

## JUDGING “UNDER FIRE” AND THE RETREAT TO FACTS

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### ABSTRACT

*Americans tend to worry about how our current polarized political climate will affect the legitimacy of our courts. Often overlooked in this important conversation is a discussion about what a toxic political dialogue can do—and in fact is doing—to the construction of the law itself. This Article will begin to make the case that judicial decisions themselves change as a result of high-intensity politics. Specifically, I will argue that when judges are “under fire” (to borrow a phrase from *Planned Parenthood v. Casey*), they tend to cloak their decisions in factual observations about the world that seem neutral and objective, even if that neutrality is an illusion.*

*To build my case, I draw lessons from a comparison with judges in a sister country also plagued with an epic political gridlock—the United Kingdom. I will make several observations stemming from this comparison, and then I will tie them together in a plausible explanatory story. I claim that (1) American law is anchored in factual claims about the way the world works that is very different from judicial decisions in the United Kingdom; (2) U.K. judges have long been protected from public accusations of acting “political” in a way American judges have not; and (3) these two observations are related.*

*An important consequence of a culture that throws political mud on judges, therefore, is that judges will shield themselves from it by anchoring their decisions in “neutral” claims of fact. Thus, the Voting Rights Act is dismantled because of factual evidence (laid out in*

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*graphs and charts) that voting patterns have changed over time. Campaign spending is protected by the First Amendment because there is no factual "evidence on the record" that it causes corruption. Even older cases penned when the Justices knew the nation was watching critically (Roe v. Wade and Brown v. Board of Education) rest their rationales on factual claims about the way the world works. Put simply, American judges are using facts as shields from accusations that they are behaving politically, and there is every reason to believe this trend will increase as the need to protect themselves continues.*

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## INTRODUCTION

Two countries with a shared heritage find themselves in epic political moments at the exact same time. In 2016, both the United Kingdom and the United States held momentous elections (voting to leave the European Union and to elect President Donald Trump, respectively).<sup>1</sup> Each decision left citizens bitterly divided along battle lines so interwoven with questions of national identity that people seem to be forever entrenched and hopelessly partisan.<sup>2</sup>

Judges in both countries have been pulled into the political mud. In the United Kingdom, a Supreme Court decision that any exit from the European Union must go through Parliament was met with cries that the courts were stealing the Brexit decision from the people.<sup>3</sup> In the United States, after a bitter confirmation battle that only united the country in feeling divided, President Trump and Chief Justice John Roberts publicly traded barbs over the independence of what the President dubbed “Obama judges.”<sup>4</sup>

There are important differences between the way judges are viewed in the United Kingdom and the way they are viewed in the United States. Reflecting on those distinct norms leads to important insights. Consider the fact that following the judicial-Brexit backlash came a subsequent reaction in the United Kingdom—a concern that criticizing judges was out of bounds and dangerous for

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1. James M. Lindsay, *Ten Most Significant World Events in 2016*, COUNCIL ON FOREIGN REL. (Dec. 16, 2016), <https://www.cfr.org/blog/ten-most-significant-world-events-2016> [<https://perma.cc/EK3S-CU8E>].

2. See Anushka Asthana et al., *UK Votes to Leave EU After Dramatic Night Divides Nation*, GUARDIAN (June 24, 2016, 2:51 PM), <https://www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexit-eu-referendum-david-cameron> [<https://perma.cc/BEW7-33NX>]; Patrick Healy & Jeremy W. Peters, *Donald Trump's Victory Is Met with Shock Across a Wide Political Divide*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/us/politics/donald-trump-election-reaction.html> [<https://perma.cc/7GR9-FSK7>].

3. See, e.g., *Brexit Court Case: Who Is Gina Miller?*, BBC NEWS (Jan. 24, 2017), <https://www.bbc.com/news/uk-politics-37861888> [<https://perma.cc/J6JR-KU88>] (“The Daily Mail branded the judges ‘Enemies of the people’, while the Daily Express said the ruling had marked ‘the day democracy died.’”).

4. Elizabeth Zwirz, *Trump Slams Chief Justice Roberts, Insists There Are ‘Obama Judges’*, FOX NEWS (Nov. 21, 2018), <https://www.foxnews.com/politics/trump-slams-chief-justice-roberts-insists-there-are-obama-judges> [<https://perma.cc/RW87-MCFQ>].

the rule of law.<sup>5</sup> Viral tweets from Britons indicated a sense of outrage but not the sort of outrage an American would expect.<sup>6</sup>

- “This is getting completely out of hand. If The Daily Mail speaks of Judges as enemies of the people, democracy is being undermined. Shame!”;<sup>7</sup>
- “Today’s a bad day for the constitution[.] Not because of #Brexit case but attacks on independent judiciary & rule of law”;<sup>8</sup>
- “Ignore anti-judge venom in tomorrow’s press, and give thanks for an independent judiciary upholding the principles of our democracy[.]”<sup>9</sup>

The notion that the judiciary must be protected from “anti-judge venom” likely seems very foreign to Americans. We are quite accustomed to seeing judges criticized in the news.<sup>10</sup> Leaders from both political parties take their fair number of shots at judges who issue decisions with which they disagree.<sup>11</sup> It is indeed quite common to

5. Christopher Clement-Davies, “*The Judges Versus the People?: Brexit, Populism and the Rule of Law*,” 2016 INT’L ENERGY L. REV. 279, 280 (“The press onslaught .... amounted to a reckless or cynical attack on two of the most fundamental pillars of a free society, the independence of the judiciary and the rule of law.”).

6. The tweets followed the decision by the High Court of England and Wales in *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 (Eng.). That decision was subsequently affirmed by the U.K. Supreme Court. *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 (appeal taken from Eng.). The tweets were collected in an article by Claire Phipps. Claire Phipps, *British Newspapers React to Judges’ Brexit Ruling: ‘Enemies of the People,’* GUARDIAN (Nov. 4, 2016), <https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling> [<https://perma.cc/AFH6-VR9N>].

7. Nigel Pascoe QC (@nigel\_pascoe), TWITTER (Nov. 3, 2016, 3:47 PM), [https://twitter.com/nigel\\_pascoe/status/794310001754066946](https://twitter.com/nigel_pascoe/status/794310001754066946) [<https://perma.cc/WX7P-NZNS>].

8. The CBA (@TheCriminalBar), TWITTER (Nov. 3, 2016, 5:28 PM), <https://twitter.com/TheCriminalBar/status/794335421522132993> [<https://perma.cc/DVK6-6RVQ>].

9. Mary Riddell (@MaryRiddell), TWITTER (Nov. 3, 2016, 3:59 PM), <https://twitter.com/MaryRiddell/status/794313100187041792> [<https://perma.cc/ZB22-ZCB8>].

10. See Alicia Bannon & Daniel I. Weiner, *How to Criticize a Judge*, U.S. NEWS & WORLD REP. (Mar. 6, 2017, 12:00 PM), <https://www.usnews.com/opinion/civil-wars/articles/2017-03-06/donald-trumps-revised-travel-ban-may-reignite-attacks-on-federal-judges> [<https://perma.cc/278J-29NX>].

11. See *id.*; see also Will Soltero, *REACTION: Democrat, Republican Leaders Criticize Supreme Court for Partisan Gerrymandering Ruling*, COMMON CAUSE (June 28, 2019), <https://>

see American academics and journalists referring to the Justices “as politicians in robes”<sup>12</sup> and poking fun at the notion that the jurists are distinct in any way from their ideology.<sup>13</sup> Even the President of the United States is not shy to express displeasure with what he calls “ridiculous” decisions of “so-called judge[s].”<sup>14</sup>

President Trump’s language may sound extreme, but the sentiment behind it is not new. Indeed, in the United States, “[j]udicial rulings are criticized all the time, and by all manner of people.”<sup>15</sup> As commentators from the Brennan Center put it, “Judges aren’t immune from pointed criticism. Like it or not, they are part of our political system.”<sup>16</sup> Judges in America are, perhaps now more than ever, “under fire.”<sup>17</sup>

The goal of this Article—and indeed the theme of this symposium—is to think critically about what it means to decide a case “under fire” (a phrase I borrow from the Supreme Court in *Casey* as it discussed the importance of stare decisis when judging under pressure).<sup>18</sup> My analytic tool is a comparative lens. Because our cousins across the pond find themselves in a similar divided political

[www.commoncause.org/democracy-wire/reaction-democrat-republican-leaders-come-out-against-supreme-court-for-partisan-gerrymandering-ruling/](http://www.commoncause.org/democracy-wire/reaction-democrat-republican-leaders-come-out-against-supreme-court-for-partisan-gerrymandering-ruling/) [https://perma.cc/Y986-UH2Q].

12. Michael B. Hyman, *An Impartial Judiciary, If We Are Willing to Keep It*, 24 CBA REC., June/July 2010, at 6, 6.

13. Ronald L. Trowbridge, *One Supreme Court Justice Can Run the Whole Country*, HILL (June 28, 2019, 5:30 PM), <https://thehill.com/opinion/judiciary/450951-one-supreme-court-justice-can-run-the-whole-country> [https://perma.cc/45JF-BVU2] (“Constitutional scholar Jeffrey Toobin has observed: ‘When it comes to the core of the Court’s work, determining the contemporary meaning of the Constitution, it is ideology, not craft or skill, that controls the outcome of cases.... When it comes to the incendiary political issues that end up in the Supreme Court, what matters is not the quality of the arguments but the identity of the justices.’ What separates justices ‘is judicial philosophy—ideology—and that means everything on the Supreme Court.’ Five people.”).

14. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> [https://perma.cc/N35G-22JZ] (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”); see also Tara Leigh Grove, *The Power of ‘So-Called Judges’*, 93 N.Y.U. L. REV. ONLINE 14, 15 n.5 (2018) (quoting *id.*).

15. Bannon & Weiner, *supra* note 10.

16. *Id.*

17. I borrow this phrase from the Supreme Court’s explanation for reaffirming *Roe v. Wade*. *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (“[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”) (upholding *Roe v. Wade*, 410 U.S. 113 (1973)).

