 2’s freedom of religion and had an unquestionably religious purpose. No further proportionality analysis was undertaken because the illegitimate religious purpose precluded finding the law “demonstrably justified in a free and democratic society.”<sup>97</sup>

Assuming a legitimate government end, the court then asks whether the means chosen are rationally directed toward this end — a familiar inquiry, to which the answer is, again, usually (though not always) affirmative. In *R. v. Oakes*,<sup>98</sup> a statute providing that possession of a narcotic in any amount presumptively established intent to distribute infringed the presumption of innocence and failed the rationality component of proportionality review.

If a provision is found rational, the next sequenced question asks whether the means chosen “minimally impair” the right. This is sometimes treated as akin to U.S. “least restrictive alternative” analysis, though it may allow multiple approaches that offer comparable blends of rights intrusion and effectiveness. Thus, in *R. v. Edwards Books & Art Ltd.*,<sup>99</sup> the Canadian Court rejected challenges to a law, enacted after the Lord’s Day Act was invalidated, providing that most stores had to close on Sundays to provide a common day of rest for social and recreational purposes. Rejecting claims that the law provided inadequate religiously based exemptions, the court concluded that although some alternatives might accommodate particular religious freedom claims more, in other respects they would be more intrusive — for example, putting subtle pressures on employees to conform to employers’

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<sup>93</sup> Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>94</sup> *See R. v. Oakes*, [1986] 1 S.C.R. 103, 139 (Can.).

<sup>95</sup> This inquiry is phrased differently in different systems, but it is essentially a question of whether the government’s purpose is a legitimate one. Except where indicated, the text generally describes Canada’s approach.

<sup>96</sup> [1985] 1 S.C.R. 295, 331, 351–53 (Can.).

<sup>97</sup> *Id.* at 351–53.

<sup>98</sup> [1986] 1 S.C.R. 103, 141–42 (Can.).

<sup>99</sup> [1986] 2 S.C.R. 713 (Can.).

wishes, or posing risks of “state-sponsored inquiries into religious beliefs”<sup>100</sup> — while being less effective in achieving the state’s legitimate secular goal.<sup>101</sup>

The last inquiry — proportionality as such — asks whether the goal being achieved warrants whatever intrusion on rights exists,<sup>102</sup> or whether the marginal contribution to the government’s goal justifies the greater intrusion on rights than another, less effective but less rights-intruding alternative.<sup>103</sup> Dieter Grimm has explained the need for a “proportionality as such” test as follows: if a statute authorized the use of deadly force when it was the only way to prevent property theft, it would meet “minimal impairment” but would still be disproportional.<sup>104</sup> “Proportionality as such” plays little independent role in Canada, but has a more significant role in German and Israeli cases.<sup>105</sup>

Each of these elements has cognates in U.S. case law. Inquiry into legitimate ends is familiar, as is examining a law’s rational connection to a legitimate end. A number of doctrinal tests, moreover, look at whether there are less intrusive means of achieving the government’s goal. Although “proportionality as such” or overt balancing of the in-

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<sup>100</sup> *Id.* at 779 (Dickson, C.J.); *see id.* at 773–82.

<sup>101</sup> *See id.* at 780–81 (describing “trade-off[s]” as between two approaches, both of which “provide incomplete relief for the class of Saturday-observing retailers as a whole, . . . [as] a necessary consequence of ensuring that as many employees as possible will realize the benefits of the common pause day legislation,” and both of which “represent genuine and serious attempts to minimize the adverse effects of pause day legislation on Saturday observers”); *cf. id.* at 800 (La Forest, J.) (noting that the goal of providing a day of rest requires any exemptions to be narrowly drawn).

<sup>102</sup> *See* ALEX Y, *supra* note 77, at 402 (explaining the German Constitutional Court’s reasoning, applying “proportionality as such” to uphold health warning requirements on cigarette packages, because “according to the current state of medical knowledge, it is certain’ that smoking causes cancer and cardio-vascular disease,” so the reasons to interfere with the tobacco sellers’ freedom of occupation are weighty while the “intensity of interference” with those rights is low (footnote omitted)). In Canada, compare *Oakes*, [1986] 1 S.C.R. at 139–41 (suggesting that adverse effects on rights be evaluated against the “sufficiently important objective”), with *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877, 969 (Can.) (considering “whether the benefits which accrue from the limitation are proportional to its deleterious effects” in light of constitutional values and the context elucidated in prior steps).

<sup>103</sup> In *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04 (2004) (Isr.), excerpted in VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 701–15 (3d ed. 2014) [hereinafter *Beit Sourik*], the Israeli Supreme Court found that although the route chosen by the Israeli military in the West Bank for a wall or fence was necessary to provide the most security for Israelis, another route would protect almost as well and at much less damage to the Palestinians’ rights to have access to their homes and farmlands; the route chosen by the military thus failed “proportionality as such,” in light of a more proportional alternative, and had to be moved.

<sup>104</sup> Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 396 (2007).

<sup>105</sup> *See id.* at 390, 393–95; *supra* note 103 (discussing Israel).

trusion on rights against the government's reasons for acting is less familiar, implicit balancing has long existed in U.S. constitutional law.<sup>106</sup> The "compelling interest" test embodies the idea that only weighty interests can warrant certain otherwise impermissible government acts. Administrative convenience is generally insufficient to justify the overt use of race, even though in other kinds of equality cases, considerations of administrative convenience have been found to justify inequalities of treatment.<sup>107</sup> Under *Mathews v. Eldridge*,<sup>108</sup> in evaluating procedural due process challenges a court must decide whether the added benefit to truth-seeking is worth the cost of recognizing a constitutional right to an added procedure.

Despite these doctrinal resemblances, at other times U.S. law reveals in categorical rules notwithstanding their consequences. One of Justice Holmes's iconic First Amendment dissents concludes, "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>109</sup> This justification for protecting speech differs from arguments based on risks of government censorship or abuse,<sup>110</sup> insofar as the former denies the possibility of value judgments about harms of speech.<sup>111</sup> The idea that constitutional interpretation must proceed regardless of

<sup>106</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965–68 (1987) (describing balancing in First Amendment, procedural due process, dormant commerce clause, and Fourth Amendment cases). On Holmes as a "balancer," see, for example, William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 845 (1998) (noting Holmes's argument that rights "are limited by . . . principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached" in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)). Compare HORWITZ, *supra* note 64, at 131, 139–41 (arguing that by 1897, Holmes had abandoned reliance on common law categories as neutral constraints and tended to resort more to case-by-case balancing), with Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 816–26 (1989) (treating elements of Holmes's thinking as more conceptualist and formalist).

<sup>107</sup> See Jackson, *Proportionality and Equality*, *supra* note 92 (discussing *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012) (finding administrative convenience justified differential tax treatment) and *Nguyen v. INS*, 533 U.S. 53, 69 (2001) (noting administrative concerns justified a gendered citizenship rule)).

<sup>108</sup> 424 U.S. 319, 343–44 (1976).

<sup>109</sup> *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

<sup>110</sup> See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

<sup>111</sup> Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (applying close-to-categorical bar on viewpoint discrimination in hate speech ordinance). Other rules might be viewed as categorically underprotective of speech. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

the consequences has rhetorical appeal across other areas of U.S. constitutional law,<sup>112</sup> and is at odds with proportionality doctrine's emphasis on empirical and normative evaluation of the effects of and justifications for government action.

*B. U.S. Exceptionalism: Why?*

A number of theories have been offered for why proportionality has been so widely adopted outside the United States, but not within. The literature is too large to permit complete summary here; I note only some important arguments.

*History:* U.S. constitutional review has a longer history than anywhere else, with a significant "rights" discourse that combines justification for government action with definitions of the right. Assuming the inviolability of something declared a "right" differs from a "prima facie" concept of rights, although the U.S. Supreme Court has long engaged in rough balancing in several areas of constitutional law.<sup>113</sup> These areas, however, were viewed as discrete, rather than as instantiations of more general principles.<sup>114</sup>

The major U.S. critiques of balancing, moreover, developed well before the flowering of proportionality doctrine. Consider reactions to *Dennis v. United States*<sup>115</sup> (and Frankfurter's deferential "balancing" concurrence), upholding convictions for teaching Marxism,<sup>116</sup> culminating in Alex Aleinikoff's influential 1987 takedown of the "Age of Balancing."<sup>117</sup> The rise of law and economics in the 1970s, moreover, contributed to a crudely utilitarian concept of balancing, attracting criticism for neglecting other normative conceptions of law.<sup>118</sup> Proportionality review was theorized by Robert Alexy in his 1984 "habilitation" on the German Constitutional Court, published in Germany in the 1980s

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<sup>112</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 945, 959 (1983) (rejecting the dissent's utilitarian argument as irrelevant because "clumsy, inefficient, even unworkable . . . [constitutional] choices" must be respected).

<sup>113</sup> See Mathews & Stone Sweet, *supra* note 80, at 813–35.

<sup>114</sup> Although the insights of Holmes, Pound, and others would arguably support pragmatic purposive approaches across issues, see Aleinikoff, *supra* note 106, at 953–58, U.S. constitutional interpretation has remained "clause bound" see Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1260–61 & 1261 n.7 (2001) (citing sources).

<sup>115</sup> 341 U.S. 494 (1951); see *id.* at 517 (Frankfurter, J., concurring).

<sup>116</sup> See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912–14 (1963) (criticizing Frankfurter's ad hoc balancing in *Dennis*, 341 U.S. at 546–52, as having "no hard core of doctrine . . . [with a] lack of structure [that] makes it realistically impossible for a court to perform its difficult function of applying accepted and impartial rules to hold in check the unruly forces that seek to destroy a system of free expression").

<sup>117</sup> Aleinikoff, *supra* note 106.

<sup>118</sup> See, e.g., Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 5–6 (1986).

but not translated into English until 2002.<sup>119</sup> The Canadian Supreme Court's adoption of proportionality analysis, which helped promote its spread among English-speaking courts, was first fully articulated in 1986 (in *Oakes*), a time when legal knowledge diffused across national boundaries only slowly. Thus, early U.S. critiques of "balancing" as something undisciplined, too liable to embody disparate personal views,<sup>120</sup> and simply replicating what legislatures do,<sup>121</sup> could not reflect the experience over time of the sequenced (and relatively uncontroversial) Canadian proportionality doctrine.<sup>122</sup>

*Culture of Authority vs. Culture of Justification?*: It has been suggested that, in contrast to "cultures of justification," where the legitimacy of government action depends on its reasons, the United States has a culture of "authority," in which the only question is whether the government actor has jurisdiction.<sup>123</sup> It is true that the United States relies significantly on categorical rules in some areas, to afford government decision-makers discretion within their area of authority. But characterizing this as a sociolegal norm, while capturing something important about U.S. legal culture and its emphasis on the authority derived from democratic decisions, does not account for those many areas of U.S. public law in which the legitimacy of government conduct is dependent on analysis of the reasons for it.<sup>124</sup> Scholars have also observed that U.S. balancing became associated with decisions rejecting rights claims (as in *Dennis*), while German proportionality analysis was associated with rights protection.<sup>125</sup> Jacco Bomhoff, interestingly, links

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<sup>119</sup> See ALEXY, *supra* note 77.

<sup>120</sup> See, e.g., Aleinikoff, *supra* note 106, at 973–74 (describing the challenges of identifying an "external scale" for balancing interests); Emerson, *supra* note 116, at 912–14.

<sup>121</sup> Aleinikoff, *supra* note 106, at 984–86. On the Progressives' relationship to balancing, see HORWITZ, *supra* note 64, at 261.

