

THE VOTING RIGHTS ACT, QUESTIONS OF DEFERENCE &
LEGISLATIVE FACTS IN A DIGITAL AGE

*Allison Orr Larsen**

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When the Supreme Court heard oral argument in *Shelby County v. Holder* – the 2013 case in which it invalidated a key provision of the Voting Rights Act – the Chief Justice quizzed the Solicitor General with statistics about voting turnout by race across the country.

CHIEF JUSTICE ROBERTS: Do you know which State has the worst ratio of white voter turnout to African American voter turnout?

GENERAL VERRILLI: I do not.

CHIEF JUSTICE ROBERTS: Massachusetts. Do you know what has the best, where African American turnout actually exceeds white turnout? Mississippi.

GENERAL VERRILLI: Yes, Mr. Chief Justice. But Congress recognized that expressly in the findings when it reauthorized the act in 2006. It said that the first generation problems had been largely dealt with, but there persisted significant—

CHIEF JUSTICE ROBERTS: Which State has the greatest disparity in registration between white and African American?

GENERAL VERRILLI: I do not know that.

CHIEF JUSTICE ROBERTS: Massachusetts. Third is Mississippi, where again the African American registration rate is higher than the white registration rate.¹

To some, there may be nothing odd about this factual quiz at all. The Voting Rights Act required more of Southern states than Northern states, and the Chief Justice was simply trying to expose that treatment as unwarranted in a modern world. But the comfort with which the Chief Justice unleashed the statistics and the little patience he had for the Solicitor Gen-

** Associate Professor of Law, William & Mary Law School. Thank you to Derek Muller for inviting me to participate on this AALS panel and to my delightful co-panelists: Doug Laycock, Bill Araiza, and Bertrall Ross.

¹ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013), oral argument transcript 2013 WL 6908203 at *32.

eral's attempt to re-focus on the legislative record are dynamics that should give us all pause.

The role of facts in Supreme Court opinions is changing.² The ability of judges to find facts – without a hearing, without a subpoena, sometimes without even the parties before the court – is changing. In oh-so-many constitutional cases, the big fight these days turns on facts – not “whodunit” facts but generalized descriptions about the world, so called “legislative facts.”³ A legislative fact gets its name not necessarily because it is found by a legislature, but because it relates to the “legislative function” or policy-making function of a court. These generalized factual questions are becoming more central to Supreme Court decision-making.⁴ And there is no better example of this in recent memory than the fate of the Voting Rights Act.

The Voting Rights Act (VRA) was enacted in 1965 to address pervasive racial discrimination in voting.⁵ The VRA provided (among other things) that certain jurisdictions – largely Southern States that used literacy tests as a voting prerequisite and had low African American voting turnout – were required to obtain federal approval before changing any of their voting procedures. The original law was set to expire in 5 years, but Congress reau-

2 For my prior work on the role of facts today at the Supreme Court, *see generally* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012); Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014).

3 “Legislative fact” and “adjudicative fact” are phrases coined by Kenneth Culp Davis in 1942 to distinguish types of fact-finding in administrative agencies. *See* Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 HARV. L. REV. 364, 402 (1942).

4 *See* Larsen, *Factual Precedents*, *supra* at 61 (“The Supreme Court . . . opinions are chock-full of statistics, social science studies, and other general statements of fact about the world”). For others who have noticed this change *see* Tim Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N. C. LAW REV. 115, 118 (2003) (“Constitutional law is now in the throes of a widespread empirical turn, a quantitative mood swing that is consistent with a more general societal turn toward all things scientific.”); Tracy L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851, 851 (2002) (“Recent studies show that, over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity.”); Rachael Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 658-668 (1988) (describing historical accounts of the use of facts in judicial opinions and noting that “once heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists”) (quoting John Monahan and Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing, Social Science in Law*, 134 U. PA. L. REV. 477 (1986)). *Cf.* Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 912 (2011) (observing how the digital revolution has “blurred the line between legal and nonlegal authority in recent judicial opinions”).

5 *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (“Congress assumed the power to prescribe these remedies from section 2 of the Fifteenth Amendment which authorizes the National Legislature to effectuate by appropriate measures the constitutional prohibition against racial discrimination in voting.” (internal quotations omitted)).

thorized it several times, most recently in 2006. Last year, in *Shelby County v. Holder*, the Supreme Court found the law's coverage formula – how it determines which states or political subdivisions are subject to preclearance – to be unconstitutional. The Chief Justice, writing for the majority, explained that the formula (which was written in 1965, revised in 1982, and reauthorized without change by Congress in 2006) was based on “decades old data,” “eradicated practices,” and needed to be “updated.”

