

**BASEBALLS AND BEACHBALLS ...
ADJUDICATIVE FACTS AND
LEGISLATIVE FACTS**

**UNDERSTANDING AND
LITIGATING LEGISLATIVE
FACTS**

**MONTE NEIL STEWART
STEWART TAYLOR & MORRIS PLLC
CLE PRESENTATION
FEBRUARY 20, 2015
ISB LITIGATION SECTION
BOISE, IDAHO**

671 F.3d 1052, 12 Cal. Daily Op. Serv. 1550, 2012 D_o
(Cite as: 671 F.3d 1052)

H

United States Court of Appeals,
Ninth Circuit.
Kristin M. PERRY; Sandra B. Stier; Paul T. Katami;
Jeffrey J. Zarrillo, Plaintiffs–Appellees,
City and County of San Francisco, Intervenor–
Plaintiff–Appellee,
v.
Edmund G. BROWN, Jr., in his official capacity as
Governor of California; Kamala D. Harris, in her
official capacity as Attorney General of California;
Mark B. Horton, in his official capacity as Director of
the California Department of Public Health & State
Registrar of Vital Statistics; Linette Scott, in her offi-
cial capacity as Deputy Director of Health Infor-
mation & Strategic Planning for the California De-
partment of Public Health; Patrick O'Connell, in his
official capacity as Clerk–Recorder for the County of
Alameda; Dean C. Logan, in his official capacity as
Registrar–Recorder/County Clerk for the County of
Los Angeles, Defendants,
Hak–Shing William Tam, Intervenor–Defendant,
and
Dennis Hollingsworth; Gail J. Knight; Martin F.
Gutierrez; Mark A. Jansson; ProtectMarriage.com–
Yes On 8, a Project of California Renewal, as official
proponents of Proposition 8, Intervenor–Defendants–
Appellants.
Kristin M. Perry; Sandra B. Stier; Paul T. Katami;
Jeffrey J. Zarrillo, Plaintiffs–Appellees,
City and County of San Francisco, Intervenor–
Plaintiff–Appellee,
v.
Edmund G. Brown, Jr., in his official capacity as
Governor of California; Kamala D. Harris, in her
official capacity as Attorney General of California;
Mark B. Horton, in his official capacity as Director of
the California Department of Public Health & State
Registrar of Vital Statistics; Linette Scott, in her offi-
cial capacity as Deputy Director of Health Infor-
mation & Strategic Planning for the California De-
partment of Public Health; Patrick O'Connell, in his
official capacity as Clerk–Recorder for the County of
Alameda; Dean C. Logan, in his official capacity as
Registrar–Recorder/County Clerk for the County of
Los Angeles, Defendants,
Hak–Shing William Tam, Intervenor–Defendant,

WARNING:

**This decision was vacated by
Hollingsworth v. Perry, 133 S. Ct.
2652 (2013).**

Nos. 10–16696, 11–16577.
Argued and Submitted Dec. 6, 2010.
Submission Withdrawn Jan. 4, 2011.
Resubmitted Feb. 7, 2012.
Argued and Submitted Dec. 8, 2011.
Filed Feb. 7, 2012.

Background: Same-sex couples brought civil rights action against Governor of California, Attorney General, Director and Deputy Director of Public Health, and county clerks, challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman, and alleging violation of due process and equal protection under Fourteenth Amendment. Proponents of amendment intervened on behalf of defendants, and municipality and county intervened on behalf of plaintiffs. The United States District Court for the Northern District of California, Vaughn R. Walker, then Chief Judge, granted judgment for plaintiffs. Proponents appealed. Subsequently, proponents moved to vacate that judgment, and James Ware, Chief Judge, denied that motion. Proponents appealed. The Court of Appeals, 628 F.3d 1191, certified question, and the California Supreme Court, 265 P.3d 1002, answered that question.

Holdings: The Court of Appeals, Reinhardt, Circuit Judge, held that:

- (1) people of California, through proponents of ballot measure, had to be allowed under Article III to defend validity of their use of initiative power in federal courts, including on appeal;
- (2) messages in support of proposition that proponents communicated to voters to encourage their approval of measure were “adjudicative facts” to which Court had to give deferential weight;
- (3) amendment was not rationally related to California's interest in childrearing and responsible procreation;
- (4) amendment was not rationally related to Califor-

671 F.3d 1052, 12 Cal. Daily Op. Serv. 1550, 2012 Daily Journal D.A.R. 1705
(Cite as: 671 F.3d 1052)

grant a permanent injunction for abuse of discretion, but we review the determinations underlying that decision by the standard that applies to each determination. Accordingly, we review the court's conclusions of law de novo and its findings of fact for clear error. See Ting v. AT&T, 319 F.3d 1126, 1134–35 (9th Cir.2003); Fed.R.Civ.P. 52(a).

[10][11][12] Plaintiffs and Proponents dispute whether the district court's findings of fact concern the types of “facts”—so-called “adjudicative facts”—that are capable of being “found” by a court through the clash of proofs presented in adjudication, as opposed to “legislative facts,” which are generally not capable of being found in that fashion. “Adjudicative facts are facts about the parties and their activities ..., usually answering the questions of who did what, where, when, how, why, with what motive or intent”—the types of “facts that go to a jury in a jury case,” or to the factfinder in a bench trial. Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir.1966) (quoting Kenneth Culp Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L.Rev. 193, 199 (1956)) (internal quotation marks omitted). “Legislative facts,” by contrast, “do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion.” Id.