<sup>122</sup> For example, while closely divided on the result, the Canadian Justices all accepted and applied the same doctrinal steps in deciding a hate speech case. See *infra* text accompanying note 175. For Canadian scholarly critique of proportionality, see, for example, GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION* (2009).

<sup>123</sup> MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* 111–29 (2013). U.S. administrative law, however, does generally require nonarbitrary reasons for action; in many countries, administrative and constitutional law are treated as aspects of a unified field of public law to which similar general principles of interpretation apply. See *id.* at 129–31.

<sup>124</sup> See, e.g., Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); see also *supra* note 123.

<sup>125</sup> See COHEN-ELIYA & PORAT, *supra* note 123, at 24–43; see also JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS* (2013) (contrasting U.S. and German understandings of balancing); cf. Aleinikoff, *supra* note 106, at 991 (arguing that balancing "undermines the checking and validating functions of constitutional law"); Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1437 (2017) (arguing that decisions expanding rights tend to reason nonconsequentially while decisions limiting rights have a "natural affinity" for consequentialist reasoning). In another paper, Cohen-Eliya and Porat argue that in Germany, administrative law, requiring justification for intrusions on liberty, developed be-

resistance to proportionality with broader social attitudes, including harshness in punishment dating to contemporary reactions to the Warren Court,<sup>126</sup> and not necessarily to more longstanding cultural differences.

*Lochner as Anti-Canon*,<sup>127</sup> *Legislatures and Progressive Changes*: If legislatures are viewed as sources of progressive change, as Brandeis suggested, or if law affords no values independent of the dominant forces' will, as Holmes implied, deference to legislatures makes great sense. In the post-1937 constitutional regime, judicial deference to legislatures came to take the form of "minimal rationality" review, as in *Williamson v. Lee Optical, Inc.*<sup>128</sup> "Rational basis" review requires courts to reject constitutional challenges if there is any plausible rational argument in support of the law; indeed, the standard requires courts to hypothesize about possible rational bases for the challenged law.<sup>129</sup>

On rare occasion rationality review has had a proportionality inflection, treating greater harms as requiring stronger reasons.<sup>130</sup> But rationality review is generally focused less on the strength of the government's reasons than on the mere presence of a not-irrational reason — a very low standard arguably more concerned with authority than with justification, and increasingly subject to critique.<sup>131</sup> This approach to "rational basis" review developed before and without the benefit of scholarly work showing that elements of proportionality review can be applied with varying degrees of deference to other actors,<sup>132</sup> depending on the degree of "confidence the court can place in the competence of the other body."<sup>133</sup>

*Value Skepticism*: Holmes contributed to a particularly corrosive value skepticism, which feeds into a crude majoritarianism in constitutional thought. He asserted that "a law should be called good if it reflects the will of the dominant forces of the community even if it takes

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fore constitutional law, whereas in the United States, constitutional law, more concerned with institutional authority, developed ahead of administrative law. Moshe Cohen-Eliya & Iddo Porat, *The Administrative Origins of Constitutional Rights and Global Constitutionalism*, in PROPORTIONALITY: NEW FRONTIERS, *supra* note 88, at 103.

<sup>126</sup> Jacco Bomhoff, *Beyond Proportionality: Thinking Comparatively About Constitutional Review and Punitiveness*, in PROPORTIONALITY: NEW FRONTIERS, *supra* note 88, at 148, 164–65.

<sup>127</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

<sup>128</sup> 348 U.S. 483 (1955).

<sup>129</sup> See *id.* at 487 (discussing what "the legislature might have concluded"). The three-judge lower court unanimously concluded from the evidence that prohibiting opticians from dispensing glasses without a new prescription bore no relation to protecting health and was unconstitutional. *Id.* at 484–85.

<sup>130</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>131</sup> See, e.g., Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1484–85 (2008); Mathews & Stone Sweet, *supra* note 80, at 837–44.

<sup>132</sup> E.g., Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 177 (2006); see *infra* pp. 2389–92.

<sup>133</sup> Rivers, *supra* note 132, at 203.

us to hell.”<sup>134</sup> His *Lochner* dissent’s lumping together of laws relating to vaccination, Sunday closing, usury, the Post Office, lotteries, taxes, education, monopolies, and maximum hours for miners reflects a refusal across most areas of constitutional law to evaluate the relative value of government ‘ends.’<sup>135</sup> More explicit are his suggestions that law is not about doing justice. Not only did he emphasize the need to distinguish the study of law from moral considerations in *Path of the Law*,<sup>136</sup> but in his later years he seemed almost exasperated with those who sought to bring them closer together: “‘I hate justice,’ Holmes wrote. ‘I know that if a man begins to talk about that, . . . he is shirking thinking in legal terms.’”<sup>137</sup>

This aspect of Holmes’s influence is inconsistent with Brandeisian aspirations for “legal justice” to approach “social justice,” as well as with the contemporary embrace of universal human rights. When I first taught Federal Courts at Harvard (around 2012), I found students surprisingly reluctant, compared with students I had taught elsewhere, to respond in class to a question handed out in advance about possible legislative reforms of the federal habeas corpus statute. A week later, over lunch with a dozen students, I asked why there had been such silence in response to that question. After a long pause, one student responded to this effect: Well, Professor Jackson, it seemed like you wanted us to discuss policy, or to say what would be more just or fair. Yes, I said, why was that a problem? Well, the response came, we were taught not to make that kind of argument. Why not, I asked? Well, came the response, you know, Oliver Wendell Holmes (presumably invoking Holmes’s aversion to arguments from justice). Not all of the students felt they had been given the message not to discuss justice or fairness in class — but a number did.

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<sup>134</sup> G. EDWARD WHITE, OLIVER WENDELL HOLMES, JR. 93 (2006) (quoting Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 24, 1914), reprinted in HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934 (Robert M. Mennel & Christine L. Compston eds., 1996); see also ALSCHULER, *supra* note 19, at 59 (quoting the same letter).

<sup>135</sup> See *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

<sup>136</sup> See Holmes, *supra* note 18, at 458–59. Although some scholars argue that Holmes’s work as a whole did not contemplate that law should be divorced from morality, see *supra* note 19, his work is so perceived by many.

<sup>137</sup> Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 333 (2002) (quoting Letter from Oliver Wendell Holmes to Dr. John C.H. Wu (July 1, 1929), in OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED PAPERS 201 (H. Shriver ed., 1936)). According to Horwitz, in his youth Holmes sought “to unite justice and rationality in the law,” but abandoned this question “in favor of . . . detached olympian skepticism.” HORWITZ, *supra* note 64, at 127 (citation omitted); see also Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 818–19, 818 n.139 (1989).

Holmes's influence has been an enduring one.<sup>138</sup> His views that law should be purposively oriented toward achieving contemporary goals, and that constitutionality may turn on questions of degree,<sup>139</sup> are important and entirely compatible with proportionality review; indeed, Holmes is sometimes described as a balancer.<sup>140</sup> Yet his skepticism about values is in tension with other aspects of proportionality review, which require identifying legitimate ends for government and deciding what goals, to what degree, justify particular kinds of intrusions on freedoms. If legislative ends are subject to no constraints other than the "dominant opinion," if law reflects what may be just a passing form of public preference,<sup>141</sup> how can courts evaluate the legitimacy and importance of legislative goals or find footing to evaluate the factual premises of legislation?

### III. PROPORTIONALITY AND FACTFINDING: WHO CAN BE TRUSTED?

Judicial review cannot be insensitive to long-run institutional changes.<sup>142</sup> Thayerian or Holmesian deference, however justified in the past, may not fulfill the institutional responsibilities of federal courts today. Proportionality as principle and as doctrine provides openings for better understandings of doctrine to influence constitutional analysis. Proportionality review also offers a more structured approach than simple "balancing" to enable constitutional law to vindicate constitutional values.<sup>143</sup> Accurate factual understandings are essential to democratic

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<sup>138</sup> For an argument that Holmes's reputation was created by Felix Frankfurter, who largely ignored Holmes's illiberal opinions on civil rights or eugenics (such as *Buck v. Bell*, 274 U.S. 200 (1927)), see WHITE, *supra* note 134, at 95-114; and WHITE, *supra* note 65, at 355-77. *But cf.* AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 129-30 (1995) (suggesting that *Buck v. Bell* may have reflected Holmes's unhappiness with the use of equal protection to strike down progressive state labor laws).

<sup>139</sup> See HORWITZ, *supra* note 64, at 131 (arguing that Holmes came to believe that when two rights are in conflict, decision must be based on "distinctions of degree").

<sup>140</sup> See COHEN-ELIYA & PORAT, *supra* note 123, at 33-34; Aleinikoff, *supra* note 106, at 955, 958 (describing Holmes as "the patron saint of all the various antiformalist schools" whose work encouraged balancing); *supra* note 106.

<sup>141</sup> See *supra* note 26.

<sup>142</sup> *Cf.* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 539, 566-70 (1999) (arguing that who makes up the judiciary is relevant to choosing a constitutional theory).

<sup>143</sup> To be sure, important normative objections to proportionality analysis exist. See Jackson, *supra* note 74, at 3156-57, 3153-54, 3153 n.269 (responding to objections from Habermas, Webber, and Tsakyrakis). Complex issues in applying proportionality doctrine may arise. See *id.* at 3115 n.92 (describing how defining the government's goal may affect minimal impairment analysis); Jackson, *Proportionality and Equality*, *supra* note 92 (discussing challenges of applying proportionality review to equality claims). Finally, while a case-by-case approach is sometimes assumed by proponents of proportionality doctrine, proportionality analysis can also be applied at the level of deciding on a constitutional rule. See Jackson, *supra* note 74, at 3168-69.

government.<sup>144</sup> Translating the concerns animating Brandeisian deference forward to present day polarizations and Congress's declining capacity to act responsibly would require federal courts to make more use of their distinctive capacities for impartiality, taking social facts seriously, while applying more nuanced approaches to deference to other branches.

A. *Proportionality, Facts, and Values*

Holmes's view that "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves,"<sup>145</sup> is compatible with at least some means-ends elements of proportionality doctrine. For those like Brandeis, who believe social facts are relevant to the constitutional bases for legislation, or who, like Thayer, see a role for a statesman's judgment on constitutional questions, proportionality doctrine as a whole provides a transparent and disciplined structure on questions both of instrumental rationality and of value.<sup>146</sup> Proportionality review also may bring law closer to social understandings of justice involving rights framed in broad normative terms,<sup>147</sup> as Brandeis sought, taking account of a broader range of interests than the more categorical rules often held up as alternatives, and thereby helping to mitigate legislative pathologies.

*Transparency:* U.S. constitutional law embraces several doctrinal tests that call for examining relations between legislative means and ends. In some cases, only "compelling" interests are sufficient to warrant presumptively unconstitutional action (though the compelling-interest

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<sup>144</sup> See, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 382 (1973) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment." (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936))); ALEXANDER MEIKLEJOHN, *FREE SPEECH* 25, 62, 69, 87 (1948) (arguing that self-governance requires wise voters with true knowledge of facts); cf. Václav Havel, *The Power of the Powerless*, in *THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE* 23 (John Keane ed., Paul Wilson trans., 1985) (arguing that totalitarian governments require people to live a lie rather than to live in truth).

<sup>145</sup> Holmes, *supra* note 18, at 469.

<sup>146</sup> To the extent Holmes was an "ad hoc balanc[er]," Treanor, *supra* note 106, at 855, he might also find proportionality review attractive. His majoritarianism, however, would make it difficult to acknowledge candidly the ways in which normative evaluation influences "distinctions of degree." See HORWITZ, *supra* note 64, at 131.