18. See *id.*

moment, but the norms of judicial criticism are quite different, it is helpful to use the comparison to explore these issues. I recognize, of course, that the variations between the two legal systems are great, and in many ways, I am not making an apples-to-apples comparison, although recent events indicate greater parallels between the two systems than existed before.<sup>19</sup> Nonetheless, sometimes it takes a comparative perspective to reveal important facets of one’s own legal system. In the words of H.L.A. Hart, “[T]here are important aspects of even very large mountains which cannot be seen by those who live on them but can be caught easily by a single glance from afar.”<sup>20</sup>

In that spirit, I offer the following three observations in this Article: (1) American law is infused with factual observations about the way the world works in a way that is very different from decisions made by judges in the United Kingdom; (2) U.K. judges have long been protected from public accusations of being “political” in a way that American judges have not; and (3) these two dynamics are related. The implication of these three observations is to suggest one explanation—though certainly not the only story—as to why U.S. law is “facy” in a way that is somewhat unique around the globe. (“Facy” is a word I coined and that I will definitely try again to make mainstream.)<sup>21</sup>

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19. In her wonderfully helpful article Professor Erin Delaney explains that recent developments in the United Kingdom—specifically the passage of the Human Rights Act in 1998; the newly empowered legislatures in Scotland, Northern Ireland, and Wales; and the creation of the United Kingdom Supreme Court in 2005—have created something of a “constitutional renaissance” and a “judiciary rising” in the United Kingdom. Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. L. REV. 543, 544, 547 (2014). Thus, although historically the United States and United Kingdom have had radically different conceptions of judicial power (owing in large part to notions of parliamentary sovereignty and political constitutionalism in the United Kingdom), the past twenty years have seen “an increased, and increasing, power of the judiciary” across the pond, leading many to claim that a constitutional shift is occurring in Britain and parallels to the United States are on the rise. *Id.* at 548.

20. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969 (1977).

21. “On the spectrum between law and fact, ‘facy’ describes the area on the fact side of the scale—meaning, as described below, claims that can be falsified and are supported by secondary authorities.” Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 182 & n.27 (2018) [hereinafter Larsen, *Constitutional Law*]; see also Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1775 (2014) [hereinafter Larsen, *Amicus Facts*].

Using four examples from across time and subject matter, I argue that U.S. judges (unlike their British brethren) feature facts in their decisions in part as a defensive move to shield themselves from political backlash. Thus, Justice Harry Blackmun—who famously spent a summer researching abortion procedures and then wrote *Roe v. Wade* steeped in those facty observations—kept newspaper clippings with Gallup poll numbers in the case file and made notes each time the Court was criticized on the abortion issue.<sup>22</sup> Or Justice Anthony Kennedy wrote *Citizens United v. FEC* in empirical terms—using facty language to discuss the evidence (or lack of evidence) of corruption caused by campaign spending—against the backdrop of sustained criticism and accusations of judicial activism lodged at the Court.<sup>23</sup> *Roe* and *Citizens United* are, I submit, high-profile examples of the Justices using “facty shields” in their rationales while deciding a case “under fire.”

Why would judges do this? Why retreat to facts when afraid of backlash? Are our judges really so thin-skinned? I fully admit that answering those questions involves a healthy dose of speculation into what motivates judges, which is always a dubious enterprise. But this is where the comparison to the United Kingdom gives important perspective and payoff. Remember that the general mudslinging over judges in the United States (the “anti-judging venom” that the United Kingdom tries to avoid) is a particular form of criticism: the accusation is that judges are acting *politically* rather

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22. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 90-91, 134, 182-84 (2005); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2301 & n.11 (2011); Issac Unah et al., *U.S. Supreme Court Justices and Public Mood*, 30 J.L. & POL. 293, 332-36 (2015).

23. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583 (2011) (“In this regard, consider the [*Citizens United*] Court’s declaration as an empirical matter—apparently for all types of elections and all types of spenders—that ‘independent expenditures ... do not give rise to corruption or the appearance of corruption.’” (quoting *Citizens United v. FEC*, 558 U.S. 310, 357 (2010))); Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269, 1280-81 (2013) (“[The *Citizens United*] explanation in one sense sounds empirical: ‘The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy’.... Those statements in *Citizens United* are phrased as statements of fact, or predictions. But as I have explained elsewhere, ‘the Court’s decision in *Citizens United* reflected a philosophical, rather than an empirical, position on money’s effect on politics.’” (citations omitted)).



than *judicially*.<sup>24</sup> The old accusation of “legislating from the bench” looms large in the United States.<sup>25</sup> In this environment and in the face of such criticism, there is something very comforting about a retreat to facts. Rather than directly announcing philosophical or normative commitments, the judge or Justice is just announcing the facts in a “neutral” way. Applying general principles to facts is, after all, in the core of the judicial role.<sup>26</sup> The allure of factiness, therefore, is that the Justices are merely calling things like they see them. This “just the facts, ma’am” strategy is attractive because it appears judicially modest ... even if it is not.

A few important disclaimers are needed in order to establish the scope of this Article. Although I have chosen high-profile examples, I do not mean to imply that it is *only* in those cases where U.S. law is fattened with factual authorities. Indeed, as I have said before, I think the facty turn in the United States incorporates far more than just the marquee end-of-June cases (although I do think the end-of-June cases are particularly prone to the facts-as-shield dynamic). Nor do I think this is an entirely new phenomenon as my examples indicate. Further, I also concede that there are many explanations for the factiness of American law, and I am articulating but one plausible story. And finally, I must largely leave to the side (for now) the normative debate about the practice of using facts as shields. Although I have previously expressed skepticism at the modesty and neutrality behind judicial factfinding of this sort,<sup>27</sup> the goal of this Article is more descriptive and preliminary: to use a comparative lens to unearth an explanation for the fact-heavy U.S. judicial culture.

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24. See Trowbridge, *supra* note 13.

25. E.g., Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 194 (2007) (“[A]ttacks against the judiciary emphasizing the courts’ inappropriate use of powers and methods associated with the legislature seem to be longstanding, steady, and generated by a wide spectrum of ideological and party interests.... [I]n recent years the specific ‘legislating from the bench’ critique appears to have increased in salience and usage .... At the outset of the twenty-first century, the term holds a prominent place in American political discourse.”).

26. See *Court Role and Structure*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/ME77-FP2P>] (describing how federal district and appellate courts view their primary function as applying law to facts).

27. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1262-63 (2012).

What should not be overlooked, however, are the stakes of these observations. Retreating to facts-as-shields is a move that shapes doctrine and has downstream consequences. If a constitutional rule is built on a factual foundation, what happens when those facts change? If a new record is built with different factual dimensions, does the precedential power of the original decision erode? What happens if the Court gets the facts wrong—and where are those facts coming from? Answering these questions is largely a task for another day. For now, the point is just to recognize that the implications of a charged political climate (like the one we inhabit now) are quite significant and long-lasting. If judicial decisions themselves change and become more facty as a result of high-intensity politics, then there is a cost to keeping judges “under fire,” and it is a cost we should recognize.

This Article will track the three points outlined above: Part I will explain two different traditions of judicial fact consumption; Part II will look at two different cultures of criticizing judges; and Part III will explore four high-profile U.S. Supreme Court decisions where the opinions can be seen as factual shields used by the Justices after periods of sustained and specific criticism.

## I. TWO DIFFERENT HISTORIES OF JUDICIAL FACT CONSUMPTION

Fact-heavy judicial decisions are par for the course in the United States.<sup>28</sup> Consider the sort of questions posed by recent cases and commonplace to any reader of the *United States Reports*: Is a “partial-birth abortion” ever medically necessary?<sup>29</sup> Do violent video

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28. When I say “fact,” I mean claims that are theoretically falsifiable and accompanied by nonlegal evidence. This is the working definition of fact I have used in prior work, although I acknowledge it is not perfect. See Larsen, *Constitutional Law*, *supra* note 21, at 184-85 (“[M]y working definition of a ‘fact’ draws from two common characteristics that lead most of us to label certain statements factual ones when we encounter them. First, factual claims are ones that can theoretically be falsified—meaning they can be tested as true or false ‘with a degree of detached certainty.’ And second, factual claims are typically followed by evidence. By this I mean that ‘a factual assertion is often followed by “look it up” (or, more likely, “Google it”), whereas a normative assertion or a proffered legal interpretation is not.” (citations omitted)).

29. See *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007) (evaluating Congress’s finding that the procedure is never medically necessary).

games harm child brain development?<sup>30</sup> Does money corrupt politics?<sup>31</sup> How common are instances of in-person voter fraud?<sup>32</sup> General observations about the world like these (so-called “legislative facts”) hold significant influence on the way U.S. courts construct and apply legal rules today, particularly constitutional ones.<sup>33</sup>

As I have explored in prior work, American judges are fluent in a language of facts—they write narratives that are heavily steeped in generalized factual observations; they increasingly consume amicus briefs and other sources of information to learn about the factual nature of their decisions; and they often anchor their legal rationales in facty claims.<sup>34</sup> There are, of course, many historical reasons for this turn, including, as described below, the rise of legal realism in the United States.<sup>35</sup> But it is neither inevitable nor universal that judicial decisions are fattened up with factual authorities and full of generalized claims about the way the world works. One only need

30. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799-801 (2011) (assessing California’s evidence from research psychologists purporting to show that violent video games cause harm to minors).

31. See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (discussing whether there is enough evidence of corruption to justify limiting “independent expenditures” in political campaigns).

32. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 201-02 (2008) (evaluating a challenge to a voter ID law by asking how many votes were burdened and how rampant was the problem of in-person voter fraud).

33. Do not be fooled by its name. A “legislative fact” need not be found by a legislature. Larsen, *supra* note 27, at 1256; Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016). Legislative facts are generalized observations about the way the world works as opposed to a specific “whodunit” fact about any particular controversy. Larsen, *supra* note 27, at 1255-57; Yoshino, *supra*, at 254.

For a very comprehensive treatment of this observation and an excellent tour of the way constitutional law depends on factual claims, see generally DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008). For other scholars who have contemplated implications from this observation, see generally Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003).

34. This is an observation I have made often in prior work. See, e.g., Larsen, *Constitutional Law*, *supra* note 21; Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59 (2015) [hereinafter Larsen, *Constitutional Shelf Life*]; Larsen, *Amicus Facts*, *supra* note 21.

