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THE ADVERSARIAL MYTH: APPELLATE COURT EXTRA-RECORD FACTFINDING

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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*

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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.

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INTRODUCTION

The most dangerous myths are those that are grounded in reality. The United States' commitment to an adversarial system of justice is a defining and distinctive feature of its legal system.[1] And although

1. *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 495 (2009) ("[T]he adversarial system itself is widely acknowledged to be a fundamental feature of the American

the U.S. legal system generally lives up to this adversarial ideal, there are many cases in which it does not.[2] This Article focuses on one important respect in which this adversarial commitment is more myth than reality: extra-record factfinding by appellate courts.[3]

Older than the country itself,[4] the U.S. legal system's commitment to adversarial justice derives from the belief that adversarial testing is the surest route to truth.[5] More than most countries in the world,[6] the United States remains committed to this ideal, trusting—at least in theory—opposing parties and their zealous advocates to present the court with all of the information the court will need to fairly adjudicate the parties' disputes and determine the proper state of the law.[7] Standing doctrine, which limits the parties that may bring claims in court, reflects this adversarial ideal and is routinely justified as a means of "ensur[ing] the proper adversarial

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adjudicatory process."); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371 (2001) ("The traditional premise of American civil adjudication is that ours is an adversary system . . . .").

2. *See, e.g.*, Rubenstein, *supra* note 1, at 371 ("The adversarial model may always have been more ideal than reality.").

3. To be sure, this is not the only sense in which the American legal system's commitment to an adversarial system of justice sometimes gives way. Surprisingly often, for example, the Supreme Court will reach out to decide an issue that was not raised by the parties. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 931 (2010) (Stevens, J., concurring in part and dissenting in part) (criticizing the majority for "decid[ing] this case on a basis relinquished below, not included in the questions presented to [the Court] by the litigants, and argued here only in response to the Court's invitation"); Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2353 (2009) (Stevens, J., dissenting) (criticizing the majority for deciding an issue that the parties did not raise). For good discussions of other situations in which courts often depart from the adversarial ideal, see generally Frost, *supra* note 1; and Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae To Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907 (2011).

4. *See, e.g.*, Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 323 (1989) ("The starting points for the development of the adversary system . . . were all in place by the end of the thirteenth century.").

5. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 908 (5th Cir. 1978) ("Truth is the essential objective of our adversary system of justice.").

6. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982) ("[O]ur tradition is considered more adversarial than most . . . ."). *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001) (comparing the American adversarial system to the legal systems of other nations). *But see generally* Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189 (2003) (reviewing KAGAN, *supra*) (critiquing Kagan's conclusions).

7. *See* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

presentation" of issues, a presentation that facilitates courts' ability to fairly adjudicate cases.[8] Indeed, trial courts are supposed to resolve cases based on the factual records presented by the parties,[9] and appellate courts are generally required to defer to district courts' factual findings.[10]

Yet notwithstanding this adversarial ideal, appellate courts often look outside the record the parties develop before the trial court, turning instead to their own independent research and to amicus briefs, even though the resulting factual findings will not have been thoroughly tested by the adversarial process.[11] Chief Justice Roberts recently illustrated the ease with which judges can engage in independent research when, during oral argument in a case challenging the constitutionality of an Arizona campaign finance law, he noted that he "checked the Citizens' Clean Elections Commission website [that] morning" to determine the purpose of the statute.[12] "Why isn't [the fact that the statute was enacted to 'level the playing field'] clear evidence that [the law is] unconstitutional?" he asked the attorney defending the statute.[13] In that case, the attorney had at least some opportunity to respond to the Chief Justice's research,[14] but in

8. Massachusetts v. EPA, 549 U.S. 497, 517 (2007).

9. *See, e.g.*, Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 467 (2009) ("A hallmark of the adversarial system is that the parties control the direction of the trial, with each side determining what facts to enter in evidence, what witnesses to call, what arguments to make, and what objections to raise."); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1187 (2005) ("The adversarial and inquisitorial models are distinguished primarily by whether the parties or the court control three key aspects of the litigation: initiating the action, gathering the evidence, and determining the sequence and nature of the proceedings.").

10. *See, e.g.*, FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); Mickens v. Taylor, 535 U.S. 162, 177 (2002) (Kennedy, J., concurring) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous.").

11. *See infra* Part II.

12. Transcript of Oral Argument at 48, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (No. 10-238).

13. *Id.*

14. The opportunity was hardly complete, however, because Justice Alito interrupted while the attorney was in the middle of his response to the Chief Justice. *See id.* ("Well, Mr. Chief Justice, whatever the Citizens Clean Elections Commission says on its web site I think isn't dispositive of what the voters of Arizona had in mind when they passed this initiative. The Court—this Court has recognized since *Buckley* that public financing serves a valid anticorruption purpose, and it does so because it eliminates the influence of private contributions on the candidates who take public financing. And it—").

many cases, the parties will not know—and thus cannot respond—when judges engage in independent research. Moreover, page limitations on briefs, time constraints on oral argument, and the general opacity of the appellate process may prevent thorough adversarial testing of the factual claims presented in amicus briefs. This reliance on extra-record facts that have not been thoroughly tested by the adversarial process helps contribute to what I describe as the "adversarial myth," a commitment to adversarial justice that appellate courts espouse as a matter of theory but often fail to realize in practice.

The tension between myth and reality is pervasive. Consider, for example, the litigation surrounding Proposition 8, a state-wide ballot initiative passed in California to ban same-sex marriage.[15] Opponents of the ban rushed to court to challenge it, arguing that it violated the Fourteenth Amendment.[16] In the process of concluding that Proposition 8 was unconstitutional, the district court made substantial factual findings, detailing—in roughly fifty pages—over eighty separate findings related to same-sex marriage and its effect on children raised by same-sex couples.[17]

Some commentators hailed these factual findings, explaining that they—like most trial court factual findings—would be entitled to deference on appeal. For example, a prominent law professor observes that:

> District courts . . . get to establish the facts. And appellate courts, because they don't get to see the witnesses and assess their credibility, are supposed to accept the facts as the trial court found them.

15. The initiative actually overturned an earlier California Supreme Court decision recognizing a right to same-sex marriage under the California constitution. *See In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008) ("[W]e conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes—the interest in retaining the traditional and well-established definition of marriage—cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.").

16. *See, e.g.*, Bob Egelko, *Legal Challenges: Same-Sex Issue Back in High Court*, S.F. CHRON., Nov. 6, 2008, at A19 (reporting that the California attorney general would defend the legality of marriages that occurred in the time span prior to the passage of Proposition 8).

17. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 953–91 (N.D. Cal.), *appeal pending*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

> So if the Supreme Court reverses the district court's decision that same-sex couples have a right to marry, it will have to do it in the teeth of [the district court judge's] factual findings . . . .[18]

Notwithstanding these commentators' observations, the reality is that nothing in the current legal framework prevents a higher court from looking outside the record created by the parties and relying on its own factual findings to reverse the trial court's decision.

The adversarial myth suggests that such extra-record appellate court factfinding does not happen. It suggests that adversarial parties provide courts with all of the information they need to resolve legal disputes and that appellate courts need only rely on the factual findings made by trial courts based on the presentation of the parties. Yet the myth is not reality;[19] instead, it obscures reality by hiding the pervasiveness of extra-record appellate court factfinding. Indeed, because the adversarial myth hides the extent to which appellate courts, particularly the Supreme Court, engage in extra-record factfinding, there has been little attention paid to the fact that no regularized practices and procedures exist to govern such factfinding. Unlike facts found by trial courts, which are subjected to adversarial testing, facts found by appellate courts are generally subjected to no testing at all. This failure to meaningfully test the facts underlying judicial decisions undermines both the legitimacy of the judicial process and the results of that process. After all, appellate courts' failure to rigorously test their factual findings can undermine the quality of those findings, even though such findings are often critical to the courts' ultimate legal conclusions.[20]

Standing doctrine ostensibly ensures adherence to the adversarial ideal and prevents extra-record appellate court factfinding. By allowing only adverse parties who have the incentives to present courts with all of the information required to bring claims

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18. Andrew Koppelman, *Power in the Facts*, N.Y. TIMES ROOM FOR DEBATE (Aug. 4, 2010, 10:03 PM), http://www.nytimes.com/roomfordebate/2010/8/4/gay-marriage-and-the-constitution/judge-walkers-factual-findings; *see also* Dahlia Lithwick, *A Brilliant Ruling*, SLATE (Aug. 4, 2010, 9:27 PM ET), http://www.slate.com/id/2262766 ("Then come the elaborate 'findings of fact'—and recall that appellate courts must defer far more to a judge's findings of fact than conclusions of law.").

19. *See infra* notes 105–135 and accompanying text.

20. The familiar adage that "bad facts make bad law" reflects the reality that facts often play a critical role in shaping the development of the law. *See, e.g.*, Doggett v. United States, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) ("Just as 'bad facts make bad law,' so too odd facts make odd law.").

in court, standing doctrine is supposed to prevent courts from having to look outside the record developed by the parties.[21] Yet current standing doctrine often prohibits institutional players—such as the ACLU or the Washington Legal Foundation—from participating as parties in cases,[22] even when those organizations have the expertise and resources to provide the courts with the information necessary to resolve factual disputes relevant to the legal claims at issue and individual plaintiffs do not.[23] Ironically, appellate courts often rely on factual claims in the amicus briefs filed by these organizations, even though standing doctrine prevents those organizations from bringing cases directly and from meaningfully participating in the development of the factual record before the trial court—the forum in which factual claims are supposed to be tested.[24]

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21. *See, e.g.*, Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714–15 (1983) ("The adversary system relies on a neutral and passive decision maker to adjudicate disputes that have been aired by the adversaries in a contested proceeding. He . . . is prohibited from becoming actively involved in the gathering of evidence or in the parties' settlement of the case. . . . Intimately connected with the requirements of decision-maker passivity and neutrality is the procedural principle that the parties are responsible for production of all the evidence upon which the decision will be based.").

22. *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1147, 1153 (2009) (denying standing to "a group of organizations dedicated to protecting the environment").

23. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891–92 (1983) ("Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever. Yet the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake."); *cf.* Lino A. Graglia, Church of the Lukumi Babalu Aye*: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 28 (1996) ("The ACLU, the paradigmatic constitutional litigator of our times, came to [the aid of an individual facing religious discrimination], providing the funds and expertise to institute litigation against the city and prosecute it to success in the nation's highest court."). As the last example illustrates, the ACLU and similar organizations will sometimes help provide courts with the information they need by serving as attorneys, rather than parties, in cases. Indeed, this is how some of the most significant legal advances in the nation's history have occurred. *See, e.g.*, Genna Rae McNeil, *Before* Brown*: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1447–60 (2003) (discussing the "litigation campaign of the NAACP" that "culminat[ed]" in *Brown v. Board of Education*, 349 U.S. 294 (1955)). But there are many other cases in which such organizations might be in the best position to provide the court with relevant information, yet do not become involved until litigation is well underway and factual development is, in theory, complete.