<sup>147</sup> See U.S. CONST. amends. IV, VIII (prohibiting "unreasonable searches" and "cruel and unusual punishment"). Such rights are akin to "principles," designed to be optimized under the circumstances, ALEXY, *supra* note 77, at 57–60, 67, rather than "rules," which either are or are not met (as in the requirement of a grand jury for federal felony prosecution). Cf. Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006) (suggesting that categorical rules implement rights reflecting a constitutional choice of how a value is to be protected, while standards implement constitutional principles that do not reflect the choice of means).

requirement is “seldom what defeats a statute”).<sup>148</sup> Rather, the Court may rely on an unarticulated combination of “least restrictive alternative” analysis and weighing the relative value of the government’s interest against the intrusion on rights, the final two prongs of formal proportionality doctrine. This blending may reflect a hesitation directly to engage empirical and normative questions about government goals and different ways of reaching them vis-à-vis rights.

For example, in *United States v. Alvarez*,<sup>149</sup> the Court struck down a criminal statute prohibiting lying about receipt of military honors. A plurality found the prohibition was not within established exceptions to the ban on content regulation of speech because the false statement was not made to secure material advantage.<sup>150</sup> It claimed to accept as “compelling” the government’s interest in “protecting the integrity of the military honors system,”<sup>151</sup> yet elsewhere referred to those interests as “not without significance,”<sup>152</sup> hardly the language of what is “compelling.” This passage, suggesting the power of the content-regulation category, also may reflect an unarticulated evaluation of the relative gravity of the government’s interests compared with the intrusion on speech. The plurality questioned whether the restriction was “actually necessary” to achieve those interests,<sup>153</sup> concluding that the government had failed to show a causal link between its goals and the ban, or “why counterspeech would not” sufficiently achieve its interest, because “the remedy for speech that is false is speech that is true.”<sup>154</sup> Moreover, a less restrictive alternative was possible: creating a database to check claims about military medals, like one for Congressional Medal of Honor recipients that already existed.<sup>155</sup>

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<sup>148</sup> David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 29 (adding that “an enormous range of government interests” have been found “compelling”). Occasionally there is serious disagreement about whether an interest is compelling (or even legitimate). Compare *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003) (accepting diversity as a compelling interest in higher education admissions), with *id.* at 355–61 (Thomas, J., concurring in part and dissenting in part) (rejecting claim of a compelling interest in racial (or what he terms “aesthetic”) diversity in legal education).

<sup>149</sup> 132 S. Ct. 2537 (2012).

<sup>150</sup> *Id.* at 2544–48 (plurality opinion).

<sup>151</sup> *Id.* at 2549.

<sup>152</sup> *Id.* at 2548.

<sup>153</sup> *Id.* at 2549 (quoting *Brown v. Entm’t Merchs. Ass’n.*, 564 U.S. 786, 799 (2011)).

<sup>154</sup> *Id.* at 2549, 2550. The dissent gave more attention to what motivated the legislation. *See id.* at 2558 (Alito, J., dissenting) (noting a dramatic increase in false claims about military medals in the years predating the legislation’s enactment). Might that increase suggest that under contemporary conditions, more speech is less effective than it once was in counteracting false speech, perhaps because of information overload and the human tendency not to absorb information in conflict with preexisting beliefs?

<sup>155</sup> *Id.* at 2551. *But see id.* at 2559 (Alito, J., dissenting) (arguing that since the government said it could only construct a database of “top military honors awarded since 2001,” it could not be as effective as the criminal statute in discouraging lying).

Justice Breyer, joined by Justice Kagan, wrote separately, eschewing the plurality's more categorical approach and suggesting that something like "intermediate scrutiny" or "proportionality" review was appropriate.<sup>156</sup> Unlike the plurality, he concluded that the nature of the speech — a readily verifiable lie about receipt of a military honor — was relevant in evaluating the constitutionality of the ban, which posed less risk of "suppressing valuable ideas" because "false factual statements are less likely than . . . true factual statements to make a valuable contribution to the marketplace of ideas."<sup>157</sup> At the same time, Justice Breyer recognized risks of selective prosecution and of true speech being chilled by fear of prosecution. Thus, he asked whether other means were available "substantially to achieve the Government's objective" and concluded that there were — a more "finely tailored statute," for example, limited to the most important awards, and construction of a database; given such alternatives, the statute worked "disproportionate constitutional harm."<sup>158</sup>

Both the plurality and the concurrence leave somewhat unclear whether they deemed the alternatives to be as effective as the criminal ban, or not as effective but still good enough that the criminal ban was unjustified. Formal proportionality doctrine might have clarified the relationship of the interests at stake by separately analyzing necessity (or minimal impairment) and "proportionality as such."<sup>159</sup> Any implicit comparative evaluation of likely harm to free speech, a very high constitutional value, vis-à-vis likely benefit to a significant but perhaps not as weighty goal, might have been clarified by evaluating proportionality as such.

Compare the stringent scrutiny applied in *Alvarez* with the approach in *Holder v. Humanitarian Law Project (HLP)*,<sup>160</sup> where the Court's implicit weighing of First Amendment interests against the value of combatting terrorism, again, may have been dispositive. *HLP* upheld a criminal prohibition on providing material support to terrorist groups as applied to a humanitarian group that, inter alia, sought to provide instruction on international law. The Court accepted that the statute as applied to plaintiffs was a "content-based regulation of speech" requiring more exacting review than "intermediate scrutiny."<sup>161</sup> As for the

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<sup>156</sup> *Id.* at 2551–52 (Breyer, J., concurring in the judgment). For his discussion of the benefits of focusing on values and proportionality in individual liberty cases, see STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 159–70 (2010) (arguing that such a focus is better than either originalist or intuitive approaches).

<sup>157</sup> *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring in the judgment).

<sup>158</sup> *Id.* at 2555, 2556.

<sup>159</sup> *But cf.* Grimm, *supra* note 104, at 389, 394–95 (characterizing the Canadian approach as relying on minimal impairment to avoid the overt balancing of proportionality as such).

<sup>160</sup> 561 U.S. 1 (2010).

<sup>161</sup> *Id.* at 27–28.

statute's purpose, "[e]veryone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."<sup>162</sup> The Court accepted the government's argument that any form of support was fungible in enabling terrorist groups to deploy terrorism, straining to defend the (nonobvious) fungibility of "train[ing] members of [the terrorist-designated group] on how to use humanitarian and international law to peacefully resolve disputes," or "teach[ing] [them] how to petition various representative bodies such as the United Nations for relief."<sup>163</sup> Indeed, the Court implied, evidence in support was not required, given the national security context.<sup>164</sup> But while it is true that Congress and the President have comparative expertise on terrorist organizations, in a First Amendment "compelling interest" case the failure to insist on a clearer connection between applying the material support ban to legal training and the freeing up of resources for violent activities stands in some tension with the reasoning and lack of deference to the government in *Alvarez*.<sup>165</sup>

The *HLP* Court also accepted the government's argument that cutting off support, even through activity normally protected by the First Amendment's protection of speech and association, would help "[de]legitimize" the group.<sup>166</sup> But First Amendment commitments, as explained by Justices Holmes and Brandeis, are inconsistent with the government using criminal law to prohibit peaceful speech in order to

<sup>162</sup> *Id.* at 28.

<sup>163</sup> *Id.* at 14–15, 29–31. The Court reasoned, for example, that teaching groups how to petition for "relief" "could readily include" obtaining money, which could be used to finance terrorism. *Id.* at 37. Justice Breyer observed in dissent, however, that "the word 'relief' does not refer to 'money,'" but rather "to recognition under the Geneva Conventions." *Id.* at 54 (Breyer, J., dissenting). Even on the majority's hypothetical account, the chain of connection between legal training and money is quite indirect, unlike the effects of a criminal ban on lying about military medals. *See infra* note 168 (on training in international law). The argument seems quite speculative, especially so for meeting the compelling interest standard of review. Indeed, it is not clear that statutory findings that foreign terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," *HLP*, 561 U.S. at 7 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247), had application to anything other than money or material goods. Nonetheless the Court deferred to this finding, *see id.* at 33 ("The State Department informs us that '[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly support[t] Congress's finding that all contributions to foreign terrorist organizations further their terrorism.'" (alterations in original) (citation omitted)), to support applying the statute to plaintiffs.

<sup>164</sup> *Id.* at 34–35 ("In this context, conclusions must often be based on informed judgment rather than concrete evidence, [which] affects what we may reasonably insist on from the Government.").

<sup>165</sup> *Cf. Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (concluding that no deference was owed to university's view of whether means are narrowly tailored).

<sup>166</sup> *See HLP*, 561 U.S. at 30; *see also id.* at 49 (Breyer, J., dissenting) (quoting Brief for the Respondents [United States] at 56, *HLP*, 561 U.S. 1 (Nos. 08-1498, 09-89)).

delegitimize others' actions or messages, even as governments may prohibit speech likely imminently to incite violence.<sup>167</sup> The potential breadth of the rationales raised serious concerns for the dissent.<sup>168</sup>

*Alvarez* struck down a statute targeting only speech that is untruthful; the material support statute was upheld as applied to (presumably) truthful speech about international law. The differences in outcome cannot be explained through traditional categories of speech entitled to greater or lesser degrees of protection. Rather, the difference lies in the implicit weighing of the importance and degree of achievement of the government's goals and the relative intrusion on free speech. The Court was, I believe, valuing the government goals of fighting terrorism as more compelling than protecting the integrity of the military honors system.

Candor is not the only virtue in judicial reasoning but it is an important one.<sup>169</sup> More rigorous application of the questions of proportionality analysis — even if not employed in the sequenced Canadian way that strikes down a law that fails any step<sup>170</sup> — may provide a better account of the Justices' reasoning and thereby promote more consistency and clarity in judgment. That is, reasoning as if relative value choices are not in play advances neither objectivity nor consistency in law and saps some of the connecting tissue between law and justice. The hesitation to deal head-on with the relative importance of different constitutional values (including the value of allowing government to pursue important goals) might owe something to Holmesian value skepticism.

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<sup>167</sup> See *id.* at 49 (Breyer, J., dissenting) (arguing along these lines that accepting the “legitimizing” argument would mean that “the First Amendment battle would be lost in untold instances where it should be won”); *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting); see also *supra* p. 2366 (quoting Holmes in *Gillow*). Holmes might ask why the remedy for harmful speech (on behalf of terrorists' means or goals) is not more speech, as in *Alvarez*.

<sup>168</sup> See *HLP*, 561 U.S. at 45–55, 62 (Breyer, J., dissenting). The *HLP* majority noted that groups were free to express themselves if acting independently of foreign terrorist groups, *id.* at 36 (majority opinion). But if the goal is to persuade terrorists to use peaceful rather than violent means to advance their political agendas, speech directed to the world may not be as effective as more targeted speech. The Court also accepted the argument that training in international law might allow terrorist groups to use legal knowledge to “threaten, manipulate, and disrupt,” buying time to recover capacity for terrorism. *Id.* at 37. Law may be misused in many spheres, but that is not generally regarded as a reason to cut off knowledge about law. See *id.* at 52 (Breyer, J. dissenting).

<sup>169</sup> See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987). Candor does not necessarily require courts always to identify every reason for their decision; there may be times when “prudential silence” will enhance acceptance of a decision. See VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 193–94 (2010); see also Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution*, 45 N.Y.L. SCH. L. REV. 119, 139 (2000–01). But the accountability mechanisms of adjudication depend strongly on a high degree of candor about decisionmaking — both to facilitate appellate review and public evaluation and to establish standards of consistency for the judges themselves.

<sup>170</sup> Cf. Jackson, *supra* note 74, at 3141 & n.223 (suggesting that evaluation of “proportionality as such” might affect the rigor of minimal-impairment analysis).