It is debatable whether some of the district court's findings of fact concerning matters of history or social science are more appropriately characterized as “legislative facts” or as “adjudicative facts.” We need not resolve what standard of review should apply to any such findings, however, because the only findings to which we give any deferential weight—those concerning the messages in support of Proposition 8 that Proponents communicated to the voters to encourage their approval of the measure, Perry IV, 704 F.Supp.2d at 990–91—are clearly “adjudicative facts” concerning the parties and “ ‘who did what, where, when, how, why, with what motive or intent.’ ” Marshall, 365 F.2d at 111. Aside from these findings, the only fact found by the district court that matters to our analysis is that “[d]omestic partnerships lack the social meaning associated with marriage”—that the difference between the designation of ‘marriage’ and the designation of ‘domestic partnership’ is meaningful. Perry IV, 704 F.Supp.2d at 970. This fact was conceded by Proponents during discovery. Defendant–Intervenors’ Response to Plain-

tiffs’ First Set of Requests for Admission, Exhibit No. PX 0707, at 2 (“Proponents admit that the word ‘marriage’ has a unique meaning.”); id. at 11 (Proponents “[a]dmit that there is a significant symbolic disparity between domestic partnership and marriage”). Our analysis therefore does not hinge on what standard we use to review the district court's findings of fact. Cf. *1076Lockhart v. McCree, 476 U.S. 162, 168 n. 3, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (“Because we do not ultimately base our decision today on the [validity or] invalidity of the lower courts’ ‘factual’ findings, we need not decide the ‘standard of review’ issue”—whether “the ‘clearly erroneous’ standard of Rule 52(a) applies to the kind of ‘legislative’ facts at issue here.”).

V

We now turn to the merits of Proposition 8's constitutionality.

A

[13] The district court held Proposition 8 unconstitutional for two reasons: first, it deprives same-sex couples of the fundamental right to marry, which is guaranteed by the Due Process Clause, see Perry IV, 704 F.Supp.2d at 991–95; and second, it excludes same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to that honored status, in violation of the Equal Protection Clause, see id. at 997–1003. Plaintiffs elaborate upon those arguments on appeal.

[14] Plaintiffs and Plaintiff–Intervenor San Francisco also offer a third argument: Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. Romer, 517 U.S. at 634–35, 116 S.Ct. 1620. Because this third argument applies to the specific history of same-sex marriage in California, it is the narrowest ground for adjudicating the constitutional questions before us, while the first two theories, if correct, would apply on a broader basis. Because courts generally decide constitutional questions on the narrowest ground available, we consider the third argument first. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (citing Ashwander v. Tenn. Valley Auth., 297 U.S.

133 S.Ct. 2675

Editor's Note: Additions are indicated by Text and deletions by Text.

Supreme Court of the United States

UNITED STATES, Petitioner

v.

Edith Schlain WINDSOR, in her capacity as executor of the Estate of Thea Clara Spyer, et al.

No. 12-307. | Argued March 27, 2013. | Decided June 26, 2013.

Synopsis

Background: Taxpayer who, as surviving spouse of same-sex couple, was denied benefit of spousal deduction due to definition of "marriage" and "spouse" provided by Defense of Marriage Act (DOMA) brought action for refund of federal estate taxes and for declaration that pertinent provision of DOMA violated Fifth Amendment. After Department of Justice (DOJ) declined to continue its defense of statute, congressional group was allowed to intervene to defend statute's constitutionality. The United States District Court for the Southern District of New York, Barbara S. Jones, J., 833 F.Supp.2d 394, granted summary judgment for taxpayer. The United States, as nominal defendant, and congressional group appealed. The United States Court of Appeals for the Second Circuit, Dennis Jacobs, Chief Judge, 699 F.3d 169, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

[1] DOJ's decision not to defend DOMA did not deprive district court of jurisdiction;

[2] United States retained a stake sufficient to support Article III jurisdiction on appeal and in proceedings before the Supreme Court;

[3] congressional group's adversarial presentation of the issues satisfied prudential standing concerns; and

[4] DOMA's definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment.

Affirmed.

Chief Justice Roberts filed a dissenting opinion.

Justice Scalia filed a dissenting opinion, in which Justice Thomas joined, and in which Chief Justice Roberts joined in part.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined in part.

West Headnotes (28)

[1] **Constitutional Law**

↳ Taxation

A taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.

[2] **Constitutional Law**

↳ Justiciability

Declaratory Judgment

↳ Marital Status

Declaratory Judgment

↳ Federal taxes

Although taxpayer's suit seeking refund of federal estate taxes as surviving spouse of same-sex couple and a declaration that provision of Defense of Marriage Act (DOMA), which, for federal law, defined "marriage" only as a legal union between a man and a woman and "spouse" only as a person of opposite sex who was a husband or wife, violated Fifth Amendment was pending when the Executive Branch decided not to defend the provision's constitutionality, the Executive's decision to continue to deny the refund meant that there was a justiciable controversy between the parties, and thus, the district court was not deprived of jurisdiction; taxpayer's injury in not receiving refund was concrete, persisting, and

pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some, see North Carolina Const., Amdt. 1 (providing that “[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State”) (approved by a popular vote, 61% to 39% on May 8, 2012),⁶ are offset by victories in other places for others, see Maryland Question 6 (establishing “that Maryland’s civil marriage laws allow gay *2711 and lesbian couples to obtain a civil marriage license”) (approved by a popular vote, 52% to 48%, on November 6, 2012).⁷ Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting “the State of Maine to issue marriage licenses to same-sex couples”) (approved by a popular vote, 53% to 47%, on November 6, 2012)⁸ with Maine Question 1 (rejecting “the new law that lets same-sex couples marry”) (approved by a popular vote, 53% to 47%, on November 3, 2009).⁹

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

Justice ALITO, with whom Justice THOMAS joins as to Parts II and III, dissenting.