24. *See infra* note 89.

Although it is perhaps unsurprising that courts sometimes rely on extra-record facts,[25] it is surprising that the phenomenon has received so little attention, given that it results in important factual disputes being decided by appellate courts, without the benefit of meaningful adversarial testing. The Supreme Court itself rarely acknowledges the practice and has made virtually no effort to square its practice of looking outside the record with its purported commitment to an adversarial system of justice.[26] Commentators, too, have largely ignored the issue. Although scholars have explored and debated the significance of amicus briefs to Supreme Court decisionmaking,[27] they

25. It is not difficult to conceive of reasons why courts might want to look outside the record developed by the parties. The parties' attorneys may fail to adequately present the relevant facts to the district court, or the appellate court may want to justify an outcome that was unsupported by the existing record.

26. When a Supreme Court Justice does reference the practice, it is generally because his was not the majority position and he thinks that his colleagues inappropriately engaged in extra-record factfinding to reach their result. *See, e.g.*, Sykes v. United States, 131 S. Ct. 2267, 2286 (2011) (Scalia, J., dissenting) ("Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery."); Kansas v. Hendricks, 521 U.S. 346, 391–92 (1997) (Breyer, J., dissenting) ("Neither the majority nor the lengthy dissent in [the Kansas Supreme Court] referred to the two facts that the majority now seizes upon, and for good reason. That court denied a motion to take judicial notice of the state habeas proceeding. The proceeding is thus not part of the record, and cannot properly be considered by this Court. . . . The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court." (citation omitted)); Poe v. Ullman, 367 U.S. 497, 512 (1961) (Douglas, J., dissenting) (criticizing the Court for going "outside the record" to determine that Connecticut had stopped enforcing its anticontraceptive law).

27. *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Amicus Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782 (1990) (discussing the participation of certain groups as amici curiae); Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 (2004) (hypothesizing why amicus briefs might prove successful); Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of* Amici Curiae, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215 (Cornell W. Clayton & Howard Gillman eds., 1999) (comparing the role of amici curiae for Justices to the role of lobbyists for legislators); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000) (considering the increase in amicus briefs and their impact on the Supreme Court); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33 (2004) (reporting on interviews with Supreme Court clerks and their perspectives on amicus briefs); Kevin T. McGuire, *Amici Curiae and Strategies for Gaining Access to the Supreme Court*, 47 POL. RES. Q. 821 (1994) (examining the reasons that lawyers seek contact with amici curiae); Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 LAW & SOC'Y REV. 311 (1981) (criticizing early research on the impact of amicus briefs); James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q.

have not answered the more fundamental question of why it is even appropriate for the Court to look to these briefs—presented by nonparties, after all—for factual claims.[28]

This resort to extra-record factfinding is problematic because it means that appellate courts often rest their decisions on facts that have not been subjected to the kind of rigorous testing that the country's adversarial system is supposed to ensure—or, in many cases, to any testing at all. In a world in which the relevant facts were all uncontestable (for example, the sky is blue, and the capital of the United States is Washington, D.C.), the courts' approach might be unproblematic—or at least much less problematic. But, in fact, people can reasonably disagree about many relevant "facts" about how the world works.[29] In such a world, the fact that a credible treatise presents one way of looking at the world (for example, a particular view of the economic effects of a merger or the environmental consequences of a particular action) does not mean that there are not other credible treatises that present alternative ways of looking at it. Given this indeterminacy, it is problematic when such "facts" are "found" by ad hoc methods without the benefit of rigorous testing and then provide the basis for consequential legal decisions.

Appellate courts' tendency to resort to extra-record facts presented by nonparties has developed because standing doctrine and

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365 (1997) (arguing that amicus curiae briefs help the Justices gauge the impact of their opinions).

28. One could argue, of course, that looking at amicus briefs for any reason is inconsistent with the adversarial ideal and with standing requirements. *See* Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1250–55 (2011) ("[A] narrow reading of Article III's cases and controversies requirement would make this participation of amici impossible, since under that clause only parties with a justiciable dispute can petition a court for redress."). That is not my claim here, and indeed, some have argued that "[a] decision forbidding the courts' consideration of legal theories not raised by the litigants would cast doubt on the rule of law." Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 280 (2000). Here, I am making the more limited claim that the use of amicus briefs to develop the factual record is inconsistent with the adversarial system and, at least in the unconsidered manner in which such reliance currently occurs, problematic.

29. To be sure, the word "fact" suggests objectivity and certainty, but appearances are often deceiving. Many so-called "facts" are the subject of significant empirical dispute, and the line between "fact" and "interpretation" is often fuzzy. *See, e.g.*, Judith Lichtenberg, *The Will to Truth: A Reply to Novick*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 46 (1998) ("[E]xplanation of fact . . . appears to be a matter of interpretation."). Philosophical questions about the meaning—and even existence—of "facts" are beyond the scope of this Article, but what is important is acknowledging that many "facts" are contestable. Recognizing that this is so explains why it is so important that "facts" be tested and considered before they become the basis for legal conclusions.

the courts' procedures governing factual development were designed to address a certain kind of fact—specifically, the kind of fact that is particular to the parties before the court. In the existing literature, these kinds of facts are known as *adjudicative facts*, and they have been distinguished from *legislative facts*, more general facts about the state of the world that are not particularly within the knowledge of the parties with standing to appear before the court.[30]

Recognizing the distinction between adjudicative and legislative facts helps explain the existence of the adversarial myth, as well as why it tends to be especially problematic in some of the most consequential cases the U.S. legal system decides. In cases in which the court is applying settled law to a dispute involving adjudicative facts, it makes sense to strictly limit who can bring the claim, to rely on those parties to develop the factual record, and to require appellate courts to defer to such factual findings on review. In doing so, the courts rely on the parties with the most knowledge of the facts—and the parties most affected by the court's factual findings—to present them to the court. But practices and procedures developed for adjudicative facts make less sense—and may generally work less well—when legislative facts are at issue. After all, legislative facts, unlike adjudicative facts, will generally help the court decide contested issues of law in a way that will affect parties beyond those before the court.[31] And when legislative facts are at issue, there is no reason to think that the parties before the court are particularly well suited to developing the factual record. Indeed, the fact that appellate courts so often go outside the record developed by the trial court based on the parties' presentation suggests that this is the case.[32]

To be sure, the parties may sometimes do a good job presenting legislative facts, and it is certainly in their interest to do so. But in many cases, they will not do a good job because they do not have the expertise or the resources to gather the relevant evidence. Moreover, even if they could do a good job, they might not do as good a job as

30. *See infra* Part III.A.

31. *See infra* notes 167–184 and accompanying text.

32. Appellate courts may sometimes "find" adjudicative facts that the parties do not present, *see, e.g.*, United States v. Boyd, 475 F.3d 875, 878 (7th Cir. 2007) (Posner, J.) ("We are, however, distressed at the sloppiness with which the case has been handled by both sides. . . . [N]o satellite photo (available free of charge from Google) was placed in evidence to indicate the physical surroundings [at the scene of the crime]."), but more often when appellate courts find facts that were not presented by the parties below, they will be "legislative" in nature, *see infra* Part III.A.

could the broader array of individuals and organizations that may also have an interest when legislative fact issues are being resolved.

Thus, adjudicative facts—the resolution of which will generally affect only the immediate parties before the court—are found by trial courts using procedures designed to ensure rigorous adversarial testing, whereas legislative facts—the resolution of which will often affect far more individuals—are often subjected to no testing at all. And the unacknowledged way in which courts currently deviate from established practices when legislative facts are at issue makes rigorous testing of such facts even less likely. That legislative facts are generally most critical in cases likely to have a more widespread effect on society only increases the significance of the problem.

In this Article, I offer some preliminary thoughts on how to address the problem of extra-record appellate court factfinding. Most significantly, I argue that courts should rethink current restrictions on standing doctrine. If courts will ultimately turn to nonparties to provide them with the legislative facts they need to decide the case, those parties should be brought into the process at the trial court level, so that the legislative facts they offer can be thoroughly tested. Toward that end, courts should also adopt practices for finding legislative facts that will improve the quality of their factfinding and their ability to transparently present the factual foundations for their decisions. There are several possible ways in which the federal system might do this—perhaps by establishing magistrates who specialize in legislative factfinding or a special research service to assist the courts.[33]

Whatever the ultimate answer, appellate courts should, in the meantime, remand to the trial courts when they are facing an inadequate factual record. Trial courts, with the assistance of both the parties and invited amici, can facilitate the kind of adversarial testing of legislative facts that the current system rarely provides.

In Part I of this Article, I explore how the American legal system's faith in the adversarial system manifests itself in the courts' doctrine and practices. I focus on standing doctrine and the treatment of factual development by courts as two examples of the more general

33. Although such tools may be no more adversarial than the status quo, they would, in theory, provide more meaningful assurances of the quality of the resulting factual findings than currently exist. My point, after all, is not that adversarial testing is the only means by which factual findings can be developed, but simply that the assumption that the factual findings in appellate court opinions are currently being subjected to such testing is often misplaced. It is important to recognize the myth and then to think broadly about possible means to address it.

phenomenon by which American courts claim to rely on adversarial parties to improve the quality of judicial decisionmaking.

In Part II, I expose this faith as a myth by discussing the repeated failure of courts to adhere to this adversarial ideal. Specifically, I explore numerous examples of appellate courts choosing not to rely on the facts developed by the parties and instead looking outside the record for the facts on which they will ultimately rest their decisions. I follow this anecdotal evidence with a discussion of one formalized mechanism by which appellate courts—and particularly the Supreme Court—invite nonparties to provide extra-record facts: the amicus brief.

In Part III, I explore the source of this tension—namely, that the adversarial system and the rules that go with it were designed for adjudicative facts and make much less sense in the context of legislative facts. Resolving disputes about legislative facts is often an essential part of the task of judging, but courts' unwillingness to acknowledge this aspect of their role leads them to ignore the fact that they are resolving these kinds of factual questions.

In Part IV, I explain why this disconnect is problematic, focusing on four consequences in particular: (a) the courts' reliance on unfounded assumptions, rather than tested facts; (b) the lack of established guidelines for the development and testing of legislative facts; (c) the lack of transparency about courts' rationales in judicial opinions; and (d) the entrenchment in law of factual claims that should be subject to reconsideration as the world—and one's means of understanding it—changes. I also raise the larger question of whether a court structure that was designed for private adversarial disputes that turn on adjudicative facts makes as much sense for more public claims that turn instead on legislative facts.