*Bringing Law Closer to Justice, Accounting for More Interests, and Combatting Democratic Pathologies*: Categorical rules by design exclude consideration of facts other than those defining the category. In so doing they can serve valuable rule-of-law purposes and provide prophylactic protection to rights; but they can also erase important considerations of history and context also relevant to constitutional values. Consider *R.A.V. v. City of St. Paul*, where the Court struck down, as an impermissible “content”- and “viewpoint”-based regulation, an ordinance prohibiting displays of material likely to “arouse ‘anger . . . in others on the basis of race, color, creed, religion, or gender.’”<sup>171</sup> Although the statute as written was plainly overbroad,<sup>172</sup> the majority’s argument that it impermissibly singled out speech concerning “race, color, creed, religion or gender” essentially erased histories of violence motivated by race, religion or gender.<sup>173</sup> By contrast, the Canadian Supreme Court, in upholding legislation prohibiting willful promotion of hatred of “any section of the public distinguished by colour, race, religion or ethnic origin,” emphasized the harms of hate speech to its targets and society.<sup>174</sup> Applying the same doctrine, the majority and dissent were in agreement on the importance of protecting members of minority groups from harm.<sup>175</sup> A less categorical U.S. approach would make it easier to take account of these interests.

Equality law also operates categorically. Except in cases of strict or intermediate scrutiny, once a rational reason for a difference in treatment is identified (or, as in *Williamson v. Lee Optical*, hypothesized), no account is typically taken of the challenger’s interests.<sup>176</sup> In *Armour v. City of Indianapolis*,<sup>177</sup> homeowners who paid for their water hookup on an installment plan were relieved of their tax balances while those who paid up front received no refund or credit. The city had changed

<sup>171</sup> 505 U.S. 377, 379, 391–93 (1992).

<sup>172</sup> See *id.* at 397 (White, J., concurring in the judgment).

<sup>173</sup> Cf. *id.* at 403 (arguing that compelling interests exist in helping to ensure the human rights of members of racial minority groups). Strongly categorical application of rules against viewpoint or content discrimination could preclude even narrowly drawn hate speech statutes that recent research in genocide studies might otherwise support. See, e.g., Deborah Mayerson, *On the Timing of Genocide*, 5 GENOCIDE STUD. & PREVENTION 20, 21 (2010) (noting, inter alia, identification of an “out-group” as an “existential threat” and propaganda as part of a sequence leading to genocide).

<sup>174</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697, 724–25 (Can.) (discussing findings of special commission).

<sup>175</sup> See *id.* at 744–49 (Dickson, C.J.); *id.* at 811–12, 846–48 (McLachlin, J., dissenting). The dissent, while acknowledging the harms of hate speech, concluded that potential misapplications and risks of increasing support for hate promoters meant that the statute failed minimal impairment and “proportionality as such.” *Id.* at 854–65.

<sup>176</sup> On the unwarranted gap between strict scrutiny and rational basis review (for example, of racially disparate effects), see Jackson, *supra* note 74, at 3178–83, 3183 n.419.

<sup>177</sup> 132 S. Ct. 2073, 2077, 2081 (2012).

its financial approach and would no longer offer installment plan payments; its interests of convenience and economy in avoiding continued administration of installment plans, the Court held, thus justified the difference in treatment.<sup>178</sup> But the interests of the homeowners who had paid up front received virtually no recognition. How galling it must have been for homeowners who helped the city by paying thousands of dollars up front, rather than taking advantage of very low-interest repayment plans, to find themselves penalized by the transition rules. Under proportionality analysis, in understanding whether a prima facie case had been made, greater account of the homeowners' grievance would have been taken, even if ultimately the distinction were found justified.<sup>179</sup>

Some categorical rules may underprotect rights. In *Atwater v. City of Lago Vista*,<sup>180</sup> the Court rejected a Fourth Amendment challenge by a parent arrested for the non-jailable traffic offense of driving children without a seat belt. Notwithstanding its agreement that the officer's conduct was disproportionate, the Court concluded that police needed a bright-line rule permitting arrest whenever the officer had probable cause to believe any offense had been committed — even one for which jail time was not authorized.<sup>181</sup> Constitutional law would come closer to common understandings of “unreasonable” or unjust searches if it were more fine-grained. *Atwater*, and similar cases,<sup>182</sup> may impose particular costs on racial minorities.<sup>183</sup> Perhaps if more middle-class parents were subject to the kinds of police harassment that occurred in *Atwater* there would be less need for courts to examine their unreasonableness, because legislation would be enacted to constrain abusive police tactics. But when the primary victims of such abuse are relatively powerless, courts can help counterbalance legislative inattention, ignorance, or disregard of obligations to govern impartially.

Questions of constitutional justice may be highly contested.<sup>184</sup> Proportionality review — whether on a case-by-case basis or as an approach

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<sup>178</sup> *Id.* at 2081.

<sup>179</sup> For a more complete explication, see Jackson, *Proportionality and Equality*, *supra* note 92, at 181–183.

<sup>180</sup> 532 U.S. 318 (2001).

<sup>181</sup> *See id.* at 346–47, 350–51.

<sup>182</sup> *E.g.*, *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318 (2012) (rejecting challenge to pre-trial detention for non-serious traffic offenses); *Whren v. United States*, 517 U.S. 806 (1996) (rejecting challenge to use of traffic violations to justify stop allegedly made based on race).

<sup>183</sup> *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

<sup>184</sup> *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 82 (2010) (concluding that it would never be proportionate under the Eighth Amendment to sentence a juvenile to life without parole for a non-homicide offense); *id.* at 91–96 (Roberts, C.J., concurring in the judgment) (objecting to the majority's categorical ban, but finding the punishment constitutionally disproportionate on the individual facts); *id.* at 97 (Thomas, J., dissenting).

to developing rules and their exceptions<sup>185</sup> — will not always lead to determinate results, but it will direct attention to questions of context and fact relevant to a sense of justice.<sup>186</sup>

*B. Losing Faith in Facts?*  
*Article III Courts as an Impartiality Resource*

U.S. constitutionalism is only in part about respect for individual rights; it is also about respect for self-government through democratic elections and representative processes, and about enabling governments that can be effective in governing. Thayer, Holmes, and Brandeis all favored deference to legislatures, which have advantages over federal courts insofar as they are democratically elected at regular intervals and include a wider variety of views and life experiences.<sup>187</sup> But courts offer advantages over legislatures as relatively objective fora for factfinding. Contemporary conditions suggest a role for federal courts in checking legislative factfinding and in helping to provide a shared sense of what the facts are.

*The Triumph of Epistemological Relativism?:* We are in an era of declining respect for truth that, in a sense, can be seen as a fulfillment of Holmes's epistemology and a rejection of Brandeis's. Holmes famously explained that "all I mean by truth is what I can't help believing — I don't know why I should assume except for practical purposes of conduct that [my] *can't help* has more cosmic worth than any other . . ."<sup>188</sup> Such a view provides an uneasy basis for identifying truth in various kinds of factual claims. Holmes's skepticism is also reflected in his comment that "truth [is] the majority vote of that nation that could lick all others."<sup>189</sup> As Strum has said, if for Holmes philosophy was most central to good judicial decisions, "Brandeis found the

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<sup>185</sup> See Jackson, *supra* note 74, at 3189–92 (discussing how structured proportionality review can help elucidate arguments concerning categorical rules of First Amendment analysis).

<sup>186</sup> See *id.* at 3147, 3169 (arguing that categorical rules should be informed by proportionality considerations and that confronting a rule's impact in different factual contexts hones a sense of justice); cf. Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 114, 126–28 (2012) (noting courts' "fear of judgment" and unwarranted failures to create exceptions to broad categorical rules).

<sup>187</sup> See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1484, 1506–11 (2007).

<sup>188</sup> ALSCHULER, *supra* note 19, at 24 (alteration in original) (quoting Letter from Oliver Wendell Holmes to John Gray (Sept. 3, 1905)); see also THE ESSENTIAL HOLMES 107 (Richard A. Posner ed., 1992) (quoting Letter from Oliver Wendell Holmes to Harold Laski (Jan. 11, 1929) (stating that he assumes that he is not dreaming, and that he and Laski exist, though he cannot prove it, and that "when I say that a thing is true I mean only that I can't help believing it," and that "the truth [is] the system of my intellectual limitations — there being a tacit reference to what I bet is or will be the prevailing can't help of the majority").

<sup>189</sup> Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

key to jurisprudence in facts.”<sup>190</sup> For Brandeis, there was nothing incoherent about the idea of common knowledge. A good faith effort to investigate the facts would lead people of good will and open minds to similar conclusions.

Holmes did not need to know many facts in *Lochner* to say that the Constitution did not embody Spencer’s *Social Statics*.<sup>191</sup> Justice Harlan, anticipating Brandeis, wrote a much longer dissent, arguing that legislatures had ample grounds to determine that bakers should not work more than ten hours a day, based on scientific treatises, government reports, and average work days in several foreign countries.<sup>192</sup> It was *Lochner*’s claim about the “common understanding”<sup>193</sup> to which Brandeis’s brief in *Muller v. Oregon*<sup>194</sup> responded, supporting the Oregon legislature’s action by reference to the facts it may have considered, informing the judges and shifting their sense of the “common understanding.”<sup>195</sup>

Facts have traditionally been understood to involve objectively ascertainable phenomena, about what has happened in the past and what is likely to happen in the future. The quality of being a “fact” contemplates that persons with different values can nonetheless agree on the existence or likelihood of the phenomena denoted by the term “facts.”<sup>196</sup> Although the fact-law distinction has been challenged,<sup>197</sup> claims that the distinction is incoherent are “greatly overdrawn.”<sup>198</sup> But U.S. legal culture (perhaps like the broader political and social culture<sup>199</sup>) is losing faith in facts — both “adjudicative” facts (“who did what, where, when,

<sup>190</sup> STRUM, *supra* note 32, at 309.

<sup>191</sup> See *supra* p. 2352.

<sup>192</sup> *Lochner v. New York*, 198 U.S. 45, 70–72 (1905) (Harlan, J., dissenting).

<sup>193</sup> *Id.* at 59 (majority opinion).

<sup>194</sup> 208 U.S. 412 (1908).

<sup>195</sup> Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 983 (1999).

<sup>196</sup> See generally E.J. Lowe, *Fact*, in THE OXFORD COMPANION TO PHILOSOPHY 287 (Ted Honderich ed., 2d ed. 2005); Phillipa Foot, *Fact-Value Distinction*, in THE OXFORD COMPANION TO PHILOSOPHY, *supra* at 287. For disagreement that values are entirely “subjective,” see HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS (2002).

<sup>197</sup> See, e.g., Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172–77 (2001).

<sup>198</sup> Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) (“[L]aw and fact . . . are points of rest and relative stability on a continuum of experience. . . . [T]he[se] categories have functioned as crucially important constructs that permit us to understand, organize, and regulate certain forms of social experience.”).

<sup>199</sup> Consider the so-called “birther controversy” about President Obama’s citizenship, which persisted for years despite overwhelming evidence of his birth in this country, including his birth certificate. See, e.g., Kyle Cheney, *No, Clinton Didn’t Start the Birther Thing. This Guy Did.*, POLITICO (Sept. 16, 2016, 4:24 PM), <http://www.politico.com/story/2016/09/birther-movement-founder-trump-clinton-228304> [<https://perma.cc/Q5R4-C7H5>].

how . . . [and] with what motive or intent”) and social or “legislative” facts.<sup>200</sup>

Such a loss of faith cannot be attributed in any direct way to Holmes’s epistemological skepticism. For we have had periods since Holmes in which American faith in facts and expertise was higher than it is now. Post-modern views across humanities, law, social studies, and even the sciences,<sup>201</sup> that perspective is critical to what is viewed as “fact,” and that constructing what is “relevant” is not a neutral activity, have surely played a role. Other causes for vast differences in “factual” understandings today include proliferation and fragmentation of information sources through the digital revolution (and related polarization).<sup>202</sup> In the nation’s judiciaries, an emphasis on “managerial judging” has devalued the role of courts as public adjudicators (of both facts and law).<sup>203</sup> There is at once a decline in agreement on what the “facts” are and a devaluation of the importance of coming to shared understandings of facts through reliable processes.