So let us return to the statistical quiz the Chief Justice administered at the *Shelby County* oral argument. As the exchange demonstrates, the fate of the VRA turned on a key question of fact: had racial conditions changed in the South such that minorities were able to cast meaningful ballots making the coverage formula of the law no longer necessary?

This question was the subject of Congressional fact-finding when the VRA was reauthorized in 2006. As the Solicitor General attempted to argue in response to the Chief Justice, and as Justice Ginsburg detailed in her dissent, Congress “amassed a sizable record” documenting that “serious and widespread intentional discrimination persisted in covered jurisdictions” making the old coverage formula still relevant and necessary.⁶ After holding 21 hearings and compiling over 15,000 pages in the legislative record, Congress made the following finding: despite the progress made by the VRA to combat racial discrimination, “second generation barriers constructed to prevent minority voters from fully participating in the electoral process” continued to persist. Thus, the “evidence clearly showed the . . . need for federal oversight in covered jurisdictions.”⁷

What should a reviewing court do with this sort of finding of fact? On the one hand, a court should perhaps defer to the finding because it was made by a politically accountable institution. On the other hand, a court should perhaps not trust the finding precisely because it was made by a politically accountable institution. This question is critically important to constitutional law today and yet – in the words of John McGinnis and Charles Mulaney – it is “radically under-theorized” by scholars.⁸ With the notable exception of work by some of my co-panelists today who have done very valuable thinking on these issues, the typical scholarly response

⁶ *Shelby Cnty.*, 133 S. Ct. at 2635-6 (Ginsburg dissenting).

⁷ *Id.* at 8 (quoting 2006 Reauthorization, 2(b)(2)-(3), 120 Stat 577-78).

⁸ See John McGinnis & Charles Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT., 69 (2008) (responding to Court's “confusion about fact-finding in the partial-birth abortion case”). For others who have joined this discussion see DAVID FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 129 (2008) (“The standard of review of legislative fact-finding should abide by the same basic principle that guides the entire enterprise of judicial review when laws implicate constitutional values.”); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172-76 (2001); Caitlin Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 35-36 (2009).

has been to shrug and conclude that this legislative fact deference question can only be explained as opportunistic behavior – the Justices defer when they like the fact finding and do not defer when they do not.⁹

Complicating the calculus in a dramatic way is the complete revolution in the way we access and use information. Judges, like the rest of us, are now surrounded by infinite amounts of information. The digital age changes not just the sources of the facts available to courts, but also the emphasis on facts in our legal discourse. Flip through the U.S. Reports these days and it is not uncommon to read Justice Breyer’s views on neuroscience¹⁰ or Justice Kennedy’s statistical analysis on the rate of fatal car accidents in police chases.¹¹ The Internet has sparked a new hunger for empirical support in judicial decisions and legal arguments. There is also a wide-open field of data to support that demand. Consequently the factual dimensions of arguments (complete with supporting secondary authorities) feature prominently in constitutional decisions.

So what? What is wrong with Chief Justice Roberts diving into the statistics himself to inquire whether the Voting Rights Act coverage formula was outdated? To make an informed decision, shouldn’t he think about the same evidence Congress did when evaluating the continued need for pre-clearance in the covered jurisdictions?

Consider what happened in the days after the *Shelby County* oral argument. Nate Silver, a well-known statistics guru, authored an op-ed in the New York Times on the subject. “As much as it pleases me to see statistical data introduced in the Supreme Court,” Silver wrote, “the act of citing statistical factoids is not the same thing as drawing sound inferences from them.”¹² A “statistical sin,” Silver explains, is “cherry picking the evidence in this way,” because “it involves making misleading rather than merely

⁹ William Araiza, *Deference to Congressional Fact Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 881 (2013) (explaining the divergent approaches to deference on legislative facts and acknowledging that “cynics can easily rationalize the divergent results by referring to the politics”); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1175 (2007) (explaining why we leave some questions of fact to the legislatures); Derek Muller, *Judicial Review of Congressional Power Before and After Shelby County*, 8 CHARLESTON L. REV. 287 (2013) (examining how the Court reviewed the record in *Shelby County v. Holder*); Bertrall Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027 (2014) (arguing “courts should engage in credibility-questioning review of the record when the political process has malfunctioned”); See also Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 945 (1999) (“The concept of deference remains malleable indeterminate and not well defined”).

¹⁰ *Brown v. Entn’t Merch. Ass’n*, 131 S.Ct. 2729, 2768 (2011) (Justice Breyer dissenting).

¹¹ *Sykes v. U.S.*, 131 S.Ct. 2267, 2274 (2011).