Finally, in Part V, I provide some preliminary thoughts on how to address these problems. In particular, I argue that the current restrictions on standing doctrine should be reconsidered because allowing more parties into the process earlier may accomplish what standing has not: a complete record for court decisions. I also argue that rules and practices are needed to guide the development of legislative facts. The U.S. legal system has largely taken shape around the adversarial myth; when there is a disconnect between myth and reality—as there is in the context of legislative facts—it is time to figure out how best to bring the two into alignment.

I. UNDERSTANDING THE MYTH

As I have noted, the American legal system is grounded in a commitment to an adversarial system of justice, one that relies on opposing parties to provide the court with the information and the arguments that it needs to decide both the meaning of the law and how it should apply in particular cases.[34] Even if this vision of an adversarial system is in many respects a myth that imperfectly captures the work of the courts, the commitment to this ideal pervades the whole of the American legal system—manifesting itself in both the cases the system considers and the processes by which it resolves them.

But the American legal system does not value adversarial competition simply for adversarial competition's own sake, nor does the system value it simply for the instrumental benefits it might seem to offer over alternative models.[35] Rather, the adversarial ideal is inextricably connected to the popular view that courts should play a limited role in a democratic society; it both ensures that courts do not exceed their proper role and provides them with a means of filling that role well.[36] I begin by discussing the traditional understanding of the proper role of courts in a democratic society and then explain how adversarialism advances that role. Finally, I show the importance of this ideal by discussing how it dictates a significant aspect of court practice and procedure.[37]

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34. *See supra* notes 4–7 and accompanying text.

35. *See, e.g.*, David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1670 (2009) (noting the argument "that the adversary system is simply better than the inquisitorial system—better at finding the truth, or better at protecting individual rights, or better at guarding against abuses of power, or better at some combination of those tasks"—and recognizing that "[t]here are hints of this argument . . . in certain decisions of the Supreme Court").

36. *See infra* Part I.B.

37. I should note at the outset that the purpose of this Article is not to engage with the comprehensive literature on the strengths and weaknesses of an adversarial system of justice, especially as compared to other comparative models. *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) ("[T]he familiar contrast between our adversarial procedure and the supposedly nonadversarial procedure of the Continental tradition has been grossly overdrawn."). My point is simply that the U.S. legal system is, in its essential attributes, an adversarial one—and yet it departs from that adversarial commitment in ways that deserve greater attention than they have heretofore received.

A. Courts as "Mere Instruments of the Law"[38]

Although there may be no statement in legal discourse that is more quoted than Chief Justice Marshall's famous conclusion (and premise) in *Marbury v. Madison*[39] that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[40] this statement is at odds with what the primary "duty of the judicial department" is typically understood to be—namely, to resolve private disputes between individual litigants.[41] In fulfilling this role, courts consider the evidence and listen to the arguments presented by individual litigants and then issue decisions binding only those

38. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.).

39. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

40. *Id.* at 177.

41. *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) ("The normal occasion for a resort to adjudication is when parties are at odds with one another, often to such a degree that a breach of social order is threatened."). Of course, the nature of adjudication has shifted over time as courts have become more involved in litigation raising public-law claims. *See* Chris H. Miller, *The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation*, 72 ALB. L. REV. 117, 129 (2009) ("[T]he courts have traditionally dealt with private disputes between two parties, then moved to large public-type disputes, and currently involve themselves in a great deal of aggregated private disputes." (footnotes omitted)); *see also* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 837 n.2 (2002) (discussing the development of "two distinctive models of adjudication:" the "traditional or 'dispute resolution' model[, which] centers on the resolution of controversies that involve only the interests of those immediately before the court," and the "public law model of legal decision-making[, which] focuses on vindicating public values, including constitutional principles, and has a unique forward-looking character"). Indeed, courts' roles in resolving such controversies may have contributed to the adversarial myth. As the courts have moved toward resolving more public-law issues, more cases may have arisen in which the parties are ill suited to presenting all of the relevant facts and in which courts, as a consequence, have looked outside the record to facts presented by nonparties. *Cf.* Rachel N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 660–61 (1988) ("[The] legitimation of change in the law and of courts as the locus for testing legal principles against empirical observation and the social welfare opened the door to an expanded role for facts in the judicial process and particularly in constitutional adjudication." (footnote omitted)). Technological innovation, such as the advent of the Internet, may also have accelerated this departure from the adversarial ideal. After all, although judges certainly engaged in independent research before the Internet, *see, e.g.*, Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1215–16 (1975) ("[Justices] conduct . . . independent research; they send their law clerks scurrying through the libraries and elsewhere . . . to add to the totality of knowledge about the social issues that they must decide as lawyers."), there can be no doubt that the Internet has made such independent research far easier, *see supra* notes 12–13.

parties.[42] It is black-letter law that individuals who did not have an opportunity to be heard cannot be bound by a court's judgment.[43]

To be sure, in the context of resolving private disputes, courts will, at times, make more general statements about the law, statements that will have an impact on individuals other than the parties before them.[44] Although such general statements may be an inevitable—and even beneficial—part of judging,[45] the fact that they are always made in the context of litigation between adverse parties is supposed to ensure that courts do not exceed their limited role in a democratic society.[46] After all, the primary role of the courts is to apply the law; responsibility for making the law rests with elected legislators who are better positioned, both institutionally and as a matter of democratic theory, to choose among competing policy positions and values.[47]

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42. *See, e.g.*, R.R. Co. v. Nat'l Bank, 102 U.S. 14, 21 (1880) ("Personal judgments bind only parties and their privies.").

43. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

44. Statements in cases can affect individuals other than the parties before them because such statements become law that either guides or binds subsequent courts addressing similar issues. *See generally* Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 (sketching out "a general theory of precedent and legal authority through historical sources").

45. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 917 (2005) ("[U]nless a court simply repeats the facts of a case and announces a judgment, its decision will almost always resolve other cases not before the court. . . . Yet most of us do not object to the articulation of general principles by courts. To the contrary, we believe that reliance on general principles promotes the rule of law and prevents judges from deciding cases based on personal bias.").

46. *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 103 (1978) (Stevens, J., concurring in the judgment) ("We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength."); Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) ("[The Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1920 (1986) ("It is a judge's obligation to decide private disputes. If, as part of that process, interpretation of the constitutionality of statutes is required, so be it. The trigger of judicial power, however, is the protection of private rights.").

47. *See, e.g.*, Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 1–2 (1986) ("I believe that both legislative lawmaking and administrative lawmaking are superior to judicial lawmaking in three main ways: (1) The product is better in clarity, reliability, and freedom from

This view of the proper role of the courts has given rise to a number of doctrines intended to ensure that courts do not breach these limits on their role. Whether limiting the type of claim that can be brought,[48] who can bring a claim,[49] or when,[50] these doctrines all embody "an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[51] Much has been written about these doctrines,[52] but what is important for present purposes is that they all serve—and are served by—the myth of the adversarial system of justice: by asserting that courts can only decide concrete and active disputes, they contribute to the notion that the role of the courts is not to make law, but rather to apply it in the context of resolving disputes between adversarial parties.

In the next Section, I focus on one of these doctrines—standing—and discuss the respects in which it, and the adversity it is supposed to ensure, helps maintain the proper role of the courts. Although the Court's framing of standing doctrine and its requirements has evolved over time, standing has always been designed to protect, implicitly or otherwise, the proper role of the

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conflict; (2) the legislative process and the administrative process are more democratic than the judicial process; and (3) the factual base for legislation and for administrative rules is normally much stronger than the factual base for judge-made law.").

48. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion) ("Sometimes . . . the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be 'nonjusticiable,' or 'political questions.'" (citations omitted)).

49. *See infra* notes 57–62 and accompanying text.

50. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (describing a "basic rationale" of ripeness doctrine as "prevent[ing] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies").

51. Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring)) (internal quotation marks omitted); *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975) (noting that these doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society").

52. For discussions of the various justiciability doctrines, see, for example, Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007); Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); and Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

courts.[53] First, by requiring adverse parties, standing doctrine attempts to ensure that courts are deciding concrete disputes, not abstract questions of policy.[54] Second, by requiring adverse parties with the incentive to zealously litigate the case, standing doctrine ensures that courts have the facts they need to properly resolve legal disputes.[55] Courts need such assistance precisely because of their limited role in society: they, unlike legislatures, have no other means of finding the facts that will provide the foundations for their decisions.[56] Or so the theory goes.

B. Standing and the Adversarial Myth

Federal courts are defined as much by what cases they decide as by how they decide them. Standing doctrine, which limits which parties may bring claims in court,[57] plays a key role in determining what cases the federal courts decide.[58] As it is currently formulated, standing doctrine provides that a plaintiff is the "proper party" to sue only if he "allege[s] *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[59] Related to, but distinct from, this standing requirement, which the Court has identified as an "irreducible constitutional minimum,"[60] the doctrine of "prudential standing" recognizes various "judicially self-imposed limits on the exercise of federal jurisdiction,"[61] all of which are intended to ensure that the courts do not inadvertently enter into disputes that are more properly left to the other branches.[62]

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53. *See infra* notes 67–70 and accompanying text.

54. *See infra* notes 67–69 and accompanying text.

55. *See infra* notes 71–76 and accompanying text.

56. *See infra* note 70 and accompanying text.

57. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) ("In every federal case, the party bringing the suit must establish standing to prosecute the action.").

58. Standing doctrine arguably derives from the Constitution's extension of "[t]he judicial Power" to "Cases" and "Controversies," U.S. CONST. art. III, § 2, cl. 1, although there is much controversy about whether standing doctrine is constitutionally required, *see infra* note 295 and accompanying text.

59. Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984) (emphasis added)) (internal quotation marks omitted); *see also Newdow*, 542 U.S. at 12 (describing these basic elements as "familiar").

60. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

61. *Newdow*, 542 U.S. at 11 (quoting *Allen*, 468 U.S. at 751) (internal quotation marks omitted).

62. *Id.* at 12.