35. See *infra* notes 54-63 and accompanying text.

look across the Atlantic Ocean to our cousins in the United Kingdom for a useful comparator.

In 2016, when British courts considered Parliament's role after the "Brexit" vote to leave the European Union, it was described as "a constitutional crisis of epic proportions."<sup>36</sup> An American observer likely expected the resulting judicial decision to include a long factual narrative perhaps exploring the economic consequences of the vote or the realities of the immigration concerns that at least partially motivated it.<sup>37</sup> What they found instead was a long, dry opinion with numbered paragraphs and a lengthy discussion of precedent, completely insistent that the court was only answering "a pure question of law."<sup>38</sup>

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36. Will Gore, *By Branding High Court Judges 'Enemies of the People,' the Pro-Brexit Media Proved It's Finally Lost Touch with Reality*, INDEP. (Nov. 4, 2016, 12:30 PM), <https://www.independent.co.uk/voices/brexit-daily-mail-pro-brexit-newspapers-tabloids-enemies-of-the-people-high-court-ruling-lost-touch-a7397251.html> [<https://perma.cc/J33Y-Q3TP>] (complaining of hysteria); see Anne Perkins, *High Court Brexit Ruling: What Does It All Mean?*, GUARDIAN (Nov. 3, 2016, 12:25 PM), <https://www.theguardian.com/politics/2016/nov/03/high-court-brexit-ruling-what-does-it-all-mean> [<https://perma.cc/33X9-LLGZ>] (attributing to Parliament the talk of "a constitutional crisis"); see also Sarah Mackie, *Brexit and the Trouble with an Uncodified Constitution: R (Miller) v. Secretary of State for Exiting the European Union*, 42 VT. L. REV. 297, 299 (2017) ("The crisis led to a case which has been described as 'the most important constitutional case for a generation,' during which the nature of the constitution, the division of power between the Crown and Parliament, and the very nature of sources of rights and obligations were argued, echoing debates which have taken place in Britain for centuries.").

37. See John Curtice, *The Vote to Leave the EU: Litmus Test or Lightning Rod?*, 34 BRIT. SOC. ATTITUDES 1, 2-4, 9-10 (2017), [http://www.bsa.natcen.ac.uk/media/39149/bsa34\\_brexit\\_final.pdf](http://www.bsa.natcen.ac.uk/media/39149/bsa34_brexit_final.pdf) [<https://perma.cc/CF2Q-CLFL>].

38. This quote comes from the opinion issued by the intermediary court in November 2016. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2678, ¶¶ 1-5 (Eng.). Similar language can also be found in the Supreme Court opinion affirming this decision in January 2017. *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, ¶¶ 3-4 (appeal taken from Eng.).

This is emblematic of British courts deciding such claims.<sup>39</sup> As one helpful commentator explains:

To be blunt about it, for most of its history the British judiciary has tended to maintain “the law-is-the-law approach” to legal language. On this model of decision-making, the job of the judiciary is conceived of as positivistic and machine-like: judges are supposed to find out what the law *is* (eschewing any inquiry into what it *ought* to be) by consulting the “plain meaning” of statutory words and common law precedents.<sup>40</sup>

Facty court opinions, in other words, are quite foreign to U.K. court-watchers. There is no judicial wading through neuroscience journals to explore the effect violent video games have on juvenile brain development, for instance.<sup>41</sup> It would be unseemly and altogether weird for a British judge to pronounce authority on such non-judicial matters.

Take, for example, the U.K. decision known as *Animal Defenders*, an analog to *Citizens United* in the United States.<sup>42</sup> The *Animal Defenders* case was a challenge to a ban on political advertising in the United Kingdom; challengers claimed that it unduly infringed a freedom of expression protected by the U.K. Human Rights Act of 1998 and Article 10 of the European Convention on Human Rights.<sup>43</sup>

39. To be sure, “constitutional law” and “judicial review” in the United Kingdom and the United States mean very different things—thanks in no small part to the tradition of parliamentary supremacy that has held firm in England (although that may have changed in the past twenty years). See Delaney, *supra* note 19, at 544-47. But claims that look a lot like American constitutional claims are often presented to U.K. courts under the “Human Rights Act of 1998,” and it is to those decisions that I refer. See *id.* at 557-61. I limit my discussion, in other words, to cases written after the recent “constitutional renaissance” in the United Kingdom had begun. See *id.* at 544. For others who have seen these two forms of judicial interpretation as similar, see Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 LAW & SOC’Y REV. 71, 74 (1990); Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL’Y & L. 239, 241 (2006); see also PAUL CRAIG, ADMINISTRATIVE LAW 610-19 (8th ed. 2016) (explaining judicial review under the Human Rights Act).

40. See Wolcher, *supra* note 39, at 283 (footnote omitted).

41. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 850-53 (2011) (Breyer, J., dissenting).

42. *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 (appeal taken from Eng.).

43. *Id.* at ¶¶ 1, 4.

The House of Lords opinion deals primarily with precedent (citing many prior cases) and includes one paragraph answering whether there is a “pressing social need” for the law in this case.<sup>44</sup> In concluding that there was and upholding the law, Lord Bingham resolved—without citation—that “it is highly desirable that the playing field of debate should be so far as practicable level.”<sup>45</sup> That is it. No citation to an amicus brief. No mention of the record. No string cite referencing the available data they had on the question. No factual narrative at all.

The jurists who wrote separately in *Animal Defenders* took more of a foray into what we would call legislative facts. One talked about “an elephant in the committee room”—that is, “the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States.”<sup>46</sup> She worried that “we do not want our government or its policies to be decided by the highest spenders,” and she referred to a book by Bruce Ackerman and Ian Ayres for the proposition that “[e]normous sums” are spent on politics in America and that “there is no limit to the amount that pressure groups can spend on getting their message across in the most powerful and pervasive media available.”<sup>47</sup> But even that generalized factual point was softened as she returned to the specifics of this particular case, to conclude “that the ban as it operates in this case is not incompatible with the appellants’ Convention rights. It is a balanced and proportionate response to the problem.”<sup>48</sup> Full stop. Conclusion reached.

Compare that approach to the one taken by the U.S. Supreme Court in *Citizens United*. The same arguments about the effect of money on politics were pressed to the U.S. Supreme Court, and the Justices responded with what Michael McConnell has called a “quasi-empirical” opinion.<sup>49</sup> As described more below, Justice Kennedy used language in *Citizens United* about the “scant evidence” on the “record” (in this case and prior ones) that independent

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44. *Id.* at ¶ 30; see, e.g., *id.* at ¶¶ 6-7, 23, 32-33, 53.

45. *Id.* at ¶ 28.

46. *Id.* at ¶ 47 (opinion of the Baroness Hale of Richmond).

47. *Id.* at ¶¶ 47-48.

48. *Id.* at ¶ 51.

49. Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 446 (2013).

expenditures do in fact cause political corruption.<sup>50</sup> Pamela Karlan observed that “[t]hose statements ... are phrased as statements of fact” even if in reality they express normative commitments.<sup>51</sup> Indeed, it was these facty claims that led a Montana court to assume that a different result was justified when litigation produced a new factual record, an assumption that was rebuffed when the Supreme Court summarily reversed the Montana court.<sup>52</sup>

To be sure, this is not a perfect comparison because (as I have noted) the nature of judicial review in the United States has historically been quite different from such review in the United Kingdom.<sup>53</sup> But, nonetheless, we can learn something by pausing to consider why facty judicial opinions are unremarkable in American constitutional law, but almost nonexistent to perhaps our closest legal cousin across the pond. The two countries share a common-law tradition where analogizing and distinguishing cases are the name of the game—both heavily fact-intensive modes of reasoning. Given this similarity, one might expect the two cultures of judicial decision-making to closely resemble each other. Why do judicial opinions in these cousin countries look so dramatically different from one another?

For one thing, as others have documented, the rise of legal realism in the United States, which was far less influential in the United Kingdom, makes legislative facts more relevant to American constitutional decisions.<sup>54</sup> At the risk of oversimplifying a

50. *Citizens United v. FEC*, 558 U.S. 310, 360-61 (2010); see also McConnell, *supra* note 49, at 446 (“[I]t was not necessary for the Justices ... [in *Citizens United* to make] dubious quasi-empirical inquiries relating to the prevention of corruption, the protection of stockholders, or leveling the playing field.”).

51. Karlan, *supra* note 23, at 1281; see also *id.* at 1279 (noting that *Citizens United* rests on claims that are “simultaneously strongly empirical and deeply normative”); Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 35 (2012) (“*Citizens United* reflected a philosophical, rather than an empirical, position on money’s effect on politics.”).

52. *W. Tradition v. Attorney Gen.*, 271 P.3d 1, 6 (Mont. 2011) (“*Citizens United* was decided under its facts or lack of facts.”), *rev’d sub nom.* *Am. Tradition P’Ship v. Bullock*, 567 U.S. 516 (2012) (per curiam).

53. See *supra* note 19 and accompanying text; see also Wolcher, *supra* note 39, at 245 (“[I]t is often said, albeit with some overstatement, that in the United States the Constitution is what the Supreme Court says it is, but in Britain the Constitution is what Parliament says it is.”).

54. See Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 115 (1988); Zick, *supra* note 33, at 129 (“For realists, then, data and social experience, not concepts, were to be the foundation for objective judicial decisionmaking.”).

complicated and varied school of thought, legal realists do not believe that judging is the mechanical application of legal principles to a set of facts.<sup>55</sup> Born largely as a reaction to the formalism that dominated legal thought in the late 19th century and early 20th century, American “[r]ealists frankly recognize[] the courts’ law-making function.”<sup>56</sup> At bottom, realists believe “(1) in interesting cases, reasonable people can frequently come out either way and (2) in such situations, policy considerations are relevant even if not dispositive.”<sup>57</sup>

The influence of realism on American legal thought cannot be overstated. Put simply, “American lawyers, to one degree or another, all subscribe to the notion that in many litigated cases—especially those that get to the Courts of Appeals and form the foundation of our casebooks—traditional legal materials (i.e., statutes and case law) rarely suffice to determine the outcome.”<sup>58</sup> In other words, Americans believe that in hard cases sometimes law just “runs out” and the ensuing gap is not filled by logical deduction (as the British believe) but rather by policy considerations propelled by claims of legislative fact.<sup>59</sup>

This “[l]egacy of American [l]egal [r]ealism” separates American courts “from the prevailing view in the United Kingdom and the rest of the world.”<sup>60</sup> It also helps to explain why judges in the United States anchor constitutional law decisions in facts, but judges in the United Kingdom do not. Edward Rock has made this observation explicitly in the context of comparative corporate law:

In a Realist system, where one is taught that indeterminacy is pervasive and that, in the interesting cases, policy consider-

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55. Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 50 (Martin P. Golding & William A. Edmundson eds., 2005) (giving an overview of the theoretical approaches to American legal realism). Examples of leading scholars in American legal realism include Karl Llewellyn, Underhill Moore, Walter Wheeler Cook, Max Radin, Brian Leiter, and more. *Id.* at 51. The father of American legal realism is said to be none other than Oliver Wendell Holmes, Jr. *Id.*

56. Woolhandler, *supra* note 54, at 115 & n.36 (citing W. REISMAN & A. SCHREIBER, *JURISPRUDENCE* 434-83 (1987)); see also Zick, *supra* note 33, at 129-30.

57. Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019, 2029 (2015).

58. *Id.* at 2021.

59. *Id.* at 2023.

60. *Id.* at 2020, 2023.



ations are paramount, it is entirely natural and appropriate to state the policy issue explicitly and then to resolve it as best one can. In a traditional, doctrinalist system that operates on the assumption that nearly all cases can be resolved by a careful analysis of precedent and that the judge, even in resolving gaps, is very much a delegated decisionmaker (an agent not just of the legislature but also of the arc of precedent), it is entirely natural and appropriate to build policy arguments from within the case law.<sup>61</sup>

Thus, one answer to my “how did we get here” question about American facty court opinions must be linked to the significant impact of realism on American legal thought. As soon as one acknowledges that, at times, courts make law (rather than just discover it), legislative facts become increasingly important.<sup>62</sup> “After all,” as Professor Ann Woolhandler explained, “it only makes sense to provide courts with data to assist in their lawmaking function if one sees courts as having such a function, as distinguished from a function of discovering law that is dictated by text, precedent, and principle.”<sup>63</sup>

Factiness, therefore, is at least partially a byproduct of American legal realism. Of course, this need not be an alternative story to the one I am telling; it could instead be a complementary one. Consider the following explanation for fact-heavy opinions in the United States: judges everywhere seek a “shield,” by which I mean they want to make their decisions seem inevitable and not dependent on personal subjective discretion. In the United Kingdom, where legalism still holds and there is a tradition of seeing judges as “finding” law and not “making it,” that shield takes the form of numbered paragraphs reciting precedent that make the present decision seem like “nothing new to see here.” In the United States where realism reigns, by contrast, the shield takes the form of a reference to facts

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61. *Id.* at 2049.

62. *See* Woolhandler, *supra* note 54, at 115.

63. *Id.* As a corollary observation, Professor Woolhandler also notes that the Realist era spawned “the instrumental view of law ... that a good legal rule is one that causes a desirable social end.” *Id.* This, too, encourages legislative factfinding. For “[i]n an age of pragmatic balancing, one would ask for a change in a legal rule by showing empirically that the rule will not advance the end it was supposed to ... and that another rule better advances social ends.” *Id.* at 116.

and a narrative that places the decision as the logical conclusion that flows from the way the world works on the ground. In either place, the shield is doing defensive work; its form is just determined by the legalism/realism divide between the two countries. But the shields are very different from one another and perhaps they are responding to different sorts of threats. We thus need further explanation.

## II. JUDGES “UNDER FIRE”—A FURTHER COMPARISON

The need for judges to defend themselves through doctrine is amplified under certain circumstances. Once again a comparative perspective sheds light on an answer as to when and how. Judges in the United States and judges in the United Kingdom have quite different relationships with politics. Traditionally, appointment to the bench in the United Kingdom was done through “secret soundings’ [where] unnamed judges and senior bar members” privately consulted with the Lord Chancellor, and a selection was made through “taps on the shoulder.”<sup>64</sup> Under this system it mattered a great deal where the candidate went to school, for example, and in what circles he or she (mostly he) ran.<sup>65</sup> The entire process was very much behind the scenes, quite distant from the public sort of confirmation hearing that is common in the United States.<sup>66</sup>

In recent years, the United Kingdom has overhauled its judicial appointment process in an effort to make it more transparent and less reliant on an “old boys network.”<sup>67</sup> But what has not changed is a strong desire to isolate judicial appointments from the political process.<sup>68</sup> It is no secret that one reason for the British insistence to

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64. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 473 (2011).

65. *Id.*

66. See, e.g., Ronald Brownstein, *Brett Kavanaugh Is Patient Zero*, ATLANTIC (Oct. 1, 2018), <https://www.theatlantic.com/politics/archive/2018/10/kavanaughs-partisanship-threatens-supreme-court/571702/> [<https://perma.cc/4G5V-7PVU>].

67. See Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URB. L.J. 387, 389-90, 395 (2007).

68. Clark, *supra* note 64, at 470 (despite the strong commitment to parliamentary supremacy, in the United Kingdom “[n]either historically nor currently has there been a formal role for Parliament in judicial appointments”); *Why US Top Court Is So Much More Political than UK’s*, BBC NEWS (Oct. 6, 2018), <https://www.bbc.com/news/world-us-canada->

keep judicial appointments out of Parliament is the desire to avoid the circus of the U.S. judicial confirmation process.<sup>69</sup> As one British commentator puts it, “[T]he single biggest factor militating against parliamentary involvement in the judicial appointment process is revulsion at the spectacle-like nature of U.S. Supreme Court confirmation hearings.”<sup>70</sup> U.S. Senate confirmation hearings, she says, leave the British with “a shiver of horror running through the system that we should have anything like that.”<sup>71</sup>

It is more than just a spectacle they wish to avoid though; the British put a premium on keeping their judges out of politics altogether.<sup>72</sup> Unlike American Justices who hold almost celebrity status at least within the legal community (think the Notorious RBG and the Justice Scalia and Justice Breyer book tours), judges who sit on the high court in England are basically anonymous.<sup>73</sup> These judges are far from celebrities, and the British like it that way.<sup>74</sup>

45632035 [<https://perma.cc/N5MT-3ULB>] (“[Changes to judicial appointments in the United Kingdom were not] ‘very controversial at all. There was no discussion of it in the press when the names were announced and when we looked at the people who were there it was all understandable,’ said Alison Young, Prof[essor] of Public Law at the University of Cambridge.”).

69. Clark, *supra* note 64, at 485.

70. *Id.*

71. *Id.*

72. T. T. Arvind & Lindsay Stirton, *Legal Ideology, Legal Doctrine and the UK’s Top Judges*, PUB. L., July 2016, at 418, 435 (“The UK has been fortunate in that the upper tiers of the judiciary have during the course of the twentieth century evolved institutional strategies that have had the effect of mitigating the impact of the overtly political aspects of the issues with which they must deal. The result is valuable and worth preserving—a highest court that is neither as politicised nor as systematically influenced by political ideologies as the US Supreme Court is commonly said to be.”); Wolcher, *supra* note 39, at 284 (“To illustrate this difference in attitude, contrast the recent widespread obsession of the American media and the U.S. Senate with the political and moral values of President Bush’s Supreme Court nominees with the following rather droll statement from the Consultation Papers of the Constitutional Reform Act of 2005: ‘It is essential that our systems do all that they can to minimize the danger that judges’ decisions could be perceived to be politically motivated.’”).

73. Colin McIntyre et al., *Supreme Courts: The US and UK Compared*, J. L. SOC’Y SCOT. (Feb. 16, 2015), <http://www.journalonline.co.uk/Magazine/60-2/1018891.aspx> [<https://perma.cc/JL85-XM3W>] (“The US Supreme Court tends to enjoy a higher domestic profile than does the UK Supreme Court.”).

74. Adam Taylor, *Why America’s Supreme Court Drama Looks So Strange to the Rest of the World*, WASH. POST (Oct. 6, 2018), <https://www.washingtonpost.com/world/2018/10/06/why-americas-supreme-court-drama-looks-so-strange-rest-world/> [<https://perma.cc/Y62W-LWRZ>] (“[I]n Britain, ... appointments to the Supreme Court receive scant attention in mainstream

Indeed, as noted above, even criticism of U.K. judicial decisions is very much considered to be out of bounds. This is true, not only with older decisions before the “constitutional renaissance” and the rise in prominence of judges in the United Kingdom, but also in even more recent decisions that have a more constitutional flavor than their older counterparts.<sup>75</sup>

When newspapers criticized the Brexit judicial decision in 2016 and accused the judges of taking the vote away from the people, it prompted a swift counterreaction.<sup>76</sup> Criticizing judges in the newspapers, according to leading lawyers, “encouraged readers to believe that the judges were somehow expressing personal political preferences,” an accusation that is “deeply shocking.”<sup>77</sup> A former Lord Chancellor put it simply—“[J]udges ‘do not do politics. They do law.’”<sup>78</sup> Interestingly, he elaborated on this sentiment by making an unflattering comparison to Americans: “Our judges ... are selected to be judges on their legal ability. Their political allegiance is irrelevant and plays no part in their selection—which is not, for example, the case in the US.”<sup>79</sup>

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media. Nominees are far from household names.”).

75. Delaney, *supra* note 19, at 544; *see also* Kate Malleson, *Judicial Reform: The Emergence of the Third Branch of Government*, in *REINVENTING BRITAIN: CONSTITUTIONAL CHANGE UNDER NEW LABOUR* 133, 134 (Andrew McDonald ed., 2007) (“The courts have thus been drawn into politically sensitive areas previously beyond their scope, as a result of which the judiciary now plays a more central role in the British constitution. This new judicial role in mediating and adjudicating the boundaries of the constitution is still developing, but it is clear that the effect of this trend will be to reshape the relationship between the judiciary and the other branches of government.”).

76. Compare Iain Duncan Smith, *Why It’s Crucial that the Judges Who Could Decide the Fate of Brexit ARE Scrutinised*, *DAILY MAIL* (Dec. 6, 2016, 8:25 PM), <https://www.dailymail.co.uk/debate/article-4007894/IAIN-DUNCAN-SMITH-s-crucial-judges-decide-fate-Brexit-scrutinised.html> [<https://perma.cc/69PL-FV64>], with Clement-Davies, *supra* note 5, at 279-81.