The willingness of both Congress and the Court to play fast and loose with factfinding undermines social capacities for well-grounded decisionmaking. An example: Unhappy with the decision in *Stenberg v. Carhart*,<sup>204</sup> holding Nebraska’s “partial birth abortion” ban unconstitutional because it was too vague and contained no “health” exception, Congress enacted the Partial-Birth Abortion Ban Act of 2003.<sup>205</sup> It pro-

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<sup>200</sup> 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958); see also Davis, *supra* note 43, at 402–03. The Advisory Committee notes to FED. R. EVID. 201 (2012), which authorizes judicial notice of adjudicative facts, explain that “omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts[, which] . . . have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” Adjudicative factfinding is governed by the rules of evidence; “judicial access to legislative facts,” though essential to judicial decisionmaking, need not meet “any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs,” although finding “legislative” facts does not exclude “introducing evidence through regular channels in appropriate situations.” *Id.* For other distinctions, see, for example, DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS 43–62 (2008) (distinguishing, among legislative facts, between “doctrinal” facts, on which doctrine is based, and “reviewable” facts, relevant to the application of legal doctrine though not necessarily about a specific past event, *id.* at 51–52); and Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) (describing general social science “frameworks” for resolving specific adjudicatory facts).

<sup>201</sup> Cf. Sandra Harding, *Feminism, Science, and Anti-Enlightenment Critiques*, in FEMINISM/POSTMODERNISM 83, 100 (Linda J. Nicholson ed., 1990) (giving up idea of one true story is not inconsistent with trying to tell “less false” stories).

<sup>202</sup> See, e.g., CASS SUNSTEIN, REPUBLIC.COM 3–84 (2001).

<sup>203</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

<sup>204</sup> 530 U.S. 914 (2000).

<sup>205</sup> 18 U.S.C. § 1531 (2012).

vided more specificity in defining what acts were prohibited but included no exception for when the procedure was necessary to preserve the pregnant woman's health. It thus replicated one of the two major constitutional errors of the statute struck down in *Stenberg*. Congress's legislative process was highly skewed,<sup>206</sup> and resulted in a set of disingenuous and flat-out incorrect "findings" in the legislation.<sup>207</sup>

Equally concerning was the Court's treatment of the proven inaccuracy of the so-called facts in *Gonzales v. Carhart*,<sup>208</sup> a challenge to the 2003 Act. Instead of candidly overruling *Stenberg*, the Court purported to distinguish it. With respect to the absence of a "health" exception, the Court concluded that "medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."<sup>209</sup> Yet all three district court judges (two appointed by President Clinton, one by President George H.W. Bush) hearing challenges to the federal Act had found otherwise.<sup>210</sup>

The Court purported to reject the argument that it could rely on congressional findings alone, acknowledging that "some of the important findings have been superseded."<sup>211</sup> Congress found, for example, that "no medical schools provide instruction on the prohibited procedure," but as evidence introduced below showed, this was incorrect.<sup>212</sup> Congress also found that "there existed a medical consensus that the prohibited procedure is never medically necessary," but again, the evidence in all three district courts "contradicts that conclusion."<sup>213</sup> The Court's language — "superseded" — arguably obscures the reality that Congress's "important findings" were enacted in disregard of the facts,<sup>214</sup> making it hard to see why the Court deferred to its findings at all. Yet the Court gave Congress a wide berth, invoking language of

<sup>206</sup> See David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 11 ("When Representative Chabot first introduced the bill in June 2002, 'complete with the same detailed factual findings that were ultimately enacted into law,' . . . Congress had not yet conducted any relevant post-*Stenberg* hearings, and thus in actuality 'had not considered any new evidence' whatsoever." (quoting Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 293 n.9 (2d Cir. 2006) (Walker, C.J., concurring))).

<sup>207</sup> See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201.

<sup>208</sup> 550 U.S. 124 (2007).

<sup>209</sup> *Id.* at 164.

<sup>210</sup> See *id.* at 133–34; *id.* at 174–75 (Ginsburg, J., dissenting). The Court itself noted the absence of reliable data to support its conclusion that the banned abortion method would cause more anguished regret, *id.* at 159–60 (majority opinion); the dissent questioned why this concern was not redressable through informed consent, *id.* at 184 (Ginsburg, J., dissenting).

<sup>211</sup> *Id.* at 165 (majority opinion).

<sup>212</sup> *Id.*; *id.* at 175–76 (Ginsburg, J., dissenting) ("[N]umerous leading medical schools teach the procedure," including at Columbia, Cornell, Yale, and University of Chicago).

<sup>213</sup> *Id.* at 165–66 (majority opinion).

<sup>214</sup> Elizabeth DeCoux, *Does Congress Find Facts or Construct Them? The Ascendance of Politics Over Reliability*, *Perfecting in Gonzales v. Carhart*, 56 CLEV. ST. L. REV. 319, 363–64 (2008).

“rational basis” review in areas of “medical and scientific uncertainty” in its discussion of the constitutionality of the absence of a health exception: “The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.”<sup>215</sup> Notwithstanding medical testimony that the banned procedure was safer for some women because it required fewer passes with a cutting instrument inside the woman’s body, the Court appears to have treated the legislation as if it regulated economic matters — rather than women’s bodies — under rational basis review.<sup>216</sup> Where reasons may be hypothesized, evidence becomes less relevant.

As a logical matter, there is a further problem with the factual basis for omitting a health exception. The statute provides an exception from its ban for situations where the pregnant woman’s life is at stake — that is, it contemplates circumstances in which performance of the procedure might be “necessary to save the life of a mother.”<sup>217</sup> It is difficult to imagine how a reasonable legislator could provide an exception for an otherwise banned procedure when a woman’s life was endangered but conclude that there were no circumstances in which use of the procedure was necessary for her health.<sup>218</sup>

Where Congress enacts into law findings of fact that are untrue, and whose premise contradicts other parts of the statute, this is surely a signal of something profoundly wrong with the factfinding process. Yet

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<sup>215</sup> *Gonzales v. Carhart*, 550 U.S. at 156, 163, 166–67 (leaving open an as applied challenge, even though *Stenberg* had found Nebraska’s law unconstitutional on a facial challenge, see *Stenberg v. Carhart*, 530 U.S. 914, 1019 (2000) (Thomas, J., dissenting)). The Court’s conclusion that there was uncertainty on this point reflects extraordinary deference to Congress. Several groups of health professionals, including the American Congress of Obstetricians and Gynecologists (whose 44,000 members, all board-certified in OBGYN, include 90% of all physicians board-certified in OBGYN, see *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957, 983–84 (N.D. Cal. 2004)), indicated that on occasion the procedure might be necessary to protect the pregnant woman’s health, see *Gonzales v. Carhart*, 550 U.S. at 176 (Ginsburg, J., dissenting). Opposing medical views came primarily from the Physicians Ad Hoc Coalition for Truth, formed for the purpose of supporting the Act, and an amicus brief in support of the Nebraska law struck down in *Stenberg* by the American Association of Physicians and Surgeons (formed to preserve “the sanctity of the patient-physician relationship and the practice of private medicine”), *About AAPS*, ASS’N. OF AM. PHYSICIANS & SURGEONS, <http://aapsonline.org/about-aaps> [<https://perma.cc/3FS2-64QE>], and appearing generally opposed to abortion, as this essay by its President suggests, Richard Amerling, *Doctors Must Defend Human Life*, 20 J. AM. PHYSICIANS & SURGEONS 69 (2015).

<sup>216</sup> Compare *Gonzales v. Carhart*, 550 U.S. at 166 (majority opinion) (“Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.”), with *id.* at 178 (Ginsburg, J., dissenting) (“[I]ntact D & E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus.”).

<sup>217</sup> 18 U.S.C. § 1531(a) (2012).

<sup>218</sup> Perhaps the implicit normative judgment was that how a fetus is destroyed was more important than maternal health, but not maternal life. But that is not what was said.

rather than so conclude, the Court engaged in a truly embarrassing shuffle, embracing the conclusions of its unreliable legislative partner, while rejecting conclusions by three district courts after long trials and on extensive records.<sup>219</sup> The process reflects poorly on both Congress and the Supreme Court. When courts acquiesce to such deeply flawed legislative factfinding, they disserve society.

The Court's inconsistency in addressing facts, which may be an inescapable consequence of being a multimember tribunal with a tradition of individual authorship of opinions, is revealed by comparing its decision in *United States v. Morrison*,<sup>220</sup> striking down a federal civil rights cause of action against the perpetrators of gender-motivated violence. In rejecting arguments for congressional power under Section Five of the Fourteenth Amendment,<sup>221</sup> the Court relied in part on empirical grounds,<sup>222</sup> finding that a nationwide remedy for gender-biased failures of investigation and prosecution of sexual violence had not been justified. Its treatment of legislative facts was unconvincing: On the one hand, the Court accurately stated, the "assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence . . . is supported by a voluminous congressional record."<sup>223</sup> However, the Court later complained that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes *does not exist in all States, or even most States.*"<sup>224</sup> This statement, as Justice Breyer's dissent emphasized, is completely unsupported: "Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings

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<sup>219</sup> See *Planned Parenthood*, 320 F. Supp. 2d at 1024 ("Congress' conclusion that the procedure is never medically necessary is not reasonable and is not based on substantial evidence."); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 488 (S.D.N.Y. 2004) ("Congress's factfindings were not reasonable and based on substantial evidence."); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1012 (D. Neb. 2004) ("[T]he congressional record proves the opposite of the Congressional Findings."); *id.* at 1015 (concluding that the finding of a medical consensus in support of the ban or that the procedure was never necessary to protect a woman's health "is both unreasonable and not supported by substantial evidence").

<sup>220</sup> 529 U.S. 598 (2000). I coauthored an amicus brief in the case supporting the constitutionality of the challenged provision of the Violence Against Women Act.

<sup>221</sup> The Court also rejected a Commerce Clause argument, primarily based on a conceptual distinction between economic and noneconomic activity. *Id.* at 607–19.

<sup>222</sup> *Morrison*, *id.* at 621–25, also cited *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment applies only to state action) as a conceptual barrier to a remedy for private wrongdoing. But the later Voting Rights Act case law had upheld legislation prohibiting acts not necessarily themselves constitutional violations, as part of a remedial scheme aimed at redressing violations of the Fourteenth and Fifteenth Amendments. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>223</sup> *Morrison*, 529 U.S. at 619–20 (emphasis added). The Court went on to discuss the evidence before Congress that "discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime." *Id.* at 620.