¹² Nate Silver, *In Supreme Court Debate on Voting Rights Act, a Dubious Use of Statistics*, N.Y. TIMES, March 8, 2013. Nina Totenberg of NPR went further in her criticism, alleging that the Chief Justice “misconstrued” the data. Nina Tonteborg, *In Voting Rights Arguments, Chief Justice Misconstrued Census Data*, (NPR Its All Politics, March 1, 2013).

imprecise claims.” He cautioned against assuming the Massachusetts and Mississippi examples were representative of a larger trend, and he worried about using statistics to infer causality when that inference was not supported. Note that Silver was not accusing the Chief Justice of finding faulty data – the Chief Justice’s numbers came from census figures and were part of the record. Instead, the bigger problem, according to Silver, was “not with the statistics he cites but with the conclusion he draws from them.”¹³

In an information age there are at least two different dangers with judicial fact-finding: (1) a temptation to use off the record facts not tested by the adversarial process (either presented by motivated amicus briefs or found independently by the judge and his law clerks), and (2) the potential for misuse of data that is in the record because of a bolstered confidence with facts that modern Justices possess coupled with an empirical hunger for facts that we all have today.

Even if this is true, an important question remains: If judicial fact-finding is dangerous, can we be confident that legislative fact-finding is superior to it? It is all too tempting to exalt the virtues of factual investigation by an institution with the power to call witnesses and hold hearings and draft reports. Alas, it is not that simple. All too often legislative “fact-finding” missions these days simply amount to political theater. As Doug Laycock has explained “legislators *can* do serious investigations but they rarely do.”¹⁴ Unfortunately, many members of Congress do not even attend hearings where factual evidence is presented, and the ones that are present typically read prepared statements written by their staff as opposed to actively engaging with witnesses and posing difficult or probing questions. The Voting Rights Act, in fact, provides an interesting example. When the House heard hearings on the reauthorization bill in 1982, no witnesses were called to oppose the bill. As one Republican publicly commented, “the only critics were supposed to come from us, and we didn’t want to call them because we weren’t really critical of the act, only certain provisions, and didn’t want to be perceived as against the act.”¹⁵

¹³ *Id.*

¹⁴ Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1174 (2007). For others who have painted a similarly depressing picture, see Neal Devins, *Congressional Fact-finding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L. J. 1169, 1170 (2001) (“[W]hile Congress has superior factfinding capacities, it often lacks the institutional incentives to take factfinding seriously”); Saul M. Pilchen, *Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 339-40 (1984) (“[T]he institutional capabilities of Congress and the courts to find and use facts do not differ sufficiently to justify the realignment of power witnessed during the enforcement clauses’ modern period.”).

¹⁵ ABIGAIL THERNSTOM, WHOSE VOTES COUNT? 79-136 (1987) (quoting Thomas Boyd, Republican minority counsel).

Moreover, legislative fact-finding is also complicated by the digital revolution. The process is often tainted by lobbyists who each arrive at Congress with their own data and fact sheets and empirical “truths.” The information age brings with it an infinite sea of factual information and it is very easy to either find data to support a pre-existing view, or even to pay to have that data manufactured and posted to the world for free.¹⁶ In Laycock’s assessment, “[m]ost of the real discussions in which legislators ‘find’ facts occur ex parte and off the record. The laws they enact are legitimate because they are responsible to voters and because this is apparently the best we can do, not because anything about legislative investigations inspires confidence.”¹⁷

The bottom line, unfortunately, is that there can be no simple bottom line. If ever the answer to the deference question was easy (defer to the branch with the greater fact-finding capacities), the digital age ushered in the end to that era. The Internet changes the game. It is thus incumbent on the next generation of legal scholars to ask about deference to Congress on questions of fact in a fact-intense world – a world where anyone with an iPhone can claim expertise on a factual debate in a matter of minutes. I do not have the answer yet, but I do have a series of questions to consider and two preliminary suggestions for the way this deference question must be tackled in a digital age.

First, we may need to get granular and look closely at the process that resulted in the fact finding. Where do the numbers come from? What were the incentives of those who provided them? Does the data come from a report filed by a federal agency charged with addressing a problem (like the Department of Justice reports presented to Congress when the Voting Rights Act was reauthorized in 2006)? Does it instead just magically appear in the record as a “finding” without accompanying witnesses or adversarial testing? If a judicial fact, does it come after a trial or is it followed by a citation to an amicus brief?

Second, we must be careful with the label “fact.” Identifying what is and is not a fact is a tricky endeavor – indeed some academics say there is no difference at all between the two concepts.¹⁸ I resist that conclusion, as I have written before, because I think most lawyers are confident in their ability to know a fact when they see it and there is something trustworthy

16 For examples of this in the judicial context see Larsen, *supra* n 2, *The Trouble with Amicus Facts* at 1788.

17 Laycock, note 14 *supra* at 1175.

18 Ronald Allen & Michael Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992); John O. McGinnis & Charles Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L. J. 1169, 1170.

about that intuition.¹⁹ To me, a fact in a Supreme Court opinion is a potentially falsifiable statement that is typically supported by a nonlegal secondary authority.²⁰ The problem, of course, is that thinking too hard about this definition will unravel it. Many statements considered pure legal propositions – “separate but equal is not equal” – can actually be re-packaged as statements of fact – “separate schools psychologically harm minority children” – without that much effort. And naked statements of normative preferences or value judgments – “abortion is hard on women”—can easily look like factual assertions once followed by a citation to supporting empirical research.