77. Clement-Davies, *supra* note 5, at 280.

78. *Id.* (quoting Lord Chancellor Charles Falconer); *see also* Kate Malleson, *The Evolving Role of the UK Supreme Court*, *PUB. L.*, Oct 2011, at 754, 769 (“I like to think that the selection of our judges and in particular the senior judiciary is now as immune from the political process as it is possible to be in a democratic society.”).

79. Charles Falconer, *The Vicious Assault on UK Judges by the Brexit Press is a Threat to Democracy*, *GUARDIAN* (Nov. 4, 2016), <https://www.theguardian.com/commentisfree/2016/nov/04/assault-uk-judges-brexit-press-judiciary-constitution> [<https://perma.cc/HDS9-4HKV>]; *see also* *Why US Top Court Is So Much More Political than UK’s*, *supra* note 68 (discussing the controversy around the Kavanaugh confirmation hearing, and how “[t]he debate is unlike any the UK has when justices at the Supreme Court are replaced, as a different appointment system means their political views are rarely publicly known and, according to experts, do not have any influence in the process”).

The shock at the prospect of mixing judging and politics—or even the impropriety of implying that a judicial decision was politically motivated—must seem unusual to an American legal audience. For in the United States, of course, judges are quite often subjected to this sort of critique.<sup>80</sup> The rallying cry that judges must not “legislate from the bench” is a favorite particularly (but not exclusively) in conservative circles.<sup>81</sup> And newspaper accounts routinely begin any report on a federal judicial decision by first identifying the judge with the political affiliation of the president who appointed her.<sup>82</sup>

Slinging mud at judges in the United States is not new, but it has recently escalated to a fever pitch—particularly at the Supreme Court level. Following the controversial confirmation of Justice Brett Kavanaugh last year and the prior decision not to give a hearing to Merrick Garland, President Barack Obama’s nominee to an earlier vacancy, it did not take long for commentators to link the partisan divisions surrounding the appointment to legitimacy problems for the Court as a whole.<sup>83</sup> The theme is that there is no longer daylight between the political nature of judicial appointments and the quasi-political nature of the decisions they make while judges.<sup>84</sup> In the words of one journalist for the *Atlantic*:

If Supreme Court Chief Justice John Roberts is truly concerned about preserving the Court’s legitimacy in American life ... Brett Kavanaugh has become his worst nightmare.... With such a partisan route as his pathway, a Justice Kavanaugh would arrive at the Supreme Court as a patient zero, carrying a virus of illegitimacy to its decisions.<sup>85</sup>

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80. See, e.g., Opinion, *A Threat to Fair Elections*, N.Y. TIMES (Sept. 7, 2009), <https://www.nytimes.com/2009/09/08/opinion.08tue1.html> [<https://perma.cc/4Z8E-V8PP>]; Editorial, *Wrong Way on Campaign Cash*, ST. LOUIS POST-DISPATCH (Sept. 11, 2009), [https://www.stltoday.com/opinion/editorial/wrong-way-on-campaign-cash-our-view-u-s-supreme/article\\_db0fdb60-35b4-5f5f-a6e9-dc6daf194838.html](https://www.stltoday.com/opinion/editorial/wrong-way-on-campaign-cash-our-view-u-s-supreme/article_db0fdb60-35b4-5f5f-a6e9-dc6daf194838.html) [<https://perma.cc/H33K-VTTZ>].

81. Catherine Cook, *Legislating from the Bench*, HARV. POL. REV. (Mar. 3, 2009), <https://harvardpolitics.com/online/legislating-from-the-bench/> [<https://perma.cc/PJ7T-Z2MV>].

82. See, e.g., Christopher Mele, *Judge Who Blocked Trump’s Refugee Order Praised for Firm Moral Compass*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/judge-trump-refugee-order-ann-donnelly.html> [<https://perma.cc/9CZP-HE2H>] (identifying Judge Donnelly as being appointed by President Obama).

83. See, e.g., Brownstein, *supra* note 66.

84. See *id.*

85. *Id.*

Indeed, court-packing plans are being discussed in mainstream politics now, and a Pew Research Report reveals “that negative views of the court are at a 30-year high, driven in part by a widespread perception that the justices are unable to set aside their political views when making decisions.”<sup>86</sup> The position that “judges do law, not politics” is almost laughable in the United States right now.<sup>87</sup>

All of this criticism has triggered concerns that the Court needs to look for an internal solution. Former Attorney General Eric Holder explained that “[w]ith the confirmation of Kavanaugh and the process which led to it, (and the treatment of Merrick Garland), the legitimacy of the Supreme Court can justifiably be questioned. The Court must now prove—through its work—that it is worthy of the nation’s trust.”<sup>88</sup> Henry Gass echoes this sentiment: “If Roberts and his colleagues are going to restore the court’s reputation as a trusted, nonpartisan counterweight in the federal government, the justices will have to take matters in their own hands.”<sup>89</sup>

Enter the facty shield.

### III. FACTS AS SHIELDS: IMPLICATIONS FOR DOCTRINE

Consider carefully those words quoted above about the U.S. Supreme Court’s current legitimacy crisis: “The Court must now prove—through its work—that it is worthy of the nation’s trust,”<sup>90</sup> and they “have to take matters in their own hands.”<sup>91</sup> The idea of course is that the judicial outputs—the decisions themselves—must

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86. Henry Gass, *John Roberts’s Mission Impossible for the Supreme Court*, CHRISTIAN SCI. MONITOR (Nov. 16, 2016), <https://www.csmonitor.com/USA/Justice/2016/1116/John-Roberts-s-mission-impossible-for-the-Supreme-Court> [<https://perma.cc/4SFH-Z3HX>]; *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RES. CTR. (July 29, 2015), <https://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/> [<https://perma.cc/MS4D-APTBJ>]; see *Supreme Court*, GALLUP (2016), <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/AR82-ZZR4>].

87. This is of course a descriptive claim of generalized sentiment; it is not a claim I personally endorse.

88. Eric Holder (@EricHolder), TWITTER (Oct. 6, 2018, 1:10 PM), <https://twitter.com/EricHolder/status/1048666766677876738> [<https://perma.cc/XTP5-6ADC>].

89. Gass, *supra* note 86.

90. Holder, *supra* note 88.

91. Gass, *supra* note 86.

undo the damage caused by partisan politics; the Court must do something internally to earn back its reputation externally.

Interestingly, this is very different from the response by the legal culture in the United Kingdom. In the debate about criticizing judges in the United Kingdom, the fear is that the judges might do just this—they might take matters into their own hands and somehow change their decisions.<sup>92</sup> To Britons, internal judicial response to criticism seems improper or undesirable.<sup>93</sup> In the United States, altering decisions is seen as the way to salvage judicial legitimacy.

In any event, the influence of criticism on judicial decisions may be inevitable. Judges are, after all, only human; and humans who pride themselves on independence and neutrality are likely sensitive to being called out in the newspapers for decisions they make that are politically motivated.<sup>94</sup> Under these circumstances it seems only natural to reach for a rationale that protects against such reproach.

Rhetorically, retreating to facts in the face of confrontation is a classic move. Americans have always equated science with legitimacy.<sup>95</sup> It is quite possible that resting judicial decisions on data and empirical explanations is a tempting shield for judges to use in a world where commentators scrutinize and politicize every word one writes in an opinion. In the words of David Faigman, a leading scholar on the Court’s use of facts in judicial doctrine, facts and “[s]cience posses[s] the mien of neutrality, rather than the stink of judicial activism.”<sup>96</sup> One explanation, therefore, for the rise of

92. Patrick O’Brien, *“Enemies of the People”: Judges, the Media, and the Mythic Lord Chancellor*, PUB. L., Nov. Supp. 2017, at 135, 143 (“The reason that criticism is so destructive is because judges are human and will want to respond.”).

93. *See id.* at 142. For a similar argument see Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2245-46, 2254-72 (2019) (arguing that it is likely not legally legitimate for a Justice to switch her vote to protect the Court’s sociological legitimacy).

94. *See* LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 125 (2006) (explaining how the Federalist Society serves as “an attentive audience” to conservative judges “that applauds certain kinds of decisions and doctrines”). *See generally* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

95. Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 116, 151 (1997) (“By reciting scientific facts, the Court shows why its rulings are in harmony with a culture that accords legitimacy to findings made by scientists.”).

96. FAIGMAN, *supra* note 33, at 155.

legislative facts in American judicial opinions is as a reaction to accusations of political behavior by the courts. U.S. courts are “under fire” more often than their British counterparts and because they are under a different kind of public scrutiny (i.e., accusations of political behavior), they benefit from a different kind of shield.

Facty opinions offer shelter. It is easier, for example, to vote that Congress was using outdated facts to justify the Voting Rights Act than it is to vote that Congress did not have the power to pass the law.<sup>97</sup> It seems more modest, even if in reality it is not. And, conversely, in a country such as the United Kingdom in which judges are already largely shielded from politics, there is less of an urge to reach for the factual authorities to make one look more objective and neutral. Below are four examples that I think illustrate the retreat to facts in judicial doctrine in the United States.

#### A. *Citizens United v. FEC*

In 2009, all eyes were on the Supreme Court as it evaluated the Bipartisan Campaign Reform Act (commonly known as the McCain-Feingold Act).<sup>98</sup> The law, which among other things restricted independent campaign expenditures by corporations and unions, was challenged as a violation of the First Amendment.<sup>99</sup> The Justices had already heard the case argued once in the 2008-2009 Term and ordered reargument in the 2009-2010 Term, expanding the list of questions presented.<sup>100</sup>

Perhaps because the reargument highlighted the stakes of the impending decision, the Justices were “under fire” in the press to a significant degree in the months leading up to the *Citizens United* decision in 2010. Commentators cried that “[t]he Supreme Court [was] about to radically change politics,”<sup>101</sup> and was poised to do so

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97. *Shelby County v. Holder*, 570 U.S. 529, 556 (2013). For my thoughts on this case—and a debunking of the idea that it was a modest rationale—see Larsen, *Constitutional Shelf Life*, *supra* note 34, at 98-101.