<sup>224</sup> *Id.* at 626 (emphasis added).

about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. *The record nowhere reveals a congressional finding that the problem ‘does not exist’ elsewhere.*<sup>225</sup> The Court’s suggestion that the problem “does not exist in . . . most states” was not only internally inconsistent but showed a lack of knowledge of actual facts in the world; plainly, Congress should have been able to “take the evidence before it as evidence of a national problem.”<sup>226</sup>

Courts’ rectitude and fair-mindedness in dealing with facts, and records, are important foundations for their special role. And yet, cases like *Carhart* or *Morrison* are part of a tapestry of decisions suggesting that accurate factfinding does not matter. In oral argument in *McCutcheon v. FEC*,<sup>227</sup> Justice Scalia suggested that the Court ordinarily did not “need a record to figure out issues of law,” notwithstanding disagreement on the corrupting influence of campaign contributions. Discussing “political law cases,” Zephyr Teachout describes a regime of “facts in exile, a disconnect from the experience of politics.”<sup>228</sup> What this means is that decisions about the law will be made based on the individual Justices’ (necessarily limited) background assumptions about the world. Putting “facts in exile” deprives the country of an important benefit of a system of independent courts — providing a source for impartial public judgment about what the shared facts of our national struggles are.

*Judicial Deference and Legislative Factfinding:* Notwithstanding the Court’s occasional failure to take facts as seriously as it should, the ability of Article III courts to act with perceived impartiality is an important social and constitutional resource in a time of increased polarization. Just as we are in a period of declining faith in the objectivity of facts, so too are we in a period of declining faith in the institutions of government, with the (concerning) exception of the military.<sup>229</sup> Trust in

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<sup>225</sup> *Id.* at 666 (Breyer, J., dissenting) (emphasis added) (citations omitted).

<sup>226</sup> *Id.*

<sup>227</sup> 134 S. Ct. 1434 (2014); Transcript of Oral Argument at 17, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 5845702, at \*17.

<sup>228</sup> ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 259 (2014) (“[The Court] repeatedly chooses to review political law cases without developing a factually grounded understanding of how influence works.”); *see also id.* at 267 (attributing the lack of interest in facts to the influence of the abstraction of law and economics and suggesting that the Justices have “abandoned faith in democratic politics,” considering it “essentially corrupt, and not worth saving”).

<sup>229</sup> *See Confidence in Institutions*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/X9JC-PR27>] (providing rankings in June 2017 and historical data back to 1973). Rising trust in the military accompanied by falling trust in other institutions of government is troubling insofar as it might invite departures from foundational constitutional principles of civilian control. *Cf. Parker v. Levy*, 417 U.S. 733, 771 (1974) (explaining why military officers’ speech can constitutionally be restricted).

Congress is at a particularly low point vis-à-vis other government institutions, and has been for several years.<sup>230</sup> Some scholars argue that Congress is behaving unusually poorly in its hyperpolarization, gridlock, and failure to engage in minimally responsible lawmaking and oversight.<sup>231</sup> But there is no need to resolve how uniquely dysfunctional Congress is in order to consider the role of federal courts in U.S. constitutional democracy at a time of declining faith in the other institutions of government and of fragmentation in the sources through which people develop their understandings of the world.

One of the functions of courts is to establish facts with (relative) impartiality. This is not to say that “facts” have some absolute reality, or that “facts” are entirely distinct from “law,” but rather to suggest that facts to which constitutional values are applied should be determined with relative objectivity. “Adjudicative” facts relate to specific past events, while “legislative” or “social” facts concern large-scale predictions or phenomena, such as how many are or will be unemployed, or involve relationships (correlative or causal) between, say, inflation rates and unemployment levels, or death penalty sentences and the rate of violent crime.<sup>232</sup> Facts should have “intersubjective” empirical verifiability,<sup>233</sup> meaning differently situated persons can be expected to agree on “facts” even if they have different values. To be sure, evaluating facts, and especially causal relationships among facts, may be affected by one’s values and presuppositions. But to the extent that facts in the world exist, institutions of government ought to be expected to try to ascertain those facts impartially. Although the facts of one’s own life experiences and thus beliefs about human beings’ experiences generally

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<sup>230</sup> See *Confidence in Institutions*, *supra* note 229 (reflecting that Congress’s approval rating is well below that of the Presidency and the Supreme Court); Jim Norman, *Americans’ Confidence in Institutions Stays Low*, GALLUP (June 13, 2016), <http://www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> [<https://perma.cc/48AJ-HTKC>] (to similar effect); *cf.* PEW RES. CTR., *BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT, TRUST IN GOVERNMENT: 1958-2015* (2015), <http://www.people-press.org/2015/11/23/trust-in-government-1958-2015/> [<https://perma.cc/XV97-ZZVW>] (finding trust in federal government to have declined dramatically over prior decades).

<sup>231</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 141–91 (2006) [hereinafter MANN & ORNSTEIN, *THE BROKEN BRANCH*]; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012) [hereinafter MANN & ORNSTEIN, *IT’S EVEN WORSE*].

<sup>232</sup> See *supra* note 200.

<sup>233</sup> *Cf.* KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 44 (Basic Books 1959) (arguing that while “scientific theories are never fully . . . verifiable, . . . the *objectivity* of scientific statements lies in the fact that they can be *inter-subjectively tested*”).

are likely to differ, one can work to better understand the facts of other people's lives.<sup>234</sup>

Courts also need knowledge of the facts concerning operations of other components of government. In a period in which legislative irresponsibility is on frequent display, Brandeis might well have measured the deference due a legislature in part by the degree to which it could be understood to have acted seriously with respect to the factfinding component of its responsibility.<sup>235</sup> Brandeis's emphasis on understanding the actual factual setting for legislative action thus today might be thought to open up inquiry into the nature of the legislative process itself, one that congressional scholars believe has changed materially in recent years.<sup>236</sup>

Various factors influence the behavior of members of Congress. First, hyperpolarization of political life has seemingly created areas in which each "side" has its own "facts"; the rise of "truthiness," though the subject of late-night comedy,<sup>237</sup> is a serious threat to sustaining a working social order in a constitutional democracy. Second, as legislation becomes more complex and the legislative process less orderly, members' ability even to read the text of laws being enacted declines.<sup>238</sup> Legislators are thus increasingly dependent on guidance from others about what they are voting on. Third, financial constraints influence the time that lawmakers can give to the legislative process as well as their incentives in legislative factfinding: the pressures of running for office require members to devote considerable attention to attracting donors, and loyalty to party may be reinforced by financial pressures for support.<sup>239</sup>

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<sup>234</sup> For Brandeis, facts provided the way to bridge the gap between legal justice and contemporary conceptions of social justice, see *supra* p. 2356, although from today's perspective, much of his data would be regarded as unreliable, see, e.g., Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 102 (2013); see also Carlin Meyer, *Brain, Gender, Law: A Cautionary Tale*, 53 N.Y.L. SCH. L. REV. 995, 998–1000 (2008–2009). That understandings of facts may change over time counsels humility, but affords no reason not to strive for the best current knowledge.

<sup>235</sup> Cf. STRUM, *supra* note 38, at 63 ("Although Brandeis did not address the problem directly, he presumably would have followed his own logic and said that if the legislature failed to amass factual data before enacting the statute and its lawyers could not themselves demonstrate its social rationality, the law should be struck down.")

<sup>236</sup> See MANN & ORNSTEIN, IT'S EVEN WORSE, *supra* note 231, at 3–80; see also Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

<sup>237</sup> See Joëlle Anne Moreno, *Extralegal Supreme Court Policy-Making*, 24 WM. & MARY BILL RTS. J. 451, 451 (2015) (stating that late-night host Stephen Colbert invented the term in 2005); see also Jim Rutenberg, *'Alternative Facts' and the Costs of Trump-Branded Reality*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/business/media/alternative-facts-trump-brand.html> [<https://perma.cc/V9B4-QBTP>].

<sup>238</sup> See, e.g., MANN & ORNSTEIN, THE BROKEN BRANCH, *supra* note 231, at 169–75 (describing, inter alia, enactment of a law that inadvertently allowed disclosures of individual tax returns).

<sup>239</sup> See Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15, 21–22 (2008) (exploring how political pressures

Fourth, media are more likely to cover sound bites or “tweets” than reasoned speeches. Fifth, although mechanisms for monitoring legislative votes and public action have increased, so too has the sheer volume of information available, creating a high degree of noise that may make it more rather than less difficult to sort through the facts.<sup>240</sup> These and other factors increase the likelihood of legislation enacted with a poor factual foundation. As Neal Devins has suggested, while Congress has good factfinding capacities, it often lacks incentives to deploy them.<sup>241</sup>

Legislating without regard to some concept of the public interest and the facts on which action is based is a form of corruption of the legislature’s role as, broadly speaking, representative of the nation’s interests. By corruption, I mean not just the notion of corruption as a direct “quid pro quo” exchange of favors for a public act,<sup>242</sup> but something closer to Teachout’s description of the founding generation’s conception of corruption as the “self-serving use of public power for private ends,” a “kind of conscious or reckless abuse of the position of trust,” a “loss of integrity” in the public processes.<sup>243</sup> If legislatures behave corruptly in this sense, that is, with a disregard for the public interest and an undue focus on narrow partisan or personal interests,<sup>244</sup> and courts defer to the extent of not engaging in independent factfinding about the reasonableness of legislation, the costs to public trust in government may be considerable.<sup>245</sup>

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and legislators’ failure to conduct adequate factfinding combine to “impair[] legislators’ cognitive judgment, engendering mistakes in evaluating facts” (citation omitted).

<sup>240</sup> Moreover, elected officials and citizens may adhere to ungrounded beliefs notwithstanding objectively verifiable data to the contrary. See Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 65–68 (2014) (noting that contrary evidence may deepen false beliefs). On citizenship as a “public office,” see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 377 (2009).

<sup>241</sup> Devins, *supra* note 197, at 1182.

<sup>242</sup> See *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010).

<sup>243</sup> Teachout, *supra* note 240, at 373–74, 395–96. For a capacious view of the proper role of a representative, embracing the advancement of both one’s own constituents’ interests and those of the broader polity, see Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1738–63 (2016).

<sup>244</sup> Legislators need to mediate the demands of different interest groups, including, importantly, their own constituents; doing so is not corrupt but appropriate in a pluralist democratic republic. See Jackson, *supra* note 243, at 1760–63, 1765–68.

<sup>245</sup> In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), the Court refused to examine whether the Georgia legislature acted from financial corruption in providing for the sale of certain lands. See TEACHOUT, *supra* note 228, at 93–101, 270; see also Thayer, *supra* note 1, at 149 (arguing that inquiry into legislative corruption would be “indecent in the extreme,” at least with respect to a mere “private contract” (quoting *Fletcher*, 10 U.S. (6 Cranch) at 131)). But the Court has relied on discriminatory animus as a basis to strike down legislation. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985). Courts need not generally inquire into legislative motivation; assuming good faith is a sensible way of recognizing the coordinate status and democratic legitimacy of the legislature. But at the same time, courts should recognize that legislators are under many pressures that push against taking seriously any objective factfinding role. Proportionality review allows courts to

Accordingly, in the contemporary context, I suggest the degree of deference given Congress should vary depending on the type of issue, the nature of the congressional factfinding process, and the nature of the underlying facts.<sup>246</sup>

(a) *Nature of the Issues*: When legislation trenches on the kinds of individual rights that must look primarily to courts for protection, the basis for deference to legislative factfinding is at its weakest, in part because one purpose of rights is to limit what majorities can impose on minorities.<sup>247</sup> By contrast, Devins has argued that in separation of powers contexts the incentives for sound factfinding in the lawmaking process are more likely to exist, given interests in establishing regimes to apply over the course of presidencies held by persons of different parties.<sup>248</sup>

Although the Supreme Court's self-understanding has increasingly focused on its role in clarifying important legal issues,<sup>249</sup> significant functions of the Court historically have included reviewing lower court findings of fact on which constitutional rights depend. The Court has a more extensive history of independent fact review in such cases than readers may recall. In *Norris v. Alabama*,<sup>250</sup> the Court famously insisted on being able independently to determine the facts on which a claim of race discrimination in jury selection depended:

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 . . . claimed[,] . . . 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

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screen for markers of improperly motivated laws without having to declare the purpose improper. See Jackson, *supra* note 92, at 175–76.