The ins and outs of the development of standing doctrine are less important than the interests the doctrine is designed to serve. The Court has stated that standing "is built on a single basic idea—the idea of separation of powers."[63] But the "idea of separation of powers" is neither singular nor basic. To the contrary, there are several concepts implicit in the idea of "separation of powers."[64] Professor Heather Elliott points to three in particular, one of which is particularly relevant here: "ensur[ing] that a particular plaintiff has a sufficient stake in the controversy he brings before the court to justify the court's action."[65]

This function—the "concrete-adversity function," as Elliott describes it—"ensures that the federal courts hear only those disputes characterized by the kind of adversary relationship that makes a legal 'case' or a 'controversy.'"[66] In this respect, both standing doctrine and adverse parties help ensure that the courts do not act as legislatures, making general rules of policy. Instead, courts limit their role to resolving concrete disputes between adverse litigants.[67] As the Supreme Court has explained, "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party."[68] The role of the courts is not to "decide abstract questions of wide public significance."[69]

Standing doctrine not only helps define the limits of the courts' role, but also recognizes that because of courts' limited role, judges need the assistance of adverse parties to provide them with the information and arguments necessary to reach the proper result.[70]

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63. *Allen*, 468 U.S. at 752.

64. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460 (2008).

65. *Id.* at 468. Professor Elliott's other two ideas are "prevent[ing] the federal courts from engaging in decisions that are better made by the political branches" and limiting the ability of Congress to "conscript[] the courts to fight its battles against the executive branch." *Id.*

66. *Id.*; *see also id.* at 469 (noting that such disputes are quintessentially appropriate for judicial resolution because they involve the adjudication of "the legal rights of litigants in actual controversies" (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) (internal quotation marks omitted)).

67. *Id.* at 470; *cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

68. Warth v. Seldin, 422 U.S. 490, 499 (1975).

69. *Id.* at 500; *see also* Scalia, *supra* note 23, at 881 ("My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle, whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance.").

70. *See, e.g.*, David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 552 (1988) ("[C]ourts are limited in their ability to investigate issues on the periphery of those

This latter idea—that the parties' adverseness "promotes better litigation"[71]—is regularly invoked in the Court's discussions of standing.[72] In *Massachusetts v. EPA*,[73] for example, the Court emphasized this aspect of standing doctrine when it explained, "'[T]he gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'"[74] Requiring

> the party bringing suit [to] show that the action injures him in a concrete and personal way . . . preserves the vitality of the adversarial process by assuring . . . that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.[75]

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brought to them by the litigants, or even to explore the issues before them in any more detail than the parties wish to provide. . . . Nor could the court easily obtain the views of those most affected by the present practice and the proposed change. These 'legislative facts' are appropriately named; legislatures are better equipped to obtain them than are courts, both because of the scope of their investigative powers and because of the resources at their command." (footnote omitted)).

71. Elliott, *supra* note 64, at 470.

72. *Id.*; *see also id.* at 471 ("The rhetoric of these cases . . . links standing to good judicial decision making."). Standing is not the only doctrine that links adversity to the quality of judicial decisionmaking. Courts, for example, regularly decline to follow statements in prior cases because such statements are merely dicta and therefore are not binding on subsequent courts. United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) (Posner, J.) (identifying dicta as "the part of an opinion that a later court, even if it is an inferior court, is free to reject"). As Judge Richard Posner has explained, one reason for a court not to give dicta weight is that "the issue addressed in the passage was not presented as an issue [and] hence was not refined by the fires of adversary presentation." *Id.* at 293; *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1261 (2006) ("Our readiness to trust a court's rulings of law depends on the assumption that the adverse parties will each vigorously assert the best defense of its positions. The court reaches its decision only after confronting conflicting arguments powerfully advanced by both sides.").

73. Massachusetts v. EPA, 549 U.S. 497 (2007).

74. *Id.* at 517 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); *see also* Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011) (noting that the "opposing party" in a case must "have an ongoing interest in the dispute, so that the case features 'that concrete adverseness which sharpens the presentation of issues'" (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983))).

75. *Massachusetts*, 549 U.S. at 517 (third omission in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted)) (internal quotation marks omitted); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S.

As the Court has further explained, the plaintiff's

> personal stake . . . enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.[76]

Thus, the commitment to adversarialism purportedly serves two purposes, both reflected in the Court's discussions of standing doctrine: it helps ensure that courts are only in the business of resolving narrow disputes, while at the same time ensuring that they have the information necessary to resolve those disputes well.

To be sure, as I noted at the outset, adverseness is not the only justification the Court has offered for standing doctrine,[77] and it has at times placed more emphasis on other rationales.[78] Indeed, the very

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464, 472 (1982) (noting that the standing requirement of an "actual injury redressable by the court" tends to ensure that legal questions presented in court have a concrete factual context).

76. Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 221 (1974); *see also id.* ("Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions."); *see also* United States v. Richardson, 418 U.S. 166, 191 (1974) (Powell, J., concurring) (lamenting the liberalization of standing requirements because he feared it would result in "issues . . . be[ing] presented in abstract form"). In the context of prudential limitations on standing, the Court has similarly invoked the courts' interest in "assur[ing] that the most effective advocate of the rights at issue is present to champion them." Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978).

77. *See, e.g.*, *Lujan*, 504 U.S. at 560 ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article

lack of consistency in the Court's justifications might suggest that the frequent rhetoric about the link between adversity and good judicial decisionmaking is just that—rhetoric and nothing more. But regardless of whether members of the Court in fact believe that standing doctrine exists to ensure adversity and to promote quality decisionmaking,[79] what is important is that they frequently say that they do and that the Court often premises the need for standing doctrine on this belief. By regularly invoking adversity as fundamental to the standing inquiry, the Court achieves two related—and problematic—ends. First, it reinforces the adversarial ideal and, by associating standing doctrine with that ideal, both confers on standing a legitimacy that it has not earned and suggests a need for it that may not exist. Second, by promoting the notion that the adversarial ideal is realized, the Court obscures the important respects in which that adversarial commitment is more myth than reality.

C. The Adversarial Myth in Practice

The adversarial ideal manifests itself in numerous practices and procedures that define the U.S. legal system. For example, adverse parties bear responsibility for providing factual evidence to trial courts, which then assess and weigh the conflicting evidence. Unlike in other court systems, judges in the adversarial system do not actively seek out the relevant facts, but instead rely on the parties

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change."); *see also Schlesinger*, 418 U.S. at 221 & n.10 (contrasting the ability of Congress to initiate "inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports" to make a record with the reliance of the courts on "the parties' treatment of the facts and claims before it to develop its rules of law"); *cf.* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–82 (2001) (discussing the argument that Congress is better at factfinding than courts); Kate T. Spelman, *Revising Judicial Review of Legislative Findings of Scientific and Medical "Fact": A Modified Due Process Approach*, 64 N.Y.U. ANN. SURV. AM. L. 837, 859–60 (2009) (same).

79. There is, of course, significant literature that questions whether standing doctrine is merely an artifice for keeping certain cases out of court. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (arguing that "[t]he doctrinal elements of standing are nearly worthless" and that "judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges"). *See generally* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010) (discussing the thesis that progressive Justices invented standing during the New Deal to "insulate" administrative agencies from judicial review).

before the court to provide them.[80] Although there are mechanisms by which nonparties can intervene in litigation,[81] and by which trial courts can solicit facts from nonparties,[82] the use of such tools is the exception, not the norm.[83] Indeed, unlike at the appellate level, the rules of procedure for district courts do not expressly provide for amicus participation.[84] And although district courts enjoy wide discretion to invite such participation, it remains rare for them to do so.[85] Some courts have suggested that district courts should hesitate to accept amicus briefs,[86] particularly briefs that present facts not offered

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80. *See, e.g.*, Frost, *supra* note 1, at 449 ("[P]arty presentation is cited as the major distinction between the adversarial system in the United States and the inquisitorial systems of continental Europe, where judges take the lead in the investigation and presentation of the case."); Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RES. L. REV. 303, 314 (2010) ("Unlike a judge in the inquisitorial system of the civil law used throughout Europe, a common law judge does not conduct his own investigation." (footnote omitted)).

81. *See* FED. R. CIV. P. 24 (providing rules for intervention of right and permissive intervention).

82. *See* FED. R. CIV. P. 53(a)(1)(B) (providing for the appointment of a master under specified circumstances to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury").

83. *Cf.* Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 307 (1990) ("Several courts have relied on [a] comment [to the 1966 amendments to Rule 24(a)] to limit their grants of intervention.").

84. *See, e.g.*, Michele Estrin Gilman, *Litigating Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 131, 152 n.169 (2007) ("There is no specific rule allowing for amicus participation at the district court level, but it is widely recognized that district courts have broad discretion to appoint amicus."); *see also* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 309 (2000) ("The Advisory Committee could encourage amicus participation in the district court by amending the Federal Rules of Civil Procedure to provide expressly for amicus participation.").

85. *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 687 (2008) ("At the district court level, amicus activity is even less significant, with the vast majority of District Court Judges (79.2%) responding that amicus activity is nominal or zero, and 19.9% indicating that approximately 5% of their docket involves amici curiae."). There are, of course, exceptions to this general rule. *See, e.g.*, Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1084 n.8 (D. Or. 2002) ("Amici curiae briefs have been filed on behalf of the following: New York Physicians, ACLU Foundation of Oregon, Inc., Association of the Bar of the City of New York, Surviving Family Members, Autonomy, Inc., et al, American Academy of Pain Management, et al, Coalition of Mental Health Professionals, Not Dead Yet, et al, National Right to Life Committee and Oregon Right to Life, and the Family Research Council."), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *aff'd sub nom.* Gonzales v. Oregon, 546 U.S. 243 (2006).

86. *See, e.g.*, Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970) ("[A] district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance."); News & Sun-Sentinel Co. v. Cox, 700 F. Supp. 30, 32 (S.D. Fla.

by the parties.[87] As one district court has noted, the growing trend toward accepting amicus briefs may be "useful in a reviewing court where, usually, only issues of law are resolved; it is not proper in a trial court."[88]

Once the parties present the relevant facts and law, the trial court is responsible for resolving these disputes in the first instance and for establishing the factual record on which the case will be decided.[89] Indeed, whereas trial courts' legal findings will be reviewed anew by appellate courts,[90] their factual findings will be reviewed only for clear error,[91] a meaningfully more difficult standard to meet.[92]

1988) ("[A]cceptance of an . . . *amicus curiae* should be allowed only sparingly, unless the *amicus* has a special interest, or unless the Court feels that existing counsel need assistance." (omission in original) (quoting Donovan v. Gillmor, 535 F. Supp. 154, 159 (N.D. Ohio 1982)) (internal quotation marks omitted)); *see also* Yip v. Pagano, 606 F. Supp. 1566, 1568 (D.N.J. 1985) ("At the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure."), *aff'd*, 782 F.2d 1033 (3d Cir. 1986).

87. *See Strasser*, 432 F.2d at 569 ("[A]n amicus who argues facts should rarely be welcomed.").