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to

intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting § 3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419, which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

I

I turn first to the question of standing. In my view, the United States clearly is not a proper petitioner in this case. The United States does not ask us to overturn the judgment of the court below or to alter that judgment in any way. Quite to the contrary, the United States argues emphatically in favor of the correctness of that judgment. We have never before reviewed a decision at the sole behest of a party that took such a position, and to do *2712 so would be to render an advisory opinion, in violation of Article III's dictates. For the reasons given in Justice SCALIA's dissent, I do not find the Court's arguments to the contrary to be persuasive.

Whether the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has standing to petition is a much more difficult question. It is also a significantly closer question than whether the intervenors in *Hollingsworth v. Perry*, *ante*, — U.S., at —, 133 S.Ct. 1521—which the Court also decides today—have standing to appeal. It is remarkable that the Court has simultaneously decided that the United States, which “receive[d] all that [it] ha[d] sought” below, *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), is a proper petitioner in this case but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not. In my view, both the *Hollingsworth* intervenors and BLAG have standing.¹

A party invoking the Court's authority has a sufficient stake to permit it to appeal when it has “ ‘suffered an injury in fact’ that is caused by ‘the conduct complained of’ and that ‘will be redressed by a favorable decision.’ ” *Camreta v. Greene*, 563 U.S. —, —, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011) (quoting *Lujan v.*

notions of the relative capabilities of men and women,” *Cleburne, supra*, at 441, 105 S.Ct. 3249, as when a State provides that a man must always be preferred to an equally qualified woman when both seek to administer the estate of a deceased party, see *Reed, supra*, at 76–77, 92 S.Ct. 251.

Finally, so-called rational-basis review applies to classifications based on “distinguishing characteristics relevant to interests the State has the authority to implement.” *Cleburne, supra*, at 441, 105 S.Ct. 3249. We have long recognized that “the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons.” *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). As a result, in rational-basis cases, where the court does not view the classification at issue as “inherently suspect,” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (internal quotation marks omitted), “the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.” *Cleburne, supra*, at 441–442, 105 S.Ct. 3249.

In asking the Court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, Windsor and the *2718 United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 821 N.Y.S.2d 770, 855 N.E.2d 1, 8 (2006) (“Until a few decades ago, it was an accepted truth for almost everyone who ever lived,

in any society in which marriage existed, that there could be marriages only between participants of different sex”)). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44–46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, e.g., Girgis, Anderson, & George, What is Marriage? Man and Woman: A Defense, at 23–28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.⁷ Because our constitutional *2719 order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government

6 Among those holding that position, some deplore and some applaud this predicted development. Compare, *e.g.*, Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 *Harv. J.L. & Pub. Pol’y* 771, 799 (2001) (“Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of ‘anything goes’ in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility”) and Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 *U. St. Thomas L.J.* 33, 58 (2005) (“If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea”), with Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?* in *I Do/I Don’t: Queers on Marriage* 53, 58–59 (G. Wharton & I. Phillips eds. 2004) (Former President George W. “Bush is correct ... when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been”) and Willis, *Can Marriage Be Saved? A Forum*, *The Nation*, p. 16 (2004) (celebrating the fact that “conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart”).

7 The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in *Hollingsworth v. Perry*, 558 U.S. 183, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010). In that case, the trial judge, after receiving testimony from some expert witnesses, purported to make “findings of fact” on such questions as why marriage came to be, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 958 (N.D.Cal.2010) (finding of fact no. 27) (“Marriage between a man and a woman was traditionally organized based on presumptions of division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family”), what marriage is, *id.*, at 961 (finding of fact no. 34) (“Marriage is the state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents”), and the effect legalizing same-sex marriage would have on opposite-sex marriage, *id.*, at 972 (finding of fact no. 55) (“Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages”).

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom. See 13 *Tr. in No. C 09–2292 VRW* (ND Cal.), pp. 3038–3039.

And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are “clearly erroneous.” See Brief for Constitutional Law and Civil Procedure Professors as *Amici Curiae* in *Hollingsworth v. Perry*, O.T. 2012, No. 12–144, pp. 2–3 (“[T]he district court’s factual findings are compelling and should be given significant weight”); *id.*, at 25 (“Under any standard of review, this Court should credit and adopt the trial court’s findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts”). Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.

Case Nos. 14-35420 and 14-35421

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. "BUTCH" OTTER and CHRISTOPHER RICH,

Defendants-Appellants,

and

STATE OF IDAHO,

Intervenor-Defendant-Appellant

On Appeal from the United States District Court

For the District of Idaho

Case No. 1:13-cv-00482-CWD

The Honorable Candy W. Dale, Magistrate Judge

**OPENING BRIEF OF
APPELLANT GOVERNOR C.L. "BUTCH" OTTER**

Thomas C. Perry
Cally A. Younger
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454
tom.perry@gov.idaho.gov
cally.younger@gov.idaho.gov

Monte Neil Stewart
Daniel W. Bower
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Ste 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Facsimile: (208) 345-4461
stewart@stm-law.com
dbower@stm-law.com

Lawyers for Defendant-Appellant Governor Otter

and to social strife with the dismissive assertion that those reasons are “myopic.”
ER 58.

E. Idaho’s choice of man-woman marriage over genderless marriage is based on legislative facts robustly supported and therefore binding on this Court, regardless of the level of judicial scrutiny.

Idaho’s reasons for choosing to preserve man-woman marriage reside in the realm of legislative facts, not adjudicative facts. “Adjudicative facts are facts about the parties and their activities . . . , usually answering the questions of who did what, where, when, how, why, with what motive or intent”—the types of “facts that go to a jury in a jury case,” or to the fact finder in a bench trial. *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) (internal quotations omitted).