<sup>246</sup> Faigman and Devins agree that the nature of the issue should affect the degree of deference, albeit for different reasons. See FAIGMAN, *supra* note 200, at 129; Devins, *supra* note 197, at 1187–206. Unlike Faigman, see *supra* note 200, at 43–62 (analyzing subcategories of legislative facts separately), I treat all “legislative facts” together, as is common in the literature, see, e.g., Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 38–43 (2011).

<sup>247</sup> Cf. Devins, *supra* note 197, at 1186 (identifying reasons, including risk of bias, why courts may be better in some areas than Congress in evaluating social facts).

<sup>248</sup> *Id.* at 1188–93.

<sup>249</sup> Compare SUP. CT. R. 10 (indicating that certiorari will rarely be granted to correct “erroneous factual findings or the misapplication of a properly stated rule of law”), and WILLIAM H. REHNQUIST, THE SUPREME COURT 236–38 (2001) (indicating that certiorari should not be granted “where the lower courts may have reached an incorrect result . . . [that] is not apt to have any influence beyond its effect on the parties to the case”), with Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1704–05 (2000) (noting that in obtaining more discretion over their docket in 1925, the Justices asserted the need to “avoid frivolous appeals,” and assured Congress that certiorari “would always be granted when there was an arguable constitutional claim”).

<sup>250</sup> 294 U.S. 587 (1935).

must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.<sup>251</sup>

As Benno Schmidt has explained, the Justices actively engaged in reviewing the evidence, using magnifying glasses to examine the jury rolls, with one Justice being heard to exclaim in a whisper, “Why it’s as plain as punch.”<sup>252</sup> Notwithstanding the state court having found no discrimination, the Court concluded to the contrary based on independent examination of the evidence.<sup>253</sup>

*Norris* was not a one-off decision; it cannot be dismissed as an artifact of a time when the Court was only reluctantly approving administrative adjudication while reserving authority for independent Article III court review of “constitutional” or “jurisdictional” facts.<sup>254</sup> Rather, in a series of cases stretching over the next thirty-plus years, the Court repeatedly refused to accept state court findings of fact in race discrimination cases.<sup>255</sup>

Review of historic “adjudicatory facts” found by lower courts differs, of course, from judicial review of legislative facts. But in *Gonzales v. Carhart*, the Court paid lip service to the same general principle: “The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”<sup>256</sup> In many constitutional

<sup>251</sup> *Id.* at 589–90.

<sup>252</sup> Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1478–79 (1983).

<sup>253</sup> *Norris*, 294 U.S. at 596–99.

<sup>254</sup> See *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“[T]he judicial power . . . necessarily extends to the independent determination of all questions, both of fact and law, necessary to [perform the] supreme function” of constitutional rights enforcement.); *id.* at 54–58 (discussing jurisdictional facts). See generally Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES 359 (Vicki C. Jackson & Judith Resnik eds., 2010).

<sup>255</sup> See *Pierre v. Louisiana*, 306 U.S. 354 (1939) (rejecting factfinding below after state trial court, though finding discrimination in petit jury selection, refused to quash grand jury and state supreme court disagreed with findings even as to the petit jury); *Patton v. Mississippi*, 332 U.S. 463, 466–69 (1947) (holding that “the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County” and commenting that the state court’s failure to consider this historical context “seriously detracts from the weight and respect” otherwise to be given its factfinding); *Cassell v. Texas*, 339 U.S. 282 (1950) (reversing conviction where grand jury was limited to white men); *Avery v. Georgia*, 345 U.S. 559, 561 (1953) (reversing conviction where prospective juror list was color-coded by race, notwithstanding trial judge’s testimony that in selecting juror names from a box “he did not, nor had he ever, practiced discrimination in any way” because “the fact remains that there was not a single Negro in that panel”); *Hernandez v. Texas*, 347 U.S. 475, 481–82 (1954); *Eubanks v. Louisiana*, 356 U.S. 584, 587–88 (1958); *Whitus v. Georgia*, 385 U.S. 545, 548–52 (1967).

<sup>256</sup> 550 U.S. 124, 165 (2007); see FAIGMAN, *supra* note 200, at 126–28 (arguing that independent review of facts concerning constitutional rights is always possible). The possibility of independent review does not exclude deference to prior decisionmakers based on, for example, their care, fair-mindedness, or independence in arriving at similar conclusions. *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984) (“The same ‘clearly erroneous’ standard applies to findings based on documentary evidence as to . . . oral testimony, but the presumption has lesser force in the

cases, however, perhaps especially those involving questions of government structure,<sup>257</sup> the question should not be one of the Court's independent factual evaluation, but whether the legislative evaluation was within the bounds of reasonableness.<sup>258</sup>

(b) *On Legislative Process:* As Thayer's distinction between review of state and federal legislation implies, the institutional setting of factfinding outside the courts matters to the appropriate degree of judicial deference.<sup>259</sup> When there is reason to doubt the bona fides of a legislative inquiry, courts should feel more free to engage in independent examination of the factual basis of legislation, especially when it is claimed to infringe on individual rights. Such reasons might exist in a variety of circumstances. Legislatively found "facts" that are demonstrably inaccurate would certainly be an indicator. Legislative factfinding staged to exclude views of recognized experts that an impartial inquiry would want to hear, or fixed in advance of the hearing,<sup>260</sup> may also call for greater judicial scrutiny.<sup>261</sup> Other situations are more ambiguous. When legislation is enacted quickly and with overwhelming support, this might indicate a body of common knowledge that provides a reasonable basis for legislation; or it might reflect an overwhelming popular passion that has momentarily swept through Congress, putting minority

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former situation . . . . Similarly, . . . [appellate deference] tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours." (citation omitted).

<sup>257</sup> In addition to Devins's arguments on Congress's incentives in separation of powers cases, *see supra* p. 2389, the parties in disputes involving ongoing governmental entities (including federalism issues) have many mechanisms to advance and defend their understanding of the facts in legislative fora; individuals or small groups of individuals do not. And determining the effects on the constitutional balance of power of different interpretations relating to structural innovations can be quite difficult. *See* Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 34 (2016) (arguing that "[m]anaging the structural constitution . . . depends on a clear understanding of where power in government is located and how it shifts," but that such knowledge is "elusive"); *see also* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1681–82 (2014) (noting failures of empirical understanding of separation of powers issues before the Court). A very light judicial hand, then, may be justified on these issues. *But cf.* Devins, *supra* note 197, at 1194–200 (arguing that Congress lacks incentives for good factfinding on federalism issues).

<sup>258</sup> *See* Matthias Klatt & Johannes Schmidt, *Epistemic Discretion in Constitutional Law*, 10 INT'L J. CONST. L. 69, 72 (2012) (arguing that too high a standard of empirical validity would lead to "paralysis" of government and too low a standard "would give the authorities far too wide discretion, undermining the binding effect of the constitution"). For a quite different view, *see* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008).

<sup>259</sup> *But see* FAIGMAN, *supra* note 200, at 173–78 (arguing that because all institutions have some special competence, deference arguments will not distinguish among institutions). But state courts are not coordinate branches and deferring to Congress does not risk non-uniform constitutional rules throughout the country.

<sup>260</sup> *See supra* note 206.

<sup>261</sup> *See, e.g.,* Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055, 1060 (2006) (arguing that "[a]n increasingly ideological, increasingly polarized Congress sees hearings as staged events in which each side can call witnesses who will explain their views to the public," rather than the past practice of hearing "nonpartisan witnesses").

rights at risk; or it might reflect the kind of disagreement with the Court on issues of law rejected in *City of Boerne v. Flores*.<sup>262</sup> Departures from regular lawmaking process, though increasingly common, might in some contexts bear on judicial deference to presumed legislative factfinding.<sup>263</sup>

(c) *Nature of the Facts*: Legislation based on patent misunderstandings of important, readily established facts should get less deference than legislation without such glaring deficiencies. Reliance on a “fact” that is untrue is, as noted, a signal of a legislative process gone awry.<sup>264</sup> The “superseded” findings in the federal Partial-Birth Abortion Ban Act were, simply, false. These went beyond “disingenuous appeals to science,” a problem that has been identified as a persistent one in some legislative processes.<sup>265</sup> This differs from a situation, in Justice Brandeis’s words, where “[h]igh medical authority” is in conflict.<sup>266</sup>

It is neither realistic nor desirable that courts should always, or never, defer to legislative findings. It will depend on the nature of the issue, the nature of the facts found by Congress, and the nature of the process used. No special procedural apparatus is needed for evaluating legislative facts, other than to make efforts to enable adversarial responses to new factual material introduced on appeal.<sup>267</sup> But more systematic attention to why congressional findings are or are not adequate

<sup>262</sup> 521 U.S. 507 (1997); cf. Transcript of Oral Argument at 46–47, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (Scalia, J.) (suggesting that increased congressional support for the Voting Rights Act extension in 2006, compared to closer votes in earlier periods, reflected a sense of “racial entitlement” calling for greater judicial scrutiny).

<sup>263</sup> On the decline of regular order, including effective exclusions of one party from a lawmaking process or circumvention of deliberation-enhancing, cross-checking practices, see, for example, MANN & ORNSTEIN, *THE BROKEN BRANCH*, *supra* note 231, at 141–45, 169–75; John McCain, *Full Text of John McCain’s Senate Floor Speech: ‘Let’s Return to Regular Order,’* USA TODAY (July 25, 2017, 4:16 PM), <https://www.usatoday.com/story/news/politics/2017/07/25/full-text-john-mccains-senate-floor-speech/509799001/> [<https://perma.cc/D4QS-63M8>]. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2368 (2006) (“Judicial review may be most needed . . . when partisan majorities pursue linked aims through the political branches without any internal check.”). Whether such a decline bears generally on judicial deference, or only in egregious circumstances, requires further consideration.

<sup>264</sup> Cf. Borgmann, *supra* note 239, at 15 (“[I]mplementing justice depends upon factual truth. Laws founded upon untruths subvert justice.”).

<sup>265</sup> See *id.*; see also Moreno, *supra* note 237 (discussing the general problem of “truthiness” in the determination of “legislative facts”); FAIGMAN, *supra* note 200, at 60 (stating that *Gonzales v. Carhart*’s assertion of substantial medical disagreement was “on the level of such scientific disagreements as evolution versus intelligent design and the reality of global warming”).

<sup>266</sup> *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926) (rejecting challenge to Prohibition-era statute limiting amount of liquor that could be medicinally prescribed).

<sup>267</sup> For example, if respondent-side amicus briefing introduces new factual claims, the Court might call for responses to assure a sound basis for its decision. Cf. JACKSON, *supra* note 169, at 190–91 (making a similar suggestion for where the downside amicus introduces arguments about foreign law). While standards of reviewing legislative facts may differ from those for review of adjudicatory facts about particular litigants, see *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986); Gorod, *supra* note 246, at 45, the benefits of adversarial contest over disputed legislative facts remain, cf. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548–49 (1924) (Holmes, J.) (stating that “the

would be a helpful development. Likewise, more consistency in the Supreme Court's procedures affecting factual development in constitutional cases,<sup>268</sup> and in its treatment of lower-court factfinding, would be beneficial. When the Court treats lower-court factfinding as dispensable,<sup>269</sup> incentives for trial courts to be careful in finding facts may be undermined. It is harder to maintain respect for the judiciary as a whole if the Supreme Court behaves as though the lower courts do not matter, to the detriment of the social and legal interests in having facts found in relatively impartial fora.