88. Leigh v. Engle, 535 F. Supp. 418, 422 (N.D. Ill. 1982).

89. K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 400 (2001); *see also* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 41 (1994) ("Congress has vested trial courts with primary responsibility for different functions than it has given appellate courts. The structure of and tasks assigned to trial courts encourage their relative proficiency at factfinding, and appellate courts are designed and situated to encourage a relative proficiency at legal reasoning."); Miller & Barron, *supra* note 41, at 1187 ("The traditional or 'Blackstonian' conception of the judicial process clearly defines the formal system of information flow to the court. Under this conception, an appellate judge . . . accept[s] the facts as found by the trial court."); *cf.* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985) ("[T]he categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system.").

90. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 867 (2005) ("This case comes to us on appeal from a preliminary injunction. We accordingly review the District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion.").

91. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 917 (1995) ("In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous.").

92. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) ("This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."). Appellate courts do not always give exactly the same deference to factual findings in all circumstances. For example, the Court has recognized that even though "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, . . . the presumption has lesser force in the former situation than in the latter." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984). The Court has also noted that "the standard [of review] does not change as the trial becomes longer and more complex, but the likelihood that the appellate

Multiple rationales have been offered for this deference to district courts' factual findings. District court judges actually see witnesses and hear live testimony,[93] and they thus develop experience in making determinations of fact.[94] Such deference also serves "the public interest in the stability and judicial economy" that comes from "recognizing . . . the trial court, not the appellate tribunal, [as] the finder of the facts."[95] Deference is also accorded to trial court factual findings because they sometimes reflect the findings of jurors drawn from the community.[96] And surely an important factor also is the trial court's closer interaction with the actual parties to the case. Although not always true, the parties generally appear and often testify before the trial court judge. By contrast, at the appellate court, where questions of law predominate, the actual parties will much more rarely appear or be noticed by members of the bench.[97] There are thus practical and dignitary values in deferring to the decisionmaker who has most closely interacted with the parties who have knowledge of—and responsibility for presenting—the relevant facts.

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court will rely on the presumption tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours." *Id.*

93. *See, e.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 438 (2007) ("[D]eferential standards of review grant lower court judges discretion . . . because they are better situated to make certain types of decisions, even though such deference may entail a loss of uniformity in outcome."); *see also* Boyd v. Boyd, 169 N.E. 632, 634 (N.Y. 1930) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.").

94. *Anderson*, 470 U.S. at 574 ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); *see also* Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1125–26 (2000) (noting that "the trial court is believed to be in a better position than the appellate court to weigh evidence and find facts" due to the expertise that comes with experience).

95. FED. R. CIV. P. 52 advisory committee's note to 1985 amend. ("To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."); *see also, e.g.*, *Anderson*, 470 U.S. at 574–75 ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."); Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 978–79 (discussing the various reasons why appellate courts defer to the factual findings of trial courts).

96. *See, e.g.*, Fredric I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 259–60 (2000) ("In the case of jury trials, appellate deference is further justified by the special role of the jury as the community's fact-finding representative.").

97. *See, e.g.*, Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 80 (2006) ("The parties to an appellate proceeding frequently do not appear, and if they do, they sit in the audience without any formal participation in the appellate process itself.").

Thus, the U.S. legal system's adversarial commitment manifests itself in the very structure of the court system—both in how the facts are presented and in which court is responsible for finding them. The existence of this commitment is important because it fosters complacency, suggesting that parties can be relied upon to present courts with all of the information that they need and that the factual findings on which cases will ultimately be decided will be those found by the trial court based on the presentations of adverse parties. It suggests that there is no reason to worry about the quality of the factual findings that underlie the decisions the U.S. judicial system reaches, at least insofar as the adversarial system can be relied upon as a rigorous means of testing factual claims. But, as I discuss in the next Part, an examination of appellate factfinding reveals that, in this important context, the United States' commitment to an adversarial system of justice is often more myth than reality.

II. UNDERMINING THE MYTH

As much as courts may tout the importance of adversarialism and maintain that they rely on proper parties to develop the factual record, courts often fail to practice what they preach. Appellate courts, particularly the Supreme Court, routinely consider facts that were not made part of the record below.[98] I begin this Part with a few examples of appellate court reliance on facts not provided by the parties to the litigation.[99] But evidence that appellate courts consider

98. *See* Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 971–72 (2009) ("Sometimes the court will decide the case on the basis of 'facts' in the record not addressed by the parties—which means that the court's decision is driven by evidence that the parties never explained and the meaning or importance of which they never contested." (footnote omitted)); *infra* Part II.A.

99. Two methodological points are in order. First, I look at appellate court *opinions* because they provide the clearest evidence of appellate court reliance on extra-record facts. That said, there may often be facts that influence—consciously or otherwise—judges' decisions, even though they do not make it into the official explanation of the judges' reasoning that appears in a published opinion. A more thorough examination of oral argument transcripts and briefs might provide some sense of the extent to which this occurs, *cf.* Transcript of Oral Argument at 18–19, Massaro v. United States, 538 U.S. 500 (2003) (No. 01-1559) (providing the Court with "essentially anecdotal reports" in response to a query for factual information that was not part of the record below), but of course even those sources cannot reveal the extent to which judges engage in independent research. Second, I assume that the facts in appellate court opinions do, in fact, influence the judges' decisions. Admittedly, there is a strong strain of academic thought that suggests that judges' decisions are shaped more by ideology than by the law, *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993), and that they simply select the facts that support the result they

extra-record facts is not merely anecdotal. Indeed, there is at least one well-established and formalized method—which I consider later in this Part—by which they actually encourage nonparties to provide information different than that provided by the parties: the amicus brief.

A. Appellate Courts and Extra-Record Factfinding

As I discussed in Part I, the Supreme Court is a frequent champion of the adversarial ideal, regularly invoking the idea that courts can rely on adverse parties to adequately develop the records needed to decide cases. Among all of the courts in the federal system, the Supreme Court is in some sense the Court best suited for realizing this ideal. Although the Supreme Court generally hears the most significant cases in the nation's court system[100]—cases in which one would want the underlying factual record to be as complete as possible—the Supreme Court also, alone among the federal courts, has a virtually discretionary docket.[101]

This discretionary docket enables the Court to select those cases that are particularly well suited for its review.[102] One might think,

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want, *see* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1419 (1995) ("The philosophy of legal realists was that judges reasoned backward from result to rationale, selecting rules and facts to fit into a preordained pattern."). It may also be the case that judges are genuinely unaware of all of the factors that are motivating their decisions. *See, e.g.*, David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1404 (2008) ("One of the most important discoveries in empirical social psychology in the twentieth century is that people's perceptions and behavior are often shaped by factors that lie outside their awareness and cannot be fully understood by intuitive methods such as self-reflection."). But even if that is true in some cases, there are many others in which judges' understandings of the relevant facts do inform their decisionmaking. *See id.* at 1419 (noting the constraints on judges that prevent them from simply reasoning backward from result to rationale). And even if judges sometimes use facts as rhetorical tools, *see id.* (noting that "[t]he way [judges] present the facts" can be a form of rhetoric), the fact that they often use *extra-record* facts as those rhetorical tools suggests that those facts are also influencing their decisions.

100. *See, e.g.*, Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 787 (1999) ("Certainly the federal judges, and especially the Justices of the Supreme Court, . . . exercise an extraordinary degree of authority over our society and culture.").

101. *See, e.g.*, Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. APP. PRAC. & PROCESS 177, 177 (2003) ("Since 1925, with the passage of the Judges' Bill, Congress increasingly has afforded the Supreme Court unfettered discretion to decide whichever cases it chooses." (footnote omitted)).

102. While the Supreme Court's selection process is guided by substantive considerations, such as whether there is a division of views among the lower courts and whether the case presents an issue of national importance, SUP. CT. R. 10; *see also* Kevin H. Smith, *Certiorari and*

therefore, that it would select only those cases in which the record contains all of the information the Court will need to resolve the case, and would avoid those in which it would be forced to look outside the record for facts the parties failed to adequately present.[103] Yet the Court regularly grants certiorari in cases that require it to ultimately look outside the record for relevant factual assertions, and it often makes factual assertions without any citation at all.[104] A couple of cases prove the point.

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the Supreme Court Agenda: An Empirical Analysis, 54 OKLA. L. REV. 727, 734–38 (2001) (discussing factors that affect the Supreme Court's decision to grant certiorari), the Court also considers other factors related not to the substantive legal question at issue but instead to how well that question has been presented. For example, the Court considers whether the record was adequately developed below and whether there will be quality lawyering. *See* Abramowicz & Colby, *supra* note 98, at 1001 n.188 (observing that "one of the factors that has influenced the Court's decisions to deny certiorari is the presence of 'poor lawyering'" (quoting Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, LITIGATION, Spring 1998, at 25, 30)).

103. To be sure, there might sometimes be cases where there are strong reasons for the Court to grant certiorari, notwithstanding the fact that the case is not otherwise well presented for review. Moreover, the Court's ability to assess the adequacy of the record based on the materials that are submitted at the certiorari stage is not perfect. But even if there are some cases that fall into each of these categories, one would still think that cases in which the Court looks outside the record developed below would be the exception, not the rule. As I will discuss, however, the Court's reliance on extra-record factual development has become an accepted part of its practice.

104. Although the Court surely sometimes regrets its decision to grant certiorari in a particular case, *see, e.g.*, Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1082–95 (1988) (discussing "DIGs"—cases the Court decides to dismiss after having granted certiorari), the Court has ample opportunity prior to granting certiorari to determine whether there is an adequate factual record, *see, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 390 (2004) ("[T]he Justices typically make decisions about whether to grant certiorari according to vague guidelines that afford them maximum discretion . . . ."); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 791 (2001) (noting the existence of the "cert pool" in addition to "individualized screening mechanisms"); *cf.* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 974–76 (2007) (book review) (arguing that the process for reviewing certiorari petitions tends to encourage the denial of petitions, not the granting of them).

In *Citizens United v. FEC*,[105] a significant corporate speech case,[106] the Supreme Court overruled long-standing precedent and held unconstitutional a federal law that prohibited "corporations and unions from using their general treasury funds" to engage in political speech.[107] In reaching this result, the Court repeatedly relied on facts that were not part of the record created by the parties below.[108] Throughout the Court's analysis, it made factual assertions with citation only to an amicus brief or, even more disturbingly, without citation at all. Indeed, there was little evidence in the Court's opinion of any record developed by the adversaries who had litigated the case below.[109]

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105. Citizens United v. FEC, 130 S. Ct. 876 (2010).