98. Seth Gitell, *Making Sense of McCain-Feingold and Campaign-Finance Reform*, ATLANTIC (July/Aug. 2003), <https://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/> [<https://perma.cc/8Z62-456G>].

99. *Citizens United v. FEC*, 558 U.S. 310, 321 (2010).

100. *Id.* at 310.

101. *A Threat to Fair Elections*, *supra* note 80; see also Peter Overby, *Decade Brought Change to Campaign Finance*, NPR (Dec. 25, 2009, 12:40 AM), <https://www.npr.org/templates/>



in a political rather than judicial manner.<sup>102</sup> Polls at the time indicated that most Americans were concerned about the effect corporate money had on politics.<sup>103</sup> The writing was on the wall by the fall of 2009; the Court was poised to make a big change to the law of campaign finance regulation.<sup>104</sup> In the words of one op-ed writer for the Saint Louis Dispatch:

It's like using a debate over the infield fly rule as an excuse to rewrite the baseball rulebook. It is a classic case of legislating from the bench—this time from the court's conservative justices. If the lower-court ruling in *Citizens United* were to be overturned, it should end all whining from the right about the scourge of “activist judges.”<sup>105</sup>

In January of 2010, the Court finally decided *Citizens United*.<sup>106</sup> Finding conflict with the First Amendment, specifically its core protection of political speech, the majority of the Court invalidated federal law that prohibited a corporation or labor union from making an “electioneering communication” or any expenditure advocating the election or defeat of a candidate at any time.<sup>107</sup>

story/story.php?storyId=121872329 [https://perma.cc/WE82-C5TZ] (“The way that the Supreme Court has been interpreting campaign finance law could well lead us into a spiral where we end up with a deregulated campaign finance system.” (quoting Rick Hasen)).

102. See Jeffrey Rosen, Opinion, *The Trial of John Roberts*, N.Y. TIMES (Sept. 12, 2009), <https://www.nytimes.com/2009/09/13/opinion/13rosen.html> [https://perma.cc/NR64-F5WQ] (“If, however, in the *Citizens United* case, Justices Roberts and Samuel Alito now join Justices Scalia, Kennedy and Thomas in a 5-to-4 decision that broadly overturns longstanding bans on corporate campaign expenditures, the 2007 Scalia critique will be vindicated. And liberals will conclude that John Roberts is guilty of precisely the kind of strategic temporizing that conservatives have long ascribed to Earl Warren.”).

103. Opinion, *The Rights of Corporations*, N.Y. TIMES (Sept. 21, 2009), <https://www.nytimes.com/2009/09/22/opinion/22tue1.html> [https://perma.cc/88TK-3H8K].

104. See, e.g., Mary E. O’Leary, *Campaign Finance Reform Law Faces Uncertain Future*, NEW HAVEN REG. (Dec. 13, 2009), <https://www.nhregister.com/news/article/Campaign-finance-reform-law-faces-uncertain-future-11638436.php> [https://perma.cc/2VT7-9J5G] (“On the national level, the betting among high court watchers, is that the majority of justices will overturn 100 years of legal precedent that reined in corporate and union campaign spending.”).

105. *Wrong Way on Campaign Cash*, *supra* note 80.

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

107. *Id.* at 320-21, 365-66. The law defined “electioneering communication” as a broadcast ad reaching over 50,000 people in the electorate within thirty days of a primary or sixty days of a general election. *Id.* at 320-21.

But, beneath the banner of the First Amendment, *Citizens United* carried a very fact-heavy rationale. The Court held “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>108</sup> As Pamela Karlan has explained, this rationale “sounds empirical .... Those statements ... are phrased as statements of fact, or predictions.”<sup>109</sup> The majority found there was “scant evidence that independent expenditures” lead to political corruption,<sup>110</sup> and it “cited an enormous variety of nonlegal texts, many written by specialists, to support their contentions about the purposes of campaign finance regulation, the scope of campaign finance corruption, and corporate power and rights.”<sup>111</sup> The end result is an opinion that focuses on what Michael McConnell has called “dubious quasi-empirical inquiries relating to the prevention of corruption ... or leveling the playing field.”<sup>112</sup>

The factual dimension of *Citizens United* had an interesting epilogue. Not even a full year after the decision, litigants in Montana challenged an almost identical campaign finance restriction in their state on the basis of a new and different factual record.<sup>113</sup> Although the litigants eventually lost at the U.S. Supreme Court in a summary reversal, they met success below because the Montana Supreme Court explained that “*Citizens United* was a case decided upon its facts” or lack of facts.<sup>114</sup> To the Montana litigants and Montana judges, *Citizens United* was such a facty decision that a

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108. *Id.* at 357.

109. Karlan, *supra* note 23, at 1280-81; *see also* Gorod, *supra* note 33, at 28-29 (arguing that the *Citizens United* Court repeatedly used facts not in the record below); Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 298, 301 (2011) (“[The *Citizens United* decision] lacked both micro-facts and the mid-level, institutional facts, which provide a coherent narrative about who does what to whom, and why.... In the re-argument, the Supreme Court did not allow for a new development of the factual record below. Instead, it relied on a very sparse record, one developed just for this case, and on facts from outside the record.”).

110. *Citizens United*, 558 U.S. at 360.

111. Karen Petroski, *Texts Versus Testimony: Rethinking Legal Uses of Non-Legal Expertise*, 35 U. HAW. L. REV. 81, 99 (2013).

112. McConnell, *supra* note 49, at 446.

113. *See* W. Tradition P’ship v. Attorney Gen., 271 P.3d 1, 3-5 (Mont. 2011), *rev’d sub nom.* Am. Tradition P’ship v. Bullock, 132 S. Ct. 2490 (2012) (per curiam).

114. *Id.* at 5.

different factual record could lead to a different result.<sup>115</sup> In a quick summary reversal, the U.S. Supreme Court set the record straight—explaining “[t]here [could] be no serious doubt” that *Citizens United* applied to the Montana law.<sup>116</sup>

Reasonable minds can debate whether the Supreme Court’s holding in *Citizens United*, particularly its definition of “corruption,”<sup>117</sup> is really a question of fact. Pamela Karlan argues that the decision “reflect[s] a philosophical, rather than an empirical, position on money’s effect on politics.”<sup>118</sup> This seems particularly persuasive in light of the Montana epilogue. But the point for now is just to recognize that, whatever its true nature, the Court’s rationale sounds “facy.” It drips in “quasi-empirical” claims and assertions about the record. In the face of pointed criticism and accusations of “judicial activism,” five Justices chose to retreat to higher ground—a rationale packaged in factual language and tethered to factual sources.

### B. *Roe v. Wade*

It is not just modern conservative Justices who retreat to facts when under pressure. *Roe v. Wade* is perhaps the most famous example of a factual shield in the *United States Reports*.

Like *Citizens United*, *Roe* was argued twice.<sup>119</sup> Chief Justice Warren Burger had assigned the opinion in *Roe* to Justice Blackmun.<sup>120</sup> We now know from his papers that Blackmun began to draft a short opinion about vagueness—the original version was only seventeen pages long—but then in May 1972, asked for the Court to order reargument.<sup>121</sup> The case was reargued on October 11, 1972.<sup>122</sup> Speculation was high that “something might be changing in the court.”<sup>123</sup> In her terrific book based on Blackmun’s private

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115. *See id.*

116. *Am. Tradition P’ship*, 132 S. Ct. at 2491.

117. *Citizens United v. FEC*, 558 U.S. 310, 351-60 (2010) (limiting the definition of corruption to be “*quid pro quo*”).

118. Karlan, *supra* note 51, at 35.

119. *Roe v. Wade*, 410 U.S. 113, 113 (1973).

120. GREENHOUSE, *supra* note 22, at 82.

121. *See id.* at 87-89.

122. *Roe*, 410 U.S. at 113.

123. *Abortion Pressures on Burger Court*, NEWSDAY, July 5, 1972, at 4.

papers, Linda Greenhouse recounts the tension in the air while the case was pending.<sup>124</sup> President Richard Nixon had issued a statement against “abortion on demand,”<sup>125</sup> and Justice Blackmun even kept Gallup opinion polling data and news clips about abortion in the case file.<sup>126</sup> One picture Greenhouse paints leaves a telling impression of Blackmun’s mental state while writing *Roe*. Upon being assigned the opinion, Blackmun asked his wife and daughters for their views on abortion at the dinner table.<sup>127</sup> According to his youngest daughter Susan, “Dad put down his fork mid-bite and pushed down his chair, ‘I think I’ll go lie down ... I’m getting a headache.’”<sup>128</sup>

Blackmun’s headache was well-deserved. In the American tradition, the criticism the 1972 Justices faced while the decision was pending was a familiar one: the allegation is that they were acting as politicians and not as judges. In the words of the *New York Times* in a 1972 article called “The Balanced Court ...” the message about the stakes of *Roe* was clear: “The divisions among the justices over fundamental issues will increasingly be interpreted as political rather than constitutional disagreements.”<sup>129</sup> Cries of judicial activism were in the air that summer with the now-familiar rallying call for “a judiciary which showed more ‘judicial restraint,’ which would ‘interpret the laws, not make them.’”<sup>130</sup> And—as no doubt modern readers will find familiar—the high stakes of the Court’s “legitimacy” were front and center.<sup>131</sup>

Certainly, the level of “anti-judge venom” in the press in the early 1970s was significantly less than it became in 2009 when everyone

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124. See GREENHOUSE, *supra* note 22, at 72-101.

125. *Id.* at 83.

126. *Id.* at 91.

127. *Id.* at 83.

128. *Id.*

129. *The Balanced Court ...*, N.Y. TIMES, July 15, 1972, at 22; see also *id.* (“The image ... created will not be that of a balanced Court but of an indecisive one” due to “the impression [of] political zeal.”).