It is of course important not to compare an idealized version of one institution with a realistic version of another.<sup>270</sup> But the legislative process has been deeply broken in recent years. And despite episodic departures from norms of fair adjudication under impartial procedures, federal courts remain a more impartial branch.<sup>271</sup>

*Deference and Proportionality:* It has been argued that regularizing procedures for judicial review of legislative facts would place too much

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Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law," but remanding to the trial court, which can "more conveniently" ascertain whether emergencies existed on certain dates in the past). For other scholarly approaches to procedural aspects of adjudicating social facts, see, for example, FAIGMAN, *supra* note 200, at 170–78; Gorod, *supra* note 246, at 72–74; Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260–61 (2012); Walker & Monahan, *supra* note 200, at 583–98.

<sup>268</sup> On how, in *Citizens United*, the Court formulated a constitutional question going to a facial-validity challenge abandoned and not litigated in the lower courts, see Gorod, *supra* note 246, at 31–32; Senator Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 201–03 (2015); see also Transcript of Oral Argument at 75–77 (Sept. 9, 2009), *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-215) (Seth Waxman, representing amicus) (arguing that there was no proper factual record on which to decide the facial challenge because the questions presented changed on appeal). On the Court's ignoring the congressional record, see *Citizens United*, 558 U.S. at 412 (Stevens, J., dissenting) ("The total record [Congress] compiled was 100,000 pages long.").

<sup>269</sup> See *supra* note 268; see also *supra* pp. 2383–84.

<sup>270</sup> See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 37 (2009) (arguing for assuming "the same motivations [of legislatures and courts] . . . to isolate the question of epistemic capacities"). But there are structural reasons why the motivations of lifetime Article III judges will not be "as ideological or partisan," *id.*, as those who have to stand for election to Congress. Notwithstanding studies showing that party affiliation of the nominating President helps predict judicial voting, this does not mean judges vote as political partisans. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 839 (2008) (observing that "Republican [and] Democratic appointees [on the courts of appeals] do not differ in their voting patterns in some areas in which significant differences might well be expected," including criminal appeals, property rights, Commerce Clause powers, and standing). Miles and Sunstein also argue that differences based on the appointing President's party affiliation are, in most areas, "significant" but "far from huge," and suggest that law has a constraining effect. *Id.* at 844.

<sup>271</sup> See generally CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 49–74 (2007). The Due Process Clause, moreover, requires judges to hear from both sides before deciding; no similar constraint applies to legislatures.

weight on such facts, thereby moving courts toward unbounded balancing and threatening to displace legislative judgment.<sup>272</sup> But while categorical rules may be applied without considering the underlying constitutional values in cases covered by the rule, *creation* of such rules may well require knowledge or evaluation of social facts. Both categorical rule-creation and case-by-case application of proportionality or other standards call for considering the factual contexts in which they would operate.<sup>273</sup> And deference to legislative determinations can have an important role to play even under standards like proportionality review.

As Alexy argues, the fact that legislatures are democratically elected is a reason for courts to defer to their judgments in areas of normative or epistemic discretion.<sup>274</sup> With respect to the choice of means that are rational and that minimally impair constitutional rights, he explains, legislatures have considerable epistemic discretion that courts should respect;<sup>275</sup> how much discretion and how much uncertainty is tolerable depends on how much the legislation intrudes on areas protected by rights.<sup>276</sup> (“Tiers” of equal protection review in the United States might be understood to formalize this approach: “suspect” classifications, posing greater risks of a serious violation, require more justification than

<sup>272</sup> See Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 121 (1988).

<sup>273</sup> The Court has sometimes adopted rules based on the Justices’ factual assumptions, for example, of what is necessary for effective police work, without engaging in serious factfinding concerning the social costs and benefits of such approaches or evaluating whether policymakers have done so. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Whren v. United States*, 517 U.S. 806 (1996); *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981); cf. *Utah v. Strieff*, 136 S. Ct. 2056, 2068–71 (2016) (Sotomayor, J., dissenting) (invoking data and her professional experience to show systemic nature and adverse consequences of the police misconduct at issue).

<sup>274</sup> See ALEXY, *supra* note 77, at 393–425 (distinguishing “structural” and “epistemic” discretion). Structural discretion exists when legislatures make normative choices of what legitimate ends to pursue; similarly, when competing values are in equipoise at the “proportionality-as-such” stage, the legislature’s choice must be respected. See *id.* at 414–15. Epistemic discretion exists when there is an insufficient knowledge base to make reliable conclusions or predictions about the facts underlying legislative policy. *Id.* at 399–401, 411–18. (Alexy also argues that there is “normative epistemic discretion” which, though distinct, approaches “structural” discretion. See *id.* at 415–16.)

<sup>275</sup> *Id.* at 399–400 (discussing German constitutional decision rejecting arguments that decriminalizing possession of marijuana would better prevent the dangers of illegal drug trading, in light of legislature’s epistemic, or “knowledge-related discretion”). Upholding the criminal ban, the court found that “scientifically based knowledge, which necessarily points to the correctness of one or the other strategies’ was not present”; thus the “decision of the legislature for criminalization had to be accepted, ‘for in choosing between several potentially suitable routes to reaching a legal goal the legislature enjoys a prerogative of assessment and decision.’” *Id.* at 399 (citation omitted). *But cf.* Klatt & Schmidt, *supra* note 258, at 76 (criticizing Alexy’s approach as affording too much epistemic discretion to legislatures).

<sup>276</sup> ALEXY, *supra* note 77, at 418–19 (describing “second Law of Balancing,” that the greater the intrusion on rights, “the greater must be the certainty” about underlying premises); see also Rivers, *supra* note 132, at 206 (“[T]he more seriously a right is limited, the more argument and evidence the court needs to [find the justification sufficient].”).

classifications based on non-suspect criteria.<sup>277</sup>) Alexy identifies a three-part scale of epistemic certainty used by the German Constitutional Court — highly reliable, plausible or defensible, and “not evidently false.”<sup>278</sup> (As *Gonzales v. Carhart* shows, there is, sadly, a fourth category of demonstrably false factual assumptions.<sup>279</sup>)

Stephen Gardbaum likewise argues that proportionality doctrine can be applied in ways deferential to legislative policy judgments:

[R]eviewing courts should ask whether a legislature’s assessment that the chosen means [meet the suitability, necessity, and proportionality-as-such tests] is a reasonable one. . . . [T]here is usually no one right answer but (a) a range of reasonable ones and (b) one or more wrong or unreasonable ones. . . . [T]he task of judicial review should be limited to weeding out the latter.<sup>280</sup>

Other scholars have also argued that proportionality review can be applied, as Thayer understood judicial review, not as a first-order interpretive choice of the courts but rather to ensure that decisions of other branches are within a “zone of proportionality.”<sup>281</sup>

A strength of proportionality doctrine is its capacity to draw on the greater impartiality of courts in determining what factual assumptions are within the range of the reasonable and thus within legislative discretion. In so doing, courts may also provide objective focal points for shared understanding of the complex realities in which we live, in a society that has lost many of its sources of shared knowledge.

## CONCLUSION

Justice is both deeply contested and central to the study of law and legal institutions. The question of what is just is, of course, not congruent with the positive question of what is law. On this point Holmes was entirely correct. But the gap between law and justice is not one to be

<sup>277</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (applying close review to facts supporting use of “suspect” classification).

<sup>278</sup> ALEXY, *supra* note 77, at 419 & n.97.

<sup>279</sup> See *supra* pp. 2382–84.

<sup>280</sup> Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 LAW & ETHICS HUM. RTS. 78, 102 (2010). Gardbaum has particular familiarity with Commonwealth constitutionalism. See STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM* (2013).

<sup>281</sup> *Beit Sourik*, at ¶ 42, (Barak, C.J.), in JACKSON & TUSHNET, *supra* note 103, at 707–08; see also, e.g., Rivers, *supra* note 132, at 191–92, 196–200; AILEEN KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 240* (2009) (arguing that courts should assess proportionality as “secondary” decisionmakers, giving deference to legislatures as primary). Moreover, some argue, the questions of proportionality review are well suited to legislative determination and may even enhance the ability of legislatures to work with courts in making policy while protecting rights. See Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, in *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* 259 (Grant Huscroft et al. eds., 2014); Jackson, *supra* note 74, at 3165.

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relished: Law ought to aspire to reflect deeply held community conceptions of justice. One does not need to commit to the proposition that an unjust law is not law to believe that the interpretive spaces of a legal system should be filled by bending toward justice. Bending toward justice may, on a procedural theory of constitutionalism, favor upholding legislative results as a general matter — if the conditions for reasonably fair legislative constitutionalism and processes are met. But to view law's primary function as giving force to the views of dominant opinion goes too far in conflating might with right,<sup>282</sup> and misses the possibility of constitutional law performing checking, legitimating, aspirational, expressive, and even constituting functions.

Judges cannot work from their own conceptions of justice, but must attempt to discern those of their community reflected in its most basic laws — in the U.S. Constitution these would include broad principles of due process protections for life, liberty, and property, and equal protection of the laws; they would also include more particular principles prohibiting, for example, unreasonable searches, or cruel and unusual punishments. Federal judges cannot invalidate legislation for failure to conform to models of justice that prioritize collective well-being over procedural protections for criminal defendants; nor can they invalidate legislation for failure to comply with religious teachings, as can judges in some other countries. The U.S. Constitution is not perfect, but one need not think it reflects an ideal range of justice values to think it embodies some.

Holmes's skepticism contributed to valuable understandings about how doctrines develop and change over time, but if applied too aggressively it can lead to a disabling relativism that obscures rather than clarifies value conflicts in constitutional adjudication, as well as to a decline in a shared sense of what is true. Thayer's arguments for judicial deference to the legislature, if not persuasive in all their particulars, remain valuable in reminding courts that they do not engage in first-order decisions about lawmaking and that in a democratic republic courts should adjudicate with an awareness of the need to allow legislatures room to be legislatures. And Brandeis's message — that without a good understanding of the social facts surrounding lived lives, law's aspiration to do justice cannot be sufficiently approached — is one that has renewed urgency today.<sup>283</sup>

Two other Harvard-affiliated jurists have recently embraced a more proportionate approach to some areas of categorical jurisprudence.

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<sup>282</sup> See ALSCHULER, *supra* note 19, at 58–62, 185–86.

<sup>283</sup> Cf. Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018) (manuscript at 46), <https://ssrn.com/abstract=2901776> [<https://perma.cc/6FAD-JCBM>] (suggesting that constitutional democracies require a “shared epistemic foundation”).

Justice Breyer, joined by Justice Kagan, referred to proportionality in their *Alvarez* concurrence, discussed above,<sup>284</sup> and Justice Kagan has suggested greater reliance on the purposes of the First Amendment (and attention to what risks are “realistically possible” in different contexts) in narrowing the “content-based” category triggering strict scrutiny.<sup>285</sup> Justice Breyer is also well-known for giving close attention to the factual context of legislation, whether in arguing that legislation should be upheld,<sup>286</sup> or struck down.<sup>287</sup> Such fact-based, contextualized, and more proportionate approaches to promoting non-arbitrary government conduct might be viewed as a contemporary embodiment of Brandeis’s vision.

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<sup>284</sup> See *supra* p. 2374; see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235–36 (2015) (Breyer, J., concurring in the judgment) (arguing, in some First Amendment contexts, for a focus on “whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives”); *supra* note 156.

<sup>285</sup> *Reed*, 135 S. Ct. at 2236, 2238 (Kagan, J., concurring in the judgment).

<sup>286</sup> See, e.g., *supra* p. 2384–85 (noting Justice Breyer’s dissent in *United States v. Morrison*).

<sup>287</sup> See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–18 (2016).