106. *See, e.g.*, *id.* at 933 (Stevens, J., concurring in part and dissenting in part) ("The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well."); *see also* Michael Waldman, *Preface* to MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED*, at xi, xi (Monica Youn ed., 2011) (noting that *Citizens United* "ranks among the Court's most controversial and consequential" decisions because, in part, "[i]n the 2010 election, independent spending spiked, much of it secret, with more to come"); Emma Dumain, *Democrats Raising Money They Oppose*, ROLL CALL (May 10, 2011, 12:00 AM), http://www.rollcall.com/issues/56_120/Democrats-Raising-Money-They-Oppose-205488-1.html ("Democratic operatives are racing to organize new groups to solicit and spend millions of dollars that the [*Citizens United*] ruling allowed, gearing up to play by the same rules as Republicans regardless of whether they like those rules. They all insist that they don't. But after watching Republicans take advantage of the new rules to spend unprecedented volumes of cash and win House and Senate seats across the map in the 2010 midterm elections, they say they can no longer stand back on moral grounds."); Lisa Rosenberg, *Happy Anniversary* Citizens United, SUNLIGHT FOUND. (Jan. 19, 2011, 11:42 AM), http://sunlightfoundation.com/blog/2011/01/19/happy-anniversary-citizens-united ("As a result of [*Citizens United*], dark money spending to elect or defeat candidates in the 2010 midterms topped $450 million dollars, or about 15 percent of total spending on elections.").

107. *Citizens United*, 130 S. Ct. at 886 (considering the constitutionality of 2 U.S.C. § 441b (2006) and overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)). More precisely, the provision at issue prohibits the use of general treasury funds "to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate." *Id.* (quoting 2 U.S.C. § 441b).

108. *See infra* notes 110–120 and accompanying text.

109. To be sure, one could argue that the *Citizens United* Court needed to rely on extra-record facts: a record for the facial challenge was not made below because the parties had only pursued an as-applied challenge before the trial court, and the Supreme Court converted it to a facial challenge on appeal. *See infra* notes 123–125 and accompanying text. But this situation was one of the Court's own making. It did not need to decide the facial issue to intimate what its views on any facial challenge would be, *cf.* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711 (1998) ("The combination of 'narrow holding + advicegiving dicta' enjoys a natural advantage over a broad holding in terms of democratic self-rule, flexibility, popular

For example, in concluding that the provision at issue violated the First Amendment, the Court first determined that it operated as an actual ban—as opposed to just a limitation—on political speech.[110] In doing so, the Court's majority had to explain why it was not sufficient that corporations and unions could establish political action committees (PACs) that could engage in speech. To the Court, the first and most simple answer was that "[a] PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban does not allow corporations to speak."[111] But the Court also explained that "[e]ven if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."[112] The Court went on to detail the regulations to which PACs are subject, but it did not offer any additional support for the separate observations that they are expensive and burdensome, other than to note that fewer than 2,000 of the millions of corporations in this country have PACs. And to support that fact, the Court cited not the record below, but an amicus brief and an IRS bulletin.[113]

Even more critically, the Court relied on extra-record facts in determining whether there was any compelling interest sufficient to justify the federal restriction on corporate speech.[114] In rejecting an anticorruption rationale,[115] the Court concluded that "independent

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accountability, and adaptability."), or, alternatively, it could have remanded the case to the trial court to decide the facial issue in the first instance.

110. *Citizens United*, 130 S. Ct. at 897 ("Section 441b is a ban on corporate speech notwithstanding the fact that a [political action committee] created by a corporation can still speak.").

111. *Id.* (citation omitted).

112. *Id.*

113. *Id.* at 897–98 (citing Brief Amici Curiae of Seven Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Appellant on Supplemental Question at 11, *Citizens United*, 130 S. Ct. 876 (No. 08-205); and IRS, 2006 STATISTICS OF INCOME: CORPORATION INCOME TAX RETURNS 2 (2009)).

114. The Court first held that corporations enjoy First Amendment rights. *Citizens United*, 130 S. Ct. at 899.

115. The Court considered three possible rationales: anti-corruption, *see* Supplemental Brief for the Appellee at 8, *Citizens United*, 130 S. Ct. 876 (No. 08-205) ("Corporate participation in candidate elections creates a substantial risk of corruption or the appearance thereof."); anti-distortion, *see Citizens United*, 130 S. Ct. at 903 (describing the possible rationale as an "interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas'" (quoting Austin v. Mich. State Chamber

expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[116] In reaching that conclusion, the Court did not cite the record below. Instead, it noted that in a case decided more than thirty years earlier, the Court had recognized that there was less risk of corruption in the context of independent expenditures than in the context of direct contributions.[117] It further observed that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt," citing a statement from an earlier separate opinion authored by Justice Kennedy.[118] The Court ultimately did cite a court record[119]—but a record from a campaign finance case decided nearly a decade before, in which the court was not even considering the same issue and in which the present parties obviously had had no opportunity to develop facts.[120]

My purpose here is not to address the validity of the Court's conclusions,[121] but simply to point out the extent to which the Court

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of Commerce, 494 U.S. 652, 660 (1990))); and shareholder protection, *see* Supplemental Brief for the Appellee, *supra*, at 13 ("Congress and state governments may appropriately act to protect shareholders' interests in avoiding unwanted subsidization of electioneering."). The Court rejected each of these rationales. *Citizens United*, 130 S. Ct. at 904–11.

116. *Citizens United*, 130 S. Ct. at 909.

117. *Id.* at 908–09 (discussing *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

118. *Id.* at 910 (citing McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

119. *Id.* at 910–11 ("The [record in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C.) (per curiam), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876,] was 'over 100,000 pages' long, yet it 'does not have any direct examples of votes being exchanged for . . . expenditures.'" (omission in original) (citations omitted) (quoting *McConnell*, 251 F. Supp. 2d at 209; and *id.* at 560 (Kollar-Kotelly, J., concurring in part and dissenting in part))).

120. *See id.* at 933 n.5 (Stevens, J., concurring in part and dissenting in part) (noting that the *McConnell* "record [was] not before [the Court] in [*Citizens United*]" and that, in any event, it did not provide a basis for assessing the specific arguments on which the majority based its decision to strike down the statute). To be sure, reliance on a prior court record may in some cases be preferable to reliance on no record at all, but rarely will an appellate judge be limited to just those two options. Moreover, when he is, there are steps he should take to ensure that reliance on the prior record is appropriate. *See infra* Part V.B.

121. A rich literature on the Court's decision in *Citizens United* is quickly developing. *See, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605–10 (2011) (examining the role foreign spending may have played in the Court's decision); Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of* Citizens United, 105 NW. U. L. REV. COLLOQUY 203, 219–21 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2011/4/LRColl2010n4Polikoff.pdf (arguing that "[e]vidence that corporate independent expenditures give rise to an appearance of corruption is extensive" and that "[t]here is no—literally no—factual support for Justice Kennedy's" legal conclusions).

relied on extra-record facts in reaching them. As the dissent pointed out, the majority rested its holding—a *facial* invalidation of the campaign finance provision—on "pure speculation" about the larger consequences of the provision and its effect on parties other than Citizens United:

> In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted [the federal law at issue] in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than Citizens United.[122]

That there was no record was hardly surprising: although Citizens United initially brought a facial challenge, it abandoned that challenge in favor of a more narrow, as-applied challenge early in the trial court litigation, before any factual record was developed.[123] Indeed, "[s]hortly before Citizens United . . . abandon[ed] its facial challenge, the Government advised the District Court that it 'require[d] time to develop a factual record regarding [the] facial challenge.'"[124] Thus, as the dissent explained, "By reinstating a claim that Citizens United [had] abandoned, the Court [gave] it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal."[125]

Indeed, by setting the case for reargument rather than remanding to the district court for further factfinding,[126] the Court

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122. *Citizens United*, 130 S. Ct. at 933 (Stevens, J., concurring in part and dissenting in part). The dissent notes:

> [W]e do not even have a good evidentiary record of how § 203 has been affecting Citizens United, which never submitted to the District Court the details of *Hillary*'s funding or its own finances. We likewise have no evidence of how § 203 and comparable state laws were expected to affect corporations and unions in the future.

Id. at 933 n.5.

123. *Id.* at 933.

124. *Id.* at 933 n.4 (third and fourth alterations in original).

125. *Id.*; *see also id.* at 933 ("Had Citizens United maintained a facial challenge, and thus argued that there are virtually no circumstances in which [the law at issue] can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions.").

126. *See* Citizens United v. FEC, 129 S. Ct. 2893 (2009) (mem.) (requesting reargument on whether "the Court [should] overrule either or both" *Austin* and part of *McConnell v. FEC*, 540

ensured that factual development would occur largely by amicus brief and other extra-record sources, rather than by the parties before the district court. To be sure, although it might theoretically have been possible for the parties to present the Court with *some* factual information in their briefs, it would have been impossible for the parties in *Citizens United* to present the Court with *all* of the relevant information in their briefs, given the strict page limitations on Supreme Court briefs[127] and the impossibility of predicting what facts the Court would draw from outside the briefs and lower court record.

If the Court's reliance on extra-record facts was particularly striking in *Citizens United*, it is hardly anomalous. In *Gonzales v. Carhart*,[128] the Court considered a federal statute concerned not with campaign finance restrictions, but with restrictions on the availability of certain abortion procedures,[129] and this time, the Court upheld the statute.[130] Relying on its own factual findings, the Court concluded that legitimate governmental objectives supported the enactment of the statute.[131] Most significantly, even though it recognized that there was "no reliable data to measure the phenomenon," the Court deemed it "unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained" and noted that "[s]evere depression and loss of esteem can follow."[132] For this proposition, the Court cited the amicus brief of Sandra Cano, the former "Mary Doe" of *Doe v. Bolton*,[133] and "180 women injured by abortion."[134] The Court, of course, did not actually have the opportunity to hear these women testify, nor was there adequate

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U.S. 93 (2003)). Indeed, the Supreme Court does sometimes remand to the lower court when it believes more factual development of the record is necessary. *See infra* note 313.

127. SUP. CT. R. 33.2(b).

128. Gonzales v. Carhart, 550 U.S. 124 (2007).

129. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

130. *Carhart*, 550 U.S. at 133.

131. *Id.* at 158.

132. *Id.* at 159.

133. Doe v. Bolton, 410 U.S. 179 (1973). *Doe* was the companion case to *Roe v. Wade*, 410 U.S. 113 (1973). Cano was in some respects an odd choice to testify to the adverse consequences of having an abortion because she now explains that she "never wanted an abortion in Doe v. Bolton and fraud was perpetrated on the Court." Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 1, *Carhart*, 550 U.S. 124 (No. 05-380); *see also id.* app. at 3 ("I was a trusting person and did not read the papers placed in front of me by my lawyer. I truly thought Margie Pitts Hames was having me sign divorce papers. I did not even suspect that the papers related to abortion . . . .").