130. John P. MacKenzie, *Court ‘Activism’ Becomes Issue*, WASH. POST, May 29, 1972, at A27.

131. See *The Balanced Court ...*, *supra* note 129 (“This, too, creates the impression that political zeal of individual members of the Court may be getting in the way of judicial ties that ought to bind the Court together even when there is sharp legal or ideological disagreement. This will further reduce the Court’s authority in the eyes of the general public. The image thus created will not be that of a balanced Court but of an indecisive one.”).

was anticipating *Citizens United* (an interesting observation in and of itself). But it is also true that the Justices who would decide if a woman’s right to an abortion was constitutionally protected knew that they were writing history and that their words would prompt controversy.<sup>132</sup> Blackmun himself wrote the following note to himself after Conference: this is “not a happy assignment;” the Court “will be excoriated.”<sup>133</sup>

As is well-known, Justice Blackmun visited the Mayo Clinic in July 1972 while *Roe* was pending.<sup>134</sup> There, he spent hours in the library researching the history and medical risks of abortion: “In longhand on a lined pad, he took careful notes, numbering each factual assertion and marking the citation for each.”<sup>135</sup> Of course, the final opinion in *Roe* differed significantly from the short opinion on vagueness that Blackmun had circulated earlier.<sup>136</sup> Anchoring the rationale in a fundamental right to privacy secured by the Fourteenth Amendment, *Roe* relied on factual claims both about the (old) history of the procedure, the (low) risks to the health of the woman, and the (great) importance of legality to keeping abortion safe.<sup>137</sup> Blackmun’s personal notes reflect that his time researching at the Mayo Clinic played a big part in these revisions and his emerging “awareness” about the greater factual contours of the controversy.<sup>138</sup>

I certainly do not mean to suggest that the scrutiny and allegations of political behavior lobbed at the Court in 1972 (perhaps the source of Blackmun’s headache) were the only reasons Justice Blackmun took the *Roe* opinion in a facty direction. But even taking Blackmun at his word that his views were awakened by factual

132. See GREENHOUSE, *supra* note 22, at 93.

133. *Id.*

134. *Id.* at 90.

135. *Id.*

136. *Id.* at 95.

137. *Roe v. Wade*, 410 U.S. 113, 129-50, 163 (1973); see also GREENHOUSE, *supra* note 22, at 90. For others who have noted the emphasis on facts in *Roe*, see Borgmann, *supra* note 33, at 1196; Hashimoto, *supra* note 95, at 143-44.

138. GREENHOUSE, *supra* note 22, at 93 (“According to his notes, Blackmun said he was ‘pleased we deferred’ the cases from the previous term. His week at [the] Rochester [Mayo Clinic] had given him ‘an awareness of medical history I have not had before.... I have a lot of personal investment. I am revising and expanding the proposed opinions to command a majority.’”).

research, it is interesting to contemplate what made him go to the Mayo Clinic to conduct that research in the first place. Given the fact that Justice Blackmun was keenly aware of the eyes on him—which we know from, among other things, the newspaper clippings he kept in his file<sup>139</sup>—it seems at least possible that the *Roe* opinion represents a retreat to facts when judging “under fire.”

Finally one other point bears mentioning in this regard. It is interesting to observe, as Brianne Gorod has, that subsequent lower courts dealing with abortion disputes have followed *Roe*'s trend of emphasizing the factual contours of the abortion dispute.<sup>140</sup> Surely *stare decisis* plays a great role in that dynamic, but one has to wonder if “the anti-judge venom” that continues to follow courts considering abortion challenges today also plays some role in the doctrine growing in the factual weeds.

### C. *Shelby County v. Holder*

Although perhaps not as obvious as some other examples in this Article, I would also add *Shelby County v. Holder* to the list of facty opinions issued by the Supreme Court while the Justices were under fire. *Shelby County* was the 2013 decision by the Court invalidating a key part of the Voting Rights Act.<sup>141</sup> It was largely briefed as a case about congressional power (power to force certain states to get approval before changing voting laws), but the Court held instead that the law's coverage formula—which determined if a state or local government must obtain this permission—was outdated and unconstitutional.<sup>142</sup> In the words of the Chief Justice, who wrote the

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139. See *supra* note 22 and accompanying text.

140. Gorod, *supra* note 33, at 46-47.

141. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

142. *Id.* at 551-54, 557. I also concede, as I have done in the past, that there is room to debate the exact nature of the constitutional violation in *Shelby County*. See Larsen, *Constitutional Shelf Life*, *supra* note 34, at 109-10 (“There is room to argue about the precise nature of the constitutional violation in *Shelby County*. The Court was certainly concerned about federalism and the ‘principle of equal sovereignty among the States,’ but that alone did not cause the statute to fall. The law’s disparate treatment of the states marked the high stakes and the exceptional nature of the preclearance system, but it was not the ultimate constitutional flaw in it. And although the Court was extensively briefed on the scope of Congress’s power under the Fourteenth and Fifteenth Amendments, the majority opinion did not decide whether the Voting Rights Act was an appropriate use of Congress’s enforcement power under those constitutional texts.” (citations omitted)).

opinion for the Court, “[T]he Act imposes current burdens and must be justified by current needs.”<sup>143</sup> The Court explained that this part of the law (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.”<sup>144</sup>

In reaching this result, *Shelby County* emphasized facts about minority voter turnout and changes in those patterns since the passage of the Voting Rights Act.<sup>145</sup> The opinion dissects the congressional record on this score and includes charts and graphs to make the factual point that times and racial voting patterns had changed.<sup>146</sup>

As critics of the decision have noted, the *Shelby County* rationale can largely be attributed to the majority’s views on questions of fact regarding racial discrimination in voting: in the Court’s view (but not Congress’s), “[v]oter turnout and registration rates [between whites and racial minorities] now approach parity.”<sup>147</sup> Indeed, Eric Berger claims *Shelby County* “hinged largely on [the Court’s] understanding of the facts.”<sup>148</sup> And, he adds, “The Court’s presentation of these facts is absolutist, framed in simple, declarative sentences as incontestable fact ineluctably leading to a constitutional conclusion. Congress’s failure to update the coverage

143. *Shelby County*, 570 U.S. at 536 (quoting *Nw. Austin Util. v. Holder*, 557 U.S. 193, 203 (2009)). For my lengthier discussion of the case’s rationale and its facty nature, see Larsen, *Constitutional Shelf Life*, *supra* note 34, at 109-113.

144. *Shelby County*, 570 U.S. at 536, 538-39, 551, 557.

145. See Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1560 (2014); Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2061 (2014).

146. *Shelby County*, 570 U.S. at 553-54; Ross II, *supra* note 145, at 2061 (discussing how the Majority supported its holding “that current needs did not justify the burdens... [by] selectively emphasize[ing] certain record evidence, second-guess[ing] other evidence, and simply ignor[ing] other evidence”); Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 107 (2015) (“At its heart, *Shelby County* is an opinion about levels of minority voter registration and turnout: they are mentioned repeatedly, almost to the exclusion of any other measure of discrimination.”).

147. *Shelby County*, 570 U.S. at 540.

148. Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 695 (2015); see also *id.* at 694 (“If the Court’s idiosyncratic factual understandings played a substantial role in *Citizens United* and *Graham*, they almost single-handedly determined the outcome in *Shelby County v. Holder*.”).

formula, it emphasized, ‘leaves [the Court] ... with no choice but to declare § 4(b) unconstitutional.’”<sup>149</sup>

There was another path—a less facty path—available to the Court when it was deliberating *Shelby County*. Coming into the case, the commentary and briefs emphasized questions of congressional power.<sup>150</sup> The Court did not choose this path. By invalidating only the coverage formula of the Voting Rights Act but not the provision authorizing the preclearance provision generally, the Court left a big open question and created doctrinal confusion. As Franita Tolson argues, by avoiding the big question in *Shelby County* “neither the Court nor the legal scholarship has a clear sense of the scope of congressional authority over elections.”<sup>151</sup>

Why did the Court make this choice? Part of the answer for sure must be the value in judicial modesty that comes with avoidance. The Chief Justice, we know, particularly values such moves.<sup>152</sup> By invalidating the coverage formula alone and leaving the question of congressional power for preclearance open, the Court kicked the ball in Congress’s court leaving them the option to try again.<sup>153</sup> But it is also, I think, at least plausible that the Court—and Roberts in particular—avoided the big question in *Shelby County* in order to keep its head down, so to speak, in light of accusations of political decision-making.

When *Shelby County* was pending, the criticism was pointed and many warned that if the Court should strike down the Voting Rights Act it would create “widespread” discrimination,<sup>154</sup> “turn back the

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149. *Id.* at 696 (quoting *Shelby County*, 570 U.S. at 557).

150. See Jon Greenbaum et al., *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 828-29, 838 (2014). For examples of these arguments pressed to the Court, see Brief for Cato Institute as Amicus Curiae Supporting Petitioner, *Shelby County*, 570 U.S. 529 (2013) (No. 12-96), 2012 WL 8678866, at \*13-15; Brief for Justice and Freedom Fund as Amicus Curiae Supporting Petitioner, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 12355741, at \*13-15.

151. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 382 (2014).

152. See Daniel Breen, *Avoiding “Wild Blue Yonders”: The Prudentialism of Henry J. Friendly and John Roberts*, 52 S.D. L. REV. 73, 128-29 (2007).

153. Of course, as others have pointed out in an era of gridlocked Congress and in the face of a 2006 reauthorization, this gesture of judicial modesty might be a hollow one. See Tolson, *supra* note 151, at 381.

154. Editorial, *Voting and Racial History*, N.Y. TIMES (Jan. 26, 2012), <https://www.nytimes.com/2012/01/27/opinion/voting-and-racial-history.html> [<https://perma.cc/9NRRN-WYWZ>].



hands of time,”<sup>155</sup> and allow “the Old South [to] rise again.”<sup>156</sup> And, of course, the dominant refrain was familiar (even if the arguments were coming from the left instead of the right this time): the Court was about to act politically and not judicially. On an episode of NPR’s *Tell Me More* while the case was pending, one commentator did not pull punches when anticipating *Shelby County*: “It’s not legal and it shows exactly why we should defer to Congress to determine that voting discrimination remains concentrated in covered states as opposed to the court. They’re basing this on, you know, political assumptions and judgments as opposed to law.”<sup>157</sup>

Indeed, after oral argument in the case, an opinion piece in the *New York Times* focused on Chief Justice Roberts personally, asking:

Is it better to be black these days in Mississippi or in Massachusetts? Not being likely to find myself black in either state, I wouldn’t presume to say, but Chief Justice John G. Roberts Jr. exhibited no such diffidence. Without having asked a single question of Shelby County’s lawyer, Bert W. Rein, he taunted Solicitor General Donald B. Verrilli with statistics purporting to show that Mississippi has the better record of African-American voter registration and turnout. It was a “gotcha” performance beneath the dignity of a chief justice.<sup>158</sup>

Once again I do not claim to know the inner workings of the Chief Justice on this issue (or any issue). He may not care what his critics say. But I think there is enough circumstantial evidence to suggest that for one who cares a lot about the Court’s legitimacy and image

155. Debbie Elliott, *Alabama Divided as Court Prepares to Hear Voting Rights Challenge*, NPR (Feb. 21, 2013), <https://www.npr.org/2013/02/25/172603328/alabama-divided-as-court-prepares-to-hear-voting-rights-challenge> [<https://perma.cc/3D8K-RB2J>].