“Legislative facts,” by contrast, “do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion.” *Id.* “Legislative facts are . . . ‘without reference to specific parties,’ and ‘need not be developed through evidentiary hearings.’” *Libertarian Nat’l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 157 (D.D.C. 2013) (quoting *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161–62 (D.C. Cir. 1979)). A legislative fact “is a question of social factors and happenings” *Dunigan v. City of Oxford, Mississippi*, 718 F.2d 738, 748 n.8 (5th Cir. 1983).

Often, the pertinent legislative facts are not contested. But sometimes legislative facts are contested in the sense that informed and thoughtful people

disagree on the validity of a proffered legislative fact. In such cases, the courts do not step in to declare one view to be true and the competing view false. Rather, if the legislative fact is fairly debatable, the courts defer to the government decision-maker's choice.

The courts do this for several important reasons. First, the courts understand and value the phenomenon of collective wisdom. Our democratic ethos privileges the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through our democratic processes, not those of this or that elite no matter how confidently asserted. *See, e.g., Schuette*, 134 S. Ct. at 1637 (“The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. . . . [This insistence] is inconsistent with the underlying premises of a responsible, functioning democracy.”); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (“We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure [T]he Constitution does not empower this Court to second-guess state officials”).

A Washington State case asserting a right to assisted suicide provides a powerful example of this privileging of the reasonable legislative facts chosen through our democratic processes. Washington prohibited assisted suicide. This Court en banc held that prohibition unconstitutional. *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996) (en banc). In doing so, the court dismissed some of the State’s assessments of social practices and their likely impacts. For example, the State asserted an interest in protecting the integrity and ethics of the medical profession, but this Court concluded that “the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide],” despite the contrary assessment of the State and responsible observers of the medical profession. *Id.* at 827. The State also asserted an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes, but this Court dismissed the State’s concern that disadvantaged persons might be pressured into physician-assisted suicide as “ludicrous on its face.” *Id.* at 825. On these two points and others like them, the Supreme Court flatly rejected this Court’s substitution of its own assessments of the relevant social practices and their likely impacts for those of the State and unanimously reversed the Ninth Circuit’s judgment. *Washington v. Glucksberg*, 521 U.S. 702, 728–36 (1997). Instead, as it did recently in *Schuette*, the Supreme

Court deferred to the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through democratic processes.

Second, many important legislative facts in these types of cases are really predictions of what will happen in society in the future assuming this or that present governmental action. Given the complexity of human society, one sensible prediction ought not be accepted as an objective “truth” in the face of a contrary but still rationally made prediction. *E.g.*, *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813–14 (1978) (“However, to the extent that factual determinations were involved . . . , they were primarily of a judgmental or predictive nature In such circumstances complete factual support in the record for the . . . judgment or prediction is not possible or required; ‘a forecast of the direction in which future public interest lies necessarily involves deductions’”) (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (Kennedy, J., plurality opinion) (noting that “[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable” and highlighting a “substantial deference” to the government decision-maker in such situations).

Third, the courts understand the limits of their own competence. “It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.” *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (internal quotations omitted).

In rational basis review, the contest between competing legislative facts can be quite lopsided against the government and the government will still prevail. The courts uphold the challenged government action if there is any reasonably conceivable state of legislative facts that could provide a rational basis for it.⁴⁹

⁴⁹ See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993). The action is presumed constitutional and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it[.]” *Heller v. Doe*, 509 U.S. 312, 320 (1993). If any basis is even minimally debatable, plaintiffs lose. The government, by contrast, has no duty “to produce evidence to sustain the rationality of a statutory classification.” *Id.* “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Commc’ns*, 508 U.S. 307, 315 (1993). Moreover, even if all defendants fail to articulate the requisite rational basis, a court will still uphold the challenged government action if it on its own can identify rational grounds. See, e.g., *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988).

This settled law has an impact on summary judgment jurisprudence. As the district court correctly observed in the Hawai’i marriage case:

Disputes of fact that might normally preclude summary judgment in other civil cases, will generally not be substantively material in a rational basis review. That is, the question before this Court is not whether the legislative facts are true, but whether they are “at least debatable.

Even if the level of judicial scrutiny is heightened, the courts will still not step in to declare as “true” or “false” a well-contested legislative fact, but instead will use the legislative facts chosen by the government decision-maker. The reasons for such judicial deference—the limits of the courts’ competence, the uncertainty of predictions of society-wide consequences, and the wisdom of respecting democratically made choices between competing legislative facts—still remain. Although under heightened scrutiny the courts may not accept some minimally plausible legislative fact conjured up in support of the challenged government action, they will defer to robustly supported legislative facts even if “opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.” *Vance*, 440 U.S. at 112.

All this is demonstrated by *Grutter v. Bollinger*, 539 U.S. 306 (2003), which applied the highest and most rigorous level of judicial scrutiny because of the presence of racial classifications. The plaintiff in that case challenged the consideration of race and ethnicity in admission decisions of the University of Michigan Law School, specifically consideration in favor of applicants from three underrepresented minority groups: African Americans, Hispanics, and Native Americans. This public law school’s leaders made an “assessment that diversity

Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1105 (D. Haw. 2012) (citations omitted).

will, *in fact*, yield educational benefits.” *Id.* at 328 (emphasis added). That legislative fact chosen by the government decision-makers was vigorously contested, with many able voices making powerful showings in favor of just the opposite legislative fact, that the diversity sought did not yield educational benefits and even harmed those intended to be benefitted.⁵⁰ Nevertheless, the majority of the Supreme Court deferred, expressly and unabashedly, “to the Law School’s conclusion that its racial experimentation leads to educational benefits.” In the majority’s words:

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.