134. *Carhart*, 550 U.S. at 159 (citing Brief of Sandra Cano, *supra* note 133, at 22–24).

opportunity for the other side to give the Court a sense of how representative the women who had signed that amicus brief were. And, again, when the Court alluded to an actual court record, it was not the record in the case before it.[135]

Indeed, even when the Court does rely heavily on the record developed by the district court, it often does not limit itself to that record. In an earlier abortion case, *Stenberg v. Carhart*,[136] the Court considered the constitutionality of a Nebraska statute banning so-called partial-birth abortion.[137] In setting out the Court's understanding of the factual lay of the land—information about abortions generally and about the procedure at issue specifically—the Court repeatedly looked to the "materials presented at trial,"[138] but in doing so, it considered "[t]he evidence before the trial court, *as supported or supplemented in the literature*."[139] As a court of appeals subsequently noted:

> [T]he Court supplemented the district court record with information from a significant array of medical sources. Extra-record sources considered by the Court included medical textbooks and journals relating to abortion, obstetrics, and gynecology; the factual records developed in prior "partial birth abortion" cases; and amicus briefs (with citations to medical authority) submitted on behalf of medical organizations.[140]

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135. *Id.* ("Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue." (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 466 (S.D.N.Y. 2004), *vacated sub nom.* Nat'l Abortion Fed'n v. Gonzales, 224 Fed. App'x 88, 88 (2d Cir. 2007))). Most of the plaintiffs' experts cited in this district court opinion acknowledged that they did not describe the abortion procedure in detail to their patients. *Nat'l Abortion Fed'n*, 333 F. Supp. 2d at 466 n.22.

136. Stenberg v. Carhart, 530 U.S. 914 (2000).

137. *Id.* at 929–30.

138. *Id.* at 929.

139. *Id.* at 923 (emphasis added).

140. Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 623 (4th Cir. 2005), *vacated sub nom.* Herring v. Richmond Med. Ctr. for Women, 550 U.S. 901 (2007). These abortion cases followed in the path established by the original abortion case—*Roe v. Wade*. In that case, Justice Blackmun did extensive independent research that ultimately found its way into the Court's opinion. *See* Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 1075, 1087–88 (2005) ("The summer months saw the Justices scatter. Justice Blackmun repaired to the library at the Mayo Clinic to research the medical history of abortion and tasked one of his clerks to write this research into the *Roe* and *Doe* opinions.").

The Court's decision in *Stenberg* may be intuitively less troubling than the decisions in *Carhart* and *Citizens United* because the Court relied heavily on the district court record and because its statements of extra-record facts seem well sourced. Nonetheless, the fact that it would look to extra-record facts even when the parties and trial court had developed a substantial factual record highlights the pervasiveness of the Court's recourse to extra-record facts. Moreover, this sampling of cases suggests how varied the quality of factfinding can be when an appellate court engages in that task with little or no assistance from the parties and the trial court.

I have focused here on the Supreme Court because that is where recourse to extra-record factfinding is most pervasive—and most pernicious—but this reliance on extra-record facts also occurs in the courts of appeals.[141] Although it may occur less commonly in the courts of appeals,[142] that makes the practice no less troubling. After all, even if this recourse to extra-record facts happened only at the Supreme Court or only rarely, it would still be troubling, given that it happens in ways that are significant to the outcome of some of the most consequential cases the nation's courts decide.[143] But these cases—and the ones I discuss later in this Article—are but a few

141. *See, e.g.*, Parker v. District of Columbia, 478 F.3d 370, 379–405 (D.C. Cir. 2007) (citing numerous law review articles that provide information relevant to the original meaning of the Second Amendment), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008); United States v. Virginia, 44 F.3d 1229, 1238 (4th Cir. 1995) (citing a "recent edition of a national magazine" to show the importance the public attached to the availability of single-sex education), *rev'd*, 518 U.S. 515 (1996). For a discussion of how appellate courts have used statistical studies when addressing abortion restrictions, see *infra* Part III.B.

142. I plan to take up in a different work a more systematic examination of the use of extra-record facts at different levels of the federal court system. If appellate courts do in fact rely on extra-record sources less frequently than the Supreme Court, that difference surely reflects in part the different nature of the cases that appellate courts hear. In other words, because the U.S. legal system includes one appeal as of right, Harlon Leigh Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985), the courts of appeals hear many more cases than the Supreme Court, and many of those cases will require only straightforward application of an established legal rule. In those cases, there will generally be no need to resort to extra-record facts. Moreover, as I discuss in the next Section, amicus briefs play a significant role in helping appellate courts find legislative facts, and cases in the courts of appeals may attract less significant amicus attention than do Supreme Court cases, in part because of the nature of the cases and in part because amicus organizations sometimes have incentives to wait until the issue is before the Supreme Court. All that said, it may also be that appellate judges tend to view their role differently than do Supreme Court Justices. By comparing the use of extra-record facts in the same cases at both the courts of appeals and the Supreme Court, I hope to elucidate the answers to these questions.

143. For a discussion of the problematic consequences of extra-record appellate court factfinding, see *infra* Part IV.

examples of the recurring phenomenon by which appellate courts, particularly the Supreme Court, look outside the record to make factual findings. Indeed, one need not rely on anecdotal evidence to appreciate the regularity with which appellate courts rely on extra-record facts because there is one significant respect in which appellate courts invite nonparties to provide them with extra-record facts: the rules providing for amicus briefs.

B. Amicus Practice

The amicus curiae—or "friend of the Court"[144]—brief is a vehicle by which individuals or organizations that would not otherwise have standing to participate in a case can present their own arguments and information to the court.[145] Although amicus briefs are often filed in the courts of appeals,[146] they are most common in the Supreme Court, where they are now filed in virtually every case.[147] In significant cases,

144. *See, e.g.*, 4 AM. JUR. 2D *Amicus Curiae* § 1 (2007) ("The literal meaning of the term 'amicus curiae' is a friend of the court.").

145. *See, e.g.*, Caldeira & Wright, *supra* note 27, at 782 n.1 (noting that "'standing' [has] limits, so a brief amicus curiae can and does serve an important function" by serving "as a vehicle for interests other than those of the parties"); *see also id.* at 783 ("The Supreme Court's continued willingness to receive this rising tide of briefs from not-so-disinterested third parties is, in our view, tacit recognition that most matters before the justices have vast social, political, and economic ramifications—far beyond the interest of the immediate parties."). Of course, amicus briefs are sometimes encouraged by the parties, *see, e.g.*, McGuire, *supra* note 27, at 822 ("[T]o the extent that the goals of lawyers and organized groups intersect, their mutual interests create incentives to build coalitions with one another."); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 674 (2005) ("Amici are often not only interested third parties, but extensions of the parties themselves. Parties often solicit amicus support as another weapon in the adversarial struggle."); *see also* Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., opinion in chambers) ("[A]micus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs."), but how involved the parties are in their content and arguments varies widely across cases.

146. *See, e.g.*, Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 322–24 (2008) (discussing federal circuit courts' amicus filing rules); Harrington, *supra* note 145, at 673–74 (discussing amicus practices in the courts of appeals).

147. Collins, *supra* note 27, at 807–08; *see also id.* at 810–11 (noting the increase in the number of amicus briefs and cosigners since the 1960s); Haw, *supra* note 28, at 1251 ("[T]he number of amicus briefs filed at the Supreme Court rose 800% between 1946 and 1995."); O'Connor & Epstein, *supra* note 27, at 315 (noting that "interest group amicus participation in noncommercial cases before the Supreme Court was nearly nonexistent until World War II, that it rose significantly after the war, and that it then accelerated very rapidly in the late 1960s and 1970s").

amicus briefs can number in the double digits.[148] Although the evidence is mixed,[149] there is a general consensus in the literature that amicus briefs often influence the Court's decisionmaking.[150]

The current Supreme Court rules do more than simply allow amicus briefs; they expressly encourage nonparties to use them to assist the Court in engaging in extra-record factfinding. The rules provide that amicus briefs should not simply regurgitate arguments and information provided by the parties: such briefs "burden[] the Court, and [their] filing is not favored."[151] To the contrary, an amicus brief that will be "of considerable help to the Court" is one that "brings to the attention of the Court relevant matter *not already brought to its attention by the parties*."[152] And the Supreme Court rules place virtually no limit on who can file such a brief. Although an amicus brief can be filed only if "accompanied by the written consent of all parties, or if the Court grants leave to file,"[153] "[t]he general practice of the U.S. Supreme Court . . . is to allow essentially unlimited amicus participation."[154]

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148. Collins, *supra* note 27, at 812 (noting that in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), seventy-eight amicus briefs were filed, representing more than 400 different organizations).

149. *See, e.g.*, Caldeira & Wright, *supra* note 27, at 788 ("[S]ome circumstantial evidence suggests that [amicus briefs] might very well be important."); Collins, *supra* note 27, at 808 & n.1 (noting that past research suggests that amici can be influential but also acknowledging dissensus on this point).

150. *See, e.g.*, Spriggs & Wahlbeck, *supra* note 27, at 373 ("Much judicial research suggests that the Court's members find amicus briefs useful, borrowing from them when writing their opinions."). *But see* Caldeira & Wright, *supra* note 27, at 788 (suggesting that amici play a much more significant role at the certiorari stage than at the merits stage).

151. SUP. CT. R. 37(1).

152. *Id*. (emphasis added). The Federal Rules of Appellate Procedure also explicitly provide for the filing of amicus briefs. FED. R. APP. P. 29.