156. *Id.*

157. *Weighing the Future of the Voting Rights Act*, NPR (Mar. 1, 2013, 12:00 PM), <https://www.npr.org/2013/03/01/173244624/weighing-the-future-of-the-voting-rights-act> [<https://perma.cc/S6P9-ZZHV>]; see also Linda Greenhouse, ‘A Big New Power,’ N.Y. TIMES (Mar. 6, 2013, 9:00 PM), <https://opinionator.blogs.nytimes.com/2013/03/06/a-big-new-power> [<https://perma.cc/R2AW-EG2H>] (“On what basis, they will wonder, did five conservative justices, professed believers in judicial restraint, reach out to grab the authority that the framers of the post-Civil War 14th and 15th Amendments had vested in Congress nearly a century and a half earlier ‘to enforce, by appropriate legislation’ the right to equal protection and the right to vote.”).

158. Greenhouse, *supra* note 157.

as a nonpolitical institution, the allure of a presumably factual decision on the Voting Rights Act rather than a bold legal call about the scope of congressional power may have been too great to resist.

Ultimately, the decision reached in *Shelby County* could be explained in charts and graphs about voter turnout. It could be laid out objectively and in a way that sounds scientific and data driven. There was no need to answer doctrinal puzzles about standards of review or enter normative debates about the scope of congressional power or even to constitutionally interpret what the words “appropriate legislation” mean in the Fifteenth Amendment.<sup>159</sup> Instead, by focusing on factual changes and the outdated nature of the coverage formula, the Court sought to “insulate[] it[self] from criticisms that it was unfairly biased against the Voting Rights Act or minority voters.”<sup>160</sup> This “just the facts, ma’am” strategy is attractive because it appears judicially modest even if the modesty is only an illusion.

#### D. *Brown v. Board of Education*

Finally, my short list of landmark Supreme Court opinions where the Justices turn to facts would not be complete without a nod towards *Brown v. Board of Education*. Forests have been felled with commentary and analysis of this historic decision, and I will not attempt to expand significantly on them here. It is sufficient to point out that when thinking about facts as shields, it is hard not to recognize the famous (or infamous) footnote eleven in *Brown*.<sup>161</sup>

In footnote eleven, of course, the *Brown* Court relied on social science data produced by Kenneth Clark (and put in the record what is now called the “doll study”)<sup>162</sup> to support the claim that “[s]egregation ... has a tendency to [retard] the educational and mental development of negro children.”<sup>163</sup> This claim was controversial from the beginning, both as a matter of methodological soundness and legal relevance.<sup>164</sup>

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159. U.S. CONST. amend XV.

160. Berger, *supra* note 148, at 705.

161. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

162. Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 802 n.33 (2002).

163. *Brown*, 374 U.S. at 494 (citation omitted).

164. Edmond Cahn, *Jurisprudence (American Survey)*, 30 N.Y.U. L. REV. 150, 164-65

Why did the Court add the citation to the doll study? There seems to be somewhat of a scholarly consensus that the sources were not necessary to the outcome in *Brown*.<sup>165</sup> And some claim that the addition of the evidence actually detracted from the power of the Court’s opinion.<sup>166</sup> In a well-known article published in 1955 (the year after *Brown*), Edmond Cahn raised the alarm that the “flimsy” social science evidence relied on in *Brown* might falsely indicate (in a bad way) “that the outcome, either entirely or in major part, was caused by the testimony and opinions of the scientists.”<sup>167</sup>

Perhaps the easiest explanation for the inclusion of footnote eleven is that the Justices—acutely aware that the country’s eyes were upon them—reached for a factual shield. Caitlin Borgmann has made this suggestion.<sup>168</sup> In her article on the use of what she calls “social facts” in civil rights cases, Borgmann argues that at least part of the reason the Justices reached for the data in *Brown* was to provide “neutral-sounding cover for Justices acutely aware of wading into a contentious social debate.”<sup>169</sup>

And they certainly were “wading into a contentious social debate.”<sup>170</sup> In a *Newsweek* article written while *Brown* was pending, ominously entitled *An Impending Crisis*, one journalist wrote about “the hot poker” being “tendered to the high court,” complete with vast political ramifications.<sup>171</sup> Others were not so polite. In the newspaper for the University of Georgia, gubernatorial candidate

(1955); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 74-75 (1961); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) (“[E]veryone who has examined the question now agrees that the Court erred [in relying on the social science data].”); see also Mody, *supra* note 162, at 803-09 (recounting debate over the Court’s use of this evidence).

165. Borgmann, *supra* note 33, at 1196-97 (“In both [the *Brown* and *Roe*] decisions, the social science ‘evidence’ likely did not influence the establishment of constitutional doctrine.”); see also Hashimoto, *supra* note 95, at 139-40.

166. Borgmann, *supra* note 33, at 1196 n.71 (noting “the ‘potential danger’ that the Court’s citation of social science in invalidating racial segregation could set a precedent in equal protection cases that ‘complaining parties [must offer] competent proof that they would sustain or had sustained some permanent (psychological or other kind of) damage’” (citing Cahn, *supra* note 164, at 168)).

167. Cahn, *supra* note 164, at 157-58.

168. Borgmann, *supra* note 33, at 1196-97.

169. *Id.*

170. *See id.*

171. Raymond Moley, *An Impending Crisis*, NEWSWEEK, Dec. 10, 1951, at 104.

Herman Talmadge said in 1950 he would not “allow it” if the Justices made the wrong choice on segregation.<sup>172</sup> What was to become massive resistance to *Brown* in the South was no surprise; it was fully advertised by southern politicians as soon as the Supreme Court agreed to hear the case.<sup>173</sup>

As historians have explained, the Justices in *Brown* were keenly aware of the gravity of the moment.<sup>174</sup> Moreover, they were being accused of making up law, and these were men that shuddered at such an accusation.<sup>175</sup> It is at least possible, I suspect, that in such a political cauldron—where editorials were issued regularly labeling the Justices as just masked politicians<sup>176</sup>—once again the allure of factiness proved rather tempting.

### CONCLUSION

The theme of this symposium is judging in “politically charged moments.” Maybe other contributors to this discussion are right that there should be nothing different about judging in hot moments as opposed to judging in cold moments.<sup>177</sup> Or maybe every moment is hot depending on one’s perspective.<sup>178</sup> As a descriptive matter, however, I think it is hard to deny the consequences that come from judging in a country where judicial criticism is a sport. It only takes

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172. Gordon Walters & Grady Griner, *Two Sides of the Coin*, RED & BLACK (June 22, 1950), [https://gahistoricnewspapers.galileo.usg.edu/lcn/gua1179162/1950-06-22/ed-1/seq-4/print/image\\_557x817\\_from\\_0,0\\_to\\_3425,5017/](https://gahistoricnewspapers.galileo.usg.edu/lcn/gua1179162/1950-06-22/ed-1/seq-4/print/image_557x817_from_0,0_to_3425,5017/) [<https://perma.cc/W4EW-LZRM>].

173. Luther A. Huston, *Supreme Court Asked to End School Segregation in Nation*, N.Y. TIMES (Dec. 10, 1952), <https://nyti.ms/32u45Ba> [<https://perma.cc/H84T-EHM6>] (announcing same threat from South Carolina’s then-governor); Lewis Wood, *High Court Takes Segregation Issue*, N.Y. TIMES (June 10, 1952), <https://nyti.ms/2L1WTS2> [<https://perma.cc/S5LF-BV4J>] (explaining southern states’ plans to “abandon [the] public school system” if the Supreme Court mandates desegregation).

174. See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004).

175. Arthur Krock, *A Hard and Cold Look at the Supreme Court*, N.Y. TIMES, Nov. 9, 1954, at 26L. (“The impression is now widespread that ... too many judges make the Constitution say what they want it to.”).

176. *Id.* (“If [the Justices] want to write political pamphlets they should resign.”).

177. See Erwin Chemerinsky, *The Court Should Not Let Politically Divided Times Affect Its Decisions*, 61 WM. & MARY L. REV. 971, 976-77 (2020).

178. See Jack Beerman, *Crisis? Whose Crisis?*, 61 WM. & MARY L. REV. 931, 934 (2020).

a quick comparison with a sister country to see the distinct norms at work,<sup>179</sup> and the consequences those norms produce.<sup>180</sup>

As judges are labeled politicians they will defend themselves “through [their] work” in an attempt to demonstrate that they are not.<sup>181</sup> The end result produces judicial decisions fat with factual claims and factual authorities;<sup>182</sup> it leads to judicial rationales that appear neutral because they are only fact-based and it potentially masks other dynamics at work. Our current political climate—and particularly our disdain for “so-called judge[s]”<sup>183</sup>—thus gives us even more to worry about. The long-term consequences of anti-judicial venom may outlast today’s headlines and worrisome tweets; the doctrinal aftereffects of the retreat to facts could last for ages to come.

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179. *See supra* Parts I-II.

180. *See supra* Introduction.

181. Justin Wise, *Holder: Supreme Court’s Legitimacy Can Be Questioned After Kavanaugh Confirmation*, HILL (Oct. 8, 2018, 8:03 AM), <https://thehill.com/homenews/administration/410356-holder-supreme-courts-legitimacy-can-be-questioned-after-kavanaugh> [<https://perma.cc/U8MW-F66U>].

182. *See supra* Part III.

183. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> [<https://perma.cc/N35G-22JZ>].