Id. at 328. On the basis of this deference to the government decision-maker’s choice of a contested legislative fact (and, necessarily, rejection of contrary assessments), the Court upheld the law school’s admissions program. The Court did not anoint one assessment as “true” and the contrary assessment as “false.” It deferred to the government decision-maker’s choice.

The Supreme Court’s approach to contested legislative facts in its very recent *Schuette* decision was the same as its approach in *Grutter*: the Court

⁵⁰ In dissent, Justice Thomas marshaled those voices and added his own. 539 U.S. at 364 (Thomas J., dissenting) (citations omitted).

deferred to the legislative facts chosen by the government decision-maker; in *Schuette* that meant the people voting on a state constitutional amendment. *Schuette*, 134 U. S. at 1638 (“we must assume” the voters’ chosen legislative fact, that “a preference system [is] unwise [because] of its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate.”)

Thus, regardless of the level of scrutiny that this Court deploys in resolving this case, settled governing law directs this Court to defer to the legislative facts chosen by Idaho and its people in making their ultimate choice between the man-woman marriage institution and genderless marriage. That is because those legislative facts are robustly supported—as shown by the description of those legislative facts in sections I.A.–D. above and the quality of the supporting authorities.

This is particularly true and important regarding competing legislative facts bearing on the fundamental question of what marriage *is*. As noted in section I.C. above, *all* advocacy for genderless marriage is premised on the “narrow description” of marriage and on avoidance (by silence) of the “broad description” of marriage. The broad description encompasses the social realities set forth above: the understanding that “the institution of marriage was created for the

440 Mass. 309
Supreme Judicial Court of Massachusetts,
Suffolk.
Hillary **GOODRIDGE** & others,¹
v.
DEPARTMENT OF **PUBLIC HEALTH** &
another.²
Nov. 18, 2003.

Same-sex couples denied marriage licenses filed action for declaratory judgment against Department and Commissioner of **Public Health**, alleging that department policy and practice of denying marriage licenses to same-sex couples violated numerous provisions of state constitution. On cross-motions for summary judgment, the Superior Court Department, Suffolk County, Thomas E. Connolly, J., entered summary judgment for department, and plaintiffs appealed. The Supreme Judicial Court granted parties' requests for direct appellate review, and, in an opinion by Marshall, C.J., held that: (1) marriage licensing statutes were not susceptible of interpretation permitting qualified same sex couples to obtain marriage licenses, and (2) as matter of first impression, limitation of protections, benefits and obligations of civil marriage to individuals of opposite sexes lacked rational basis and violated state constitutional equal protection principles.

Vacated and remanded.

Greaney, J., concurred with opinion.

Spina, J., dissented with opinion in which Sosman and Cordy, JJ., joined.

Sosman, J., dissented with opinion in which Spina and Cordy, JJ., joined.

Cordy, J., dissented with opinion in which Spina and Sosman, JJ., joined.

West Headnotes (42)

[1] **Marriage**
⚙️ Statutory requirements

Marriage licensing statute is both a gatekeeping and a **public** records statute; it sets minimum

qualifications for obtaining a marriage license and directs city and town clerks, the registrar, and the department of **public health** to keep and maintain certain vital records of civil marriages. M.G.L.A. c. 207, §§ 19, 20.

[2] **Marriage**
⚙️ Same-Sex and Other Non-Traditional Unions

Marriage licensing statute was not susceptible of interpretation permitting "qualified same sex couples" to obtain marriage licenses; legislature's use of undefined common-law term "marriage" incorporated its common-law and quotidian meaning concerning genders of marriage partners, and silence of consanguinity provisions of statute with respect to consanguinity of same-sex marriage applicants evinced legislative intent not to permit licensing of same-sex couples. M.G.L.A. c. 207, §§ 19, 20.

14 Cases that cite this headnote

[3] **Statutes**
⚙️ Plain Language; Plain, Ordinary, or Common Meaning

Courts construing statutes interpret them to carry out the legislature's intent, determined by the words of a statute interpreted according to the ordinary and approved usage of the language.

[4] **Marriage**
⚙️ Statutory requirements

Definition of "marriage," as such term is employed in the marriage licensing statute, derives from the common law. M.G.L.A. c. 207,

today.

This court has previously exercised the judicial restraint mandated by art. 30 and declined to extend due process protection to rights not traditionally coveted, despite recognition of their social importance. See *Tobin's Case*, 424 Mass. 250, 252–253, 675 N.E.2d 781 (1997) (receiving workers' compensation benefits not fundamental right); *Doe v. Superintendent of Schs. of Worcester*, 421 Mass. 117, 129, 653 N.E.2d 1088 (1995) (declaring education not fundamental right); *Williams v. Secretary of the Executive Office of Human Servs.*, 414 Mass. 551, 565, 609 N.E.2d 447 (1993) (no fundamental right to receive mental health services); *356 *Matter of Tocci*, 413 Mass. 542, 548 n. 4, 600 N.E.2d 577 (1992) (no fundamental right to practice law); *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 542, 320 N.E.2d 911 (1974) (no **978 fundamental right to pursue one's business). Courts have authority to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative processes.

Likewise, the Supreme Court exercises restraint in the application of substantive due process “ ‘because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.’ [*Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ [*id.*], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, *Moore [v. East Cleveland]*, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)] (plurality opinion).” *Washington v. Glucksberg*, *supra* at 720, 117 S.Ct. 2258.