But even if understanding the contours of a factual claim versus a legal claim versus a normative statement of value is an exercise likely to cause headaches, it is an exercise we must undertake. Return to the exchange between the Chief Justice and the Solicitor General about the fate of the Voting Rights Act. I labeled that debate a factual one. But am I right? The majority opinion certainly reads as if the defect in the VRA coverage formula is a factual one. Indeed the Chief Justice includes a chart in his opinion comparing voter turnout by race and by state between 1965 and 2004 in an effort to make the point he made at oral argument that the covered jurisdictions have made much racial progress and that “current conditions” no longer justified the “current burdens” of the law.²¹

Statistics and charts and data sure make a debate sound like a factual one. But I doubt the Court really thought Congress got the facts wrong. I do not think the problem is that members of Congress did not understand that the coverage formula captured states where voting turnout had improved and missed states where racial discrimination persists.²² Instead, I submit, what is really happening is that the Court did not like the inferences Congress drew from those facts – specifically the decision that racial conditions had not improved in the South to the point where it was wise to make a change in who was covered and who was not.²³ That sounds like a differ-

¹⁹ See Larsen *supra* n 2, Factual Precedents at 67.

²⁰ For elaboration on this definition, *see* Larsen, 162 U. PA. L. REV. at 67. For an interesting take on the rise of these non-legal authorities and for an illuminating discussion on the difference between the legal and the non-legal *see generally* FREDERICK SCHAUER AND VIRGINIA J. WISE, NONLEGAL INFORMATION AND THE DELEGALIZATION OF THE LAW, THE JOURNAL OF LEGAL STUDIES VOL. 29, No. S1 (January 2000).

²¹ *Shelby County*, 133 S. Ct. at 2626-7.

²² Indeed the legislative record contains statements that explicitly recognize the changes that had occurred since the formula was originally written, and yet Congress reauthorized it anyway. *See, e.g.* 152 Cong. Rec. H5133-02 (2006); 152 Cong. Rec. S8372-01 (2006); 152 Cong. Rec. S7949-05 (2006).

²³ Derek Muller helpfully refers to this disagreement as one over “fit.” Congress thought the fit was good enough between which states were covered by the formula and where the problems of race discrimination continued to persist; the Court did not agree. Derek Muller, *Judicial Review of Congressional Power Before and After Shelby County v. Holder*, 8 CHARLESTON L. REV. 287,

ent kind of claim than what we usually call a statement of fact. That decision starts to sound more like a value judgment or a prediction. Bill Araiza has already wisely identified this difference. He calls these sorts of claims “evaluative facts” or “value based facts,”—the former reflects conclusions drawn from empirical facts and the latter includes judgments about morality.²⁴ But I am not sure they qualify as facts at all. They cannot be falsified, and no amount of adversarial testing or empirical support will alter the quality of the conclusion. A prediction or value choice is a judgment call that can be informed by facts, but not a factual conclusion as we typically use the phrase.

If I am right, then the question becomes about deference to legislative values as opposed to deference to Congressional fact finding. And this is a distinction that carries a world of difference. While it is one thing for the Court to find the VRA formula based on stale facts; it is quite another to second-guess a Congressional decision that the law was still necessary. Many of the current Justices applaud deferring to political choices and values reflected in the legislative process. This is what makes the factual label so powerful and perhaps so dangerous. A “just calling the facts like I see them” mode of judicial modesty is, I think, not modest at all.

Put simply, as constitutional law becomes increasingly steeped in factual claims, we must guard against the understandable temptation to see everything as a question of fact: refutable, objective, and almost scientific. That use of the factual label translates to a very robust brand of judicial power. If the Court finds the Voting Rights Act no longer wise or necessary or justifiable as appropriate remedial legislation under the Fifteenth Amendment, then it can so hold (and take the political heat for doing so). But finding a constitutional flaw by faulting Congressional findings of fact as insufficient is no less powerful a judicial move, and certainly carries equally significant implications for judicial review and constitutional law in the future.

311-12 (2013). I think a question of “fit” is also a question of value; how tight is tight enough is a normative call and not a question that can be empirically tested or theoretically falsified.

²⁴ William Araiza, *supra* note 9 at 895.