The court has extruded a new right from principles of substantive due process, and in doing so it has distorted the meaning and purpose of due process. The purpose of substantive due process is to protect existing rights, not to create new rights. Its aim is to thwart government intrusion, not invite it. The court asserts that the Massachusetts Declaration of Rights serves to guard against government intrusion into each individual's sphere of privacy. *Ante* at 329, 798 N.E.2d at 959. Similarly, the Supreme Court has called for increased due process protection when individual privacy and intimacy are threatened by unnecessary government imposition. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (private nature of sexual

behavior implicates increased due process protection); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (privacy protection extended to procreation decisions within nonmarital context); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (due process invoked because of intimate nature of procreation decisions). These cases, along with the *Moe* case, focus on the threat to privacy when government seeks to regulate the most intimate activity behind bedroom doors. The statute in question does not seek to regulate intimate activity *357 within an intimate relationship, but merely gives formal recognition to a particular marriage. The State has respected the private lives of the plaintiffs, and has done nothing to intrude in the relationships that each of the plaintiff couples enjoy. Cf. *Lawrence v. Texas*, *supra* at 2484 (case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”). Ironically, by extending the marriage laws to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs' lives.

SOSMAN, J. (dissenting, with whom Spina and Cordy, JJ., join).

In applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality. Today, rather than apply that test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage **979 licenses.¹ Reduced to its essence, the court's opinion concludes that, because same-sex couples are now raising children, and withholding the benefits of civil marriage from their union makes it harder for them to raise those children, the State must therefore provide the benefits of civil marriage to same-sex couples just as it does to opposite-sex couples. Of course, many people are raising children outside the confines of traditional marriage, and, by definition, those children are being deprived of the various benefits that would flow if they were being raised in a household with married parents. That does not mean that the *358 Legislature must accord the full benefits of marital status on every household raising children. Rather, the Legislature need only have some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of

centuries. People are of course at liberty to raise their children in various family structures, so long as they are not literally harming their children by doing so. See *Blixt v. Blixt*, 437 Mass. 649, 668–670, 774 N.E.2d 1052 (2002) (Sosman, J., dissenting), cert. denied, 537 U.S. 1189, 123 S.Ct. 1259, 154 L.Ed.2d 1022 (2003). That does not mean that the State is required to provide identical forms of encouragement, endorsement, and support to all of the infinite variety of household structures that a free society permits.

Based on our own philosophy of child rearing, and on our observations of the children being raised by same-sex couples to whom we are personally close, we may be of the view that what matters to children is not the gender, or sexual orientation, or even the number of the adults who raise them, but rather whether those adults provide the children with a nurturing, stable, safe, consistent, and supportive environment in which to mature. Same-sex couples can provide their children with the requisite nurturing, stable, safe, consistent, and supportive environment in which to mature, just as opposite-sex couples do. It is therefore understandable that the court might view the traditional definition of marriage as an unnecessary anachronism, rooted in historical prejudices that modern society has in large measure rejected and biological limitations that modern science has overcome.

It is not, however, our assessment that matters. Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. *359 See *post* at 386–387, **980 798 N.E.2d at 998–999 (Cordy, J., dissenting). Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and

lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

Although ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples. While avoiding any express conclusion as to any of the proffered routes by which that exclusion would be subjected to a test of strict scrutiny—infringement of a fundamental right, discrimination based on gender, or discrimination against gays and lesbians as a suspect classification—the opinion repeatedly alludes to those concepts in a prolonged and eloquent prelude before articulating its view that the exclusion lacks *360 even a rational basis. See, e.g., *ante* at 313, 798 N.E.2d at 948 (noting that State Constitution is “more protective of individual liberty and equality,” demands “broader protection for fundamental rights,” and is “less tolerant of government intrusion into the protected spheres of private life” than Federal Constitution); *ante* at 322, 798 N.E.2d at 949 (describing decision to marry and choice of marital partner as “among life's momentous acts of self-definition”); *ante* at 326, 798 N.E.2d at 955 (repeated references to “right to marry” as “fundamental”); *ante* at 327–328, 798 N.E.2d at 958–959 (repeated comparisons to statutes prohibiting interracial marriage, which were predicated on suspect classification of race); *ante* at 328, 798 N.E.2d at 958–959 (characterizing ban on same-sex marriage as “invidious” discrimination that “deprives individuals of access to an institution of fundamental legal, personal, and social significance” and again noting that Massachusetts Constitution “protects matters of personal liberty against government incursion” more zealously than Federal Constitution); *ante* at 329, 798 N.E.2d at 959 (characterizing “whom to marry, how to express sexual intimacy, and whether and how to establish a family” as

61 Duke L.J. 1

Duke Law Journal
October, 2011

Article

THE ADVERSARIAL MYTH: APPELLATE COURT EXTRA-RECORD FACTFINDING

Brianne J. Gorodt

Copyright (c) 2011 Duke Law Journal; Brianne J. Gorod

Abstract

*The United States' commitment to adversarial justice is a defining feature of its legal system. Standing doctrine, for example, is supposed to ensure that courts can rely on adverse parties to present the facts courts need to resolve disputes. Although the U.S. legal system generally lives up to this adversarial ideal, it sometimes does not. Appellate courts often look outside the record the parties developed before the trial court, turning instead to their own independent research and to factual claims in amicus briefs. This deviation from the adversarial process is an important respect in which the nation's adversarial commitment is more myth than reality. This myth is problematic for many reasons, including the fact that it obscures the extent to which some of the most significant cases the Supreme Court decides, such as Citizens United v. FEC, rely upon "facts" that have not been subjected to rigorous adversarial testing. The adversarial myth exists because the U.S. legal system's current procedures were designed to address adjudicative facts--facts particularly within the knowledge of the parties--but many cases turn instead on legislative facts--more general facts about the state of the world. Recognizing *2 this distinction between adjudicative and legislative facts helps identify those cases in which existing practices undermine, rather than promote, adversarial justice. This Article concludes with suggestions for reform, including liberalizing standing doctrine when legislative facts are at issue. If courts are going to turn to nonparties for help in resolving disputes of legislative fact, it is better that they be brought into the process earlier so the factual claims they offer can be rigorously tested.*

Table of Contents

	Introduction	2
I.	Understanding the Myth	13
	A. Courts as "Mere Instruments of the Law"	14
	B. Standing and the Adversarial Myth	17
	C. The Adversarial Myth in Practice	21
II.	Undermining the Myth	25
	A. Appellate Courts and Extra-Record Factfinding	26
	B. Amicus Practice	35
III.	A Different Kind of Facts	37
	A. Explaining Legislative Facts	39
	B. Legislative Facts Let Loose	43
	C. Willful Ignorance of Legislative Facts	50
IV.	The Troubling Consequences of the Adversarial Myth	53
	A. Unfounded Assumptions	53
	B. Lack of Rules and Regulations	57
	C. Transparency	61
	D. Factual Stare Decisis	63
	E. More Fundamental Questions	66
V.	Some Thoughts on Moving Forward	68
	A. Larger Solutions	68

17 Am. J. Trial Advoc. 1

American Journal of Trial Advocacy
Summer, 1993

THE BRANDEIS BRIEF—TOO LITTLE, TOO LATE: THE TRIAL COURT AS A SUPERIOR FORUM FOR
PRESENTING LEGISLATIVE FACTS

John Frazier Jackson¹

Copyright (c) 1993 by the American Journal of Trial Advocacy; John Frazier Jackson

Judicial decision-making in constitutional cases and other cases where judges make policy¹ is, in one sense, a process of shopping for facts. Judges have two basic varieties of facts from which to choose, sometimes referred to as adjudicative facts and legislative facts.² Adjudicative facts are case specific. They are, for example, the actions and the words of the parties that give rise to charges of breach of contract. When determining if two parties formed a contract, and whether it was breached, judges do not need to know the psychological theories behind how and why human beings react in certain relationships. Underlying psychological theories are an example of the second variety of facts—legislative facts.³ Judges use legislative facts in making policy choices and in ²deciding some constitutional issues. Those facts are sometimes called constitutional facts.

Constitutional facts usually have nothing to do with the immediately pressing issues which initially brought the case before the court. Constitutional litigation, thus, incorporates different evidence than the typical case and often focuses on presenting legislative evidence as the core idea of a proposed theory, rather than simply limiting a case to an effective portrayal of the adjudicative facts.

This Article highlights the importance of legislative facts in constitutional litigation and precedent-setting or policy-making cases. Because they serve distinct judicial decision-making functions, legislative facts must be classified and distinguished. While adjudicative facts mainly serve the purpose of being the basis and the controlling force behind the application of existing law, legislative facts serve as a basis for a court to change or expand the existing law.⁴ Indeed, legislative facts become quite important in cases of first impression.

This Article further argues that the superior forum in which to present legislative evidence is not through the traditional Brandeis-type brief,⁵ but through the trial process. A Brandeis brief is a document implemented at the appellate level that seeks to persuade the court by including, among other things, legislative evidence in the form of economic and social surveys, copious legal citations, reports of public investigative committees, or scientific discussions by experts.⁶ The core of the argument for using legislative evidence at the trial level is that an attorney lessens his chance of winning if he waits until the case is on appeal to present legislative ³evidence. When the parties establish the record before the case reaches the appellate process, fact-finding can be more controlled, and judges will be less inclined to search for evidence without the aid or input of the parties.

Many scholars have written about judges' use of legislative facts, and some scholars have suggested the trial as a superior forum for the presentation of such facts. This Article reviews a portion of the pertinent scholarship. This Article also studies different decisions where legislative evidence or some recognizable combination of legislative and adjudicative evidence was used. Several historical decisions are included, but the primary focus is on two recent cases that best illustrate the different functions of fact-finding. The first of these is the Tennessee case of *Davis v. Davis*.⁷ This case involved the issue of which spouse has the right of possession of cryogenically-frozen embryos and explored such facts as when does life begin, i.e., whether cells in the first stages of embryonic development are sufficiently differentiated to be considered life.⁸ The parties presented extensive legislative evidence at the trial level.⁹ The Tennessee Appellate and Supreme Courts wrestled with such facts and finally decided the case, which is ideal for study. The second decision, *United States v. Virginia (VMI)*,¹⁰ which involved the Virginia Military Institute (VMI), concerned whether state maintenance of an all-male military institute violated equal protection rights of females seeking military-style education.¹¹ VMI has gone through the trial and appellate process,

84 Ind. L.J. 1

Indiana Law Journal
 Winter, 2009

Articles

RETHINKING JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING^{d1}
 Caitlin E. Borgmann^{d1}

Copyright © 2009 by the Trustees of Indiana University; Caitlin E. Borgmann

It is traditionally assumed that the role of ascertaining and evaluating the social facts underlying a statute belongs to the legislatures. The courts in turn are tasked with deciding the law and must defer to legislative fact-finding on relevant issues of social fact. This simplistic formula, however, does not accurately describe the courts' confused approach to legislative fact-finding. Although the courts often speak in terms of deference, they follow no consistent or predictable pattern in deciding whether to defer in a given case. Moreover, blanket judicial deference to legislative fact-finding would not be a wise general rule. Because social fact-finding plays a decisive role in constitutional analysis, blind judicial deference would undermine the courts' responsibility to protect basic individual rights and liberties. Judicial treatment of legislative fact-finding is thus sorely in need of a coherent theory.

This Article proposes a new approach, a paradigm of selective independent judicial review of social facts. Under this model, the courts should independently review the factual foundation of legislation that curtails basic individual rights, even when those rights do not receive strict or heightened scrutiny. This approach is unique in ensuring a baseline protection for important individual rights, including emerging rights, while respecting the division of power between the branches of government. The paradigm is needed because, this Article asserts, legislatures are poorly positioned to gather and assess facts dispassionately, especially when addressing laws that restrict controversial or minority rights. The process of fact-finding in federal trial courts ensures a superior factual record when such rights are at stake. This Article illustrates the courts' and legislatures' contrasting capacities for fact-finding through case studies, including "partial-birth abortion," gay parenting, and indecency on the Internet. Moreover, the Article argues, because of the courts' traditional and vital role in protecting basic individual rights, the proposed paradigm honors constitutional structural principles.

INTRODUCTION	2
I. JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING: A DOCTRINE IN DISARRAY	6
A. THE MEANING OF JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING	6
B. THE COURTS' INCONSISTENT TREATMENT OF LEGISLATIVE FACT-FINDING	13
C. INSTITUTIONAL LEGITIMACY AS GROUNDS FOR JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING	16
D. SUPERIOR LEGISLATIVE COMPETENCE AS GROUNDS FOR JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING	18
II. CASE STUDIES	21
A. "PARTIAL-BIRTH ABORTION"	21
B. SEXUAL ORIENTATION AND PARENTING	28
C. CHILDREN AND "INDECENCY" ON THE INTERNET	32
III. A CRITIQUE OF JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING	35
A. INSTITUTIONAL LEGITIMACY	35
B. COMPETENCE	40
IV. REEVALUATING JUDICIAL DEFERENCE TO LEGISLATIVE FACT-FINDING WHEN BASIC INDIVIDUAL RIGHTS ARE AT STAKE	46
A. A PARADIGM OF SELECTIVE INDEPENDENT JUDICIAL REVIEW	46
B. APPLYING THE PARADIGM	50
CONCLUSION	56

69 Ohio St. L.J. 1115

Ohio State Law Journal
2008

Symposium: The School Desegregation Cases and the Uncertain Future of Racial Equality
Articles

SCIENCE AND CONSTITUTIONAL FACT FINDING IN EQUAL PROTECTION ANALYSIS

Angelo N. Ancheta¹

Copyright (c) 2008 Ohio State University; Angelo N. Ancheta

I. Introduction

The Supreme Court's multiple opinions and divergent analyses in *Parents Involved in Community Schools v. Seattle School District No. 11* reflect deep-seated tensions in equal protection law and the meaning of racial equality. A plurality led by Chief Justice Roberts, joined by Justice Kennedy, formed the five-member majority that voted to strike down race-conscious voluntary desegregation plans in Seattle, Washington and Louisville, Kentucky as violations of the Equal Protection Clause. Justice Breyer, joined by three other Justices in dissent, would have upheld the student assignment plans as constitutional. The Court's dividing lines in *Parents Involved* are extensive, revealing disagreements over the appropriate standard of review to evaluate voluntary desegregation plans,² the meaning and valuation of racial diversity as a governmental interest,³ and the fitness of racial classifications *1116 in assigning students in K-12 educational settings.⁴ Moreover, as demonstrated by the stark ideological contrasts between the Roberts plurality and the other Justices in *Parents Involved*,⁵ there are profound divisions over whether *Brown v. Board of Education* stands for a strict anti-classification norm of color-blindness or for an anti-subordination ideal that permits color-consciousness to address persistent racial inequality.⁶

Along a separate set of dimensions—more methodological than ideological—the *Parents Involved* opinions illuminate another group of differences that have arisen in recent Supreme Court cases. These differences focus on the role of scientific research findings in the development of standards and rules under the Equal Protection Clause. In *Parents Involved*, the Roberts plurality and Justice Kennedy formed the bloc that struck down the Seattle and Louisville desegregation policies, but neither the Roberts opinion nor the Kennedy opinion cited scientific research to support the Court's judgment. On the other hand, Justice Breyer's dissenting opinion relied heavily on scientific findings on the benefits of diversity and the harms *1117 of segregation to argue that the plans were fully constitutional.⁷ Justice Thomas's concurring opinion also drew extensively on research findings, but countered the Breyer dissent by arguing that the scientific literature was inconclusive and did not lend sufficient support to the school districts' interests in promoting diversity and addressing racial isolation.⁸

The stances of the Roberts, Kennedy, and Thomas opinions in *Parents Involved* diverge from the approach adopted four years earlier in *Grutter v. Bollinger*,⁹ where the Court upheld the constitutionality of race-conscious admissions policies designed to promote student body diversity in higher education. In addressing the question of whether promoting educational diversity could be a compelling interest, Justice O'Connor's majority opinion in *Grutter* cited numerous research studies and amicus curiae briefs that demonstrated the educational benefits of a diverse student body, such as improving academic learning, increasing students' satisfaction with college, and promoting greater cross-racial understanding.¹⁰

Yet, the opinions of the Court in *Parents Involved* and *Grutter* do not reflect the only approaches taken in recent cases involving equal educational opportunity. They contrast, for example, with the Court's decidedly different tack in *United States v. Virginia*,¹¹ a 1996 case addressing gender-based segregation in higher education. The Virginia Court dismissed expert testimony and scientific evidence in the trial court record that supported a state's interest in maintaining a single-sex military academy.¹² Justice Ginsburg's majority opinion concluded that the state's scientific evidence on gender-based developmental differences and the benefits of single-sex education reflected only generalizations about men and women, and could not justify the exclusion of women from the Virginia Military Institute.