153. SUP. CT. R. 37(2)(a).

154. Caldeira & Wright, *supra* note 27, at 784; *see also* Collins, *supra* note 27, at 809 ("Though Supreme Court Rule 37 contains explicit guidelines regarding amicus curiae participation on the merits, in practice, the Court allows for essentially unlimited participation."). Amicus participation was not always as robust. The Court has at times been less liberal in accepting briefs and has even encouraged the solicitor general to deny consent to their filing. *See* Caldeira & Wright, *supra* note 27, at 785 (discussing Justice Frankfurter's "restrictive view" of amicus curiae briefs). In a memorandum to the other members of the Court, Justice Frankfurter once subtly alluded to the tension caused by nonparties making arguments different from those offered by the parties: "those responsible for arguing cases . . . ought not to be embarrassed by amici briefs that may give a different shape or twist to the argument . . . as the parties molded it." *Id.* at 784 (omissions in original) (quoting Justice Frankfurter) (internal quotation marks omitted). Justice Black responded by noting that "[m]ost of the cases that come before the Court involve matters that affect far more people than the immediate record parties." *Id.* at 784–85 (quoting Justice Black) (internal quotation marks

Although amicus briefs have been the focus of significant scholarly attention,[155] there has been no effort to square the Court's reliance on amicus briefs with its purported commitment to an adversarial system of justice. Indeed, not even the Court itself has attempted to explain why the practice is appropriate. To be sure, sometimes a dissenting justice will chastise the majority for relying on amicus briefs rather than the factual record developed below—in *FEC v. Colorado Republican Federal Campaign Committee*,[156] for example, a Justice criticized the majority for "not examin[ing] the record or the findings of the District Court, but instead rel[ying] wholly on the 'observ[ations]' of the 'political scientists' who happen to have written an *amicus* brief in support of the petitioner"[157]—but people in glass houses do sometimes throw stones. Justices who criticize the practice in one case often turn to amici to decide issues in the next without themselves acknowledging, let alone explaining, the tension between the Court's practice and its mythology.[158] It is that tension—its cause and its consequences—that I consider in the remainder of this Article.

III. A DIFFERENT KIND OF FACTS

This Article has focused thus far on what I have referred to as the adversarial myth—the belief that appellate courts rely on the parties to present relevant factual information, even as they regularly resort to extra-record facts that have not been thoroughly tested in the adversarial process. This myth, in turn, is based on yet another myth—the notion that the role of the courts is simply to apply clear legal rules to disputes between private parties.[159] In cases where the

omitted). Justice Black thought that "the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs." *Id.* at 785 (quoting Justice Black) (internal quotation marks omitted). And Justice Burton made a practice of considering whether the parties could sufficiently present the cert-worthiness of their case and whether the amici represented one of the party's points of view in deciding whether to allow an amicus brief to be filed. *Id.* at 785 n.4.

155. *See supra* notes 145–154 and accompanying text.

156. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).

157. *Id.* at 472 (Thomas, J., dissenting) (third alteration in original) (quoting *id.* at 449 (majority opinion)).

158. For example, the same Justice who criticized the use of amicus briefs in *Colorado Republican Federal Campaign Committee* has also used them himself. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2776–77 (2007) (Thomas, J., concurring) (relying on facts provided in the amicus briefs submitted in the case).

159. *See supra* note 41.

court's role is simply to apply clear legal rules, the standard procedures make sense because the relevant facts are ones particularly within the knowledge of those parties who will be most affected if the factual presentation is incomplete.[160]

But there are many cases that do not fit this model because the relevant facts are not so limited and because the courts are not simply applying settled law to disputed facts. Rather, in these cases, courts are crafting legal rules and principles—based on general facts about the state of the world—that will apply not only to the case at hand, but to many other cases as well. Resolving these types of cases requires consideration of a different kind of facts—facts about the larger world that are not uniquely within the knowledge of the parties to the litigation.[161]

This distinction between adjudicative facts and legislative facts—a distinction Professor Kenneth Culp Davis discusses in his 1942 article on "[p]roblems of [e]vidence in the [a]dministrative [p]rocess"[162]—can help explain the existence of the adversarial myth. Because the adversarial system and its rules were designed for adjudicative facts, courts tend to ignore the rules when they are considering cases that turn instead on legislative facts. And because courts have largely ignored this distinction between adjudicative and legislative facts,[163] they have failed to recognize both what they are doing and the need for new rules specifically equipped to address legislative facts.

I begin this Part by discussing the distinction between the two types of facts. I then explore what can be learned from the limited attention that this distinction has received in the case law. Finally, I

160. For a discussion of how the courts' standard procedures rely on parties to provide the courts with the relevant factual information, see *supra* Part I.B–C.

161. *See infra* notes 167–174 and accompanying text.

162. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) [hereinafter Davis, *Problems of Evidence*]; *see also* Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952–59 (1955) [hereinafter Davis, *Judicial Notice*]; *infra* Part III.C.

163. Davis, *Judicial Notice*, *supra* note 162, at 958 ("Only rarely have courts specifically articulated the distinction between legislative and adjudicative facts for purposes of judicial or official notice."); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 14 (1988) ("[R]elatively little explicit discussion of this distinction has appeared in judicial opinions."); *see also In re* Asbestos Litig., 829 F.2d 1233, 1245 (3d Cir. 1987) (Becker, J., concurring) ("The subject of legislative fact-finding is rarely discussed in the jurisprudence . . . .").

offer an explanation for why most courts have failed to meaningfully acknowledge this important distinction.

A. Explaining Legislative Facts

In the vast majority of cases, courts apply settled principles of law to disputed facts;[164] the main work of the court is to resolve the parties' disputes about what happened to whom and when. How the court resolves these disputes determines how the rule of law should be applied, but will have no effect on the rule of law itself. These facts that are related to the particular parties before the court—adjudicative facts[165]—are what courts and commentators most often have in mind when they refer to the "facts of the case."[166]

But there is another kind of fact that is no less important—and, in fact, is arguably more important—to the courts' resolution of many legal disputes. Unlike adjudicative facts, which deal with the particular, legislative facts deal with the general,[167] providing descriptive, and sometimes predictive,[168] information about the larger world. Not to be confused with facts found by a legislature,[169] these facts are called legislative facts because they are general and because

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164. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991).

165. David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991); *see also* Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 640 (1966) ("[A]djudicative facts . . . deal with particular circumstances, relating the actions of the parties to the law . . . .").

166. In perhaps the most famous scene in the classic film THE PAPER CHASE (Thompson Films 1973), the movie's protagonist is asked to "recite the facts of Hawkins versus McGee." *Id.* The facts he was expected to recite were "adjudicative facts," background facts about what had happened to the plaintiff to bring him into court—namely, that his hand had been injured, that the doctor had made it worse when he operated, and that the plaintiff now sought compensation for his "hairy hand." *Id. See generally* Hawkins v. McGee, 146 A. 641 (N.H. 1929).

167. Faigman, *supra* note 165, at 552 (describing legislative facts as ones that "transcend the particular dispute"); *see also* Alfange, *supra* note 165, at 640 ("[L]egislative facts . . . deal with general problems and demonstrate a need for legislation . . . ."); Keeton, *supra* note 163, at 11 ("[Legislative] facts are foundation facts. They are building blocks in the foundation on which the whole structure of reason is built for deciding cases. . . . [*Legislative*] *facts*, therefore, is shorthand for *facts that serve as premises for deciding an issue of law*.").

168. Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 99 ("[Legislative facts] look to the future. They tend to be facts which relate to other 'cases' which may never be decided." (footnote omitted)).

169. The term "legislative facts" is sometimes used to refer to those facts that are found by Congress in developing a record for the exercise of one of its enumerated powers. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) ("To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.").

they are used in the course of developing legal rules.[170] Legislative facts can take various forms; they might help the court understand the history of a given practice,[171] identify current realities,[172] or make predictions about the potential effects of legal rules that the court is considering adopting.[173] Although there will be many cases in which legislative facts play no role at all,[174] when such facts do play a role, they are often critical.

In the Proposition 8 case, for example, legislative facts were critical to the district court's determination that there was no rational basis for distinguishing between heterosexual and homosexual marriage. Because the primary rationales offered in support of the proposition were that children raised by heterosexual couples are better off than children raised by homosexual couples and that recognition of same-sex marriage would impair traditional marriage,[175] the court's factual findings focused on these two questions. These were questions of legislative fact, as opposed to adjudicative fact, because they focused not on any particular child or on any particular heterosexual couple's decision to marry, but rather on the general effects of same-sex adoption on children and the general effect of recognizing same-sex marriage on heterosexual marriage. The district court ultimately concluded that the children of same-sex couples benefit when their parents can marry,[176] and that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children

170. Some scholars have suggested that an alternative label is preferable to avoid confusion with those facts found by a legislature. *See, e.g.*, Keeton, *supra* note 163, at 9 n.22 ("I am uneasy . . . about misunderstandings that may arise from using the term *legislative facts* to describe not only those premises a legislature uses to enact a statute but also those that a court uses for judicial lawmaking."). Nevertheless, this remains the most common nomenclature.

171. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2790–99 (2008) (discussing historical sources to elucidate the purported meaning of the Second Amendment).

172. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2512 (2009) (discussing "evidence that [section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006),] fails to account for current political conditions").

173. *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2549–50 (2009) (Kennedy, J., dissenting) (discussing the consequences of the majority's opinion recognizing that lab analysts are "witnesses" within the meaning of the Sixth Amendment).

174. Davis, *Judicial Notice*, *supra* note 162, at 952 ("In the great mass of cases decided by courts and by agencies, the legislative element is either absent, unimportant, or interstitial, because in most cases the applicable law and policy have been previously established.").

175. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 931 (N.D. Cal.), *appeal pending*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

176. *Id.* at 973.

outside of marriage, or otherwise affect the stability of opposite-sex marriages."[177]

These factual findings, and others compiled by the district court, provided the basis for its legal conclusions. For example, when the court concluded that there was no rational basis to support the state's discrimination between same-sex and opposite-sex couples, it relied on its factual findings, including its determination that "[t]he evidence shows that the state advances nothing when it adheres to the tradition of excluding same-sex couples from marriage."[178] A district court that viewed these facts differently almost certainly would have viewed the law differently as well.

In the cases discussed in Part II, in which appellate courts looked outside the record to make factual findings, those facts were also legislative facts; they helped the courts formulate and apply legal rules by enabling them to better understand general facts about the world, as opposed to facts specific to the parties. For example, in *Citizens United*, the Court was concerned not with whether any particular corporation was burdened by its requirement to speak through a PAC, but with whether the requirement was generally so burdensome that it could be considered an outright ban on speech.[179] And the Court was concerned not with whether any particular expenditure caused corruption, but with whether expenditures generally cause corruption such that the government's anticorruption rationale would be a compelling interest sufficient to justify the First Amendment restriction.[180] Likewise, in the abortion cases I previously discussed, the Court was focused not on any particular woman, but on the general physical and emotional consequences of abortions.[181]

That courts must look to such facts is unsurprising. The establishment of any legal rule requires some understanding of the world in which that legal rule will operate; otherwise it is impossible to determine what its consequences will be and whether its

177. *Id.* at 972.

178. *Id.* at 998; *see also id.* (concluding that the "[p]roponents' asserted state interests in tradition are nothing more than tautologies and do not amount to rational bases for Proposition 8"). The same findings supported the district court's conclusion that Proposition 8 violated the plaintiffs' rights to due process. *Id.* at 994–95.

179. Citizens United v. FEC, 130 S. Ct. 876, 897 (2010) (discussing the "burdensome" nature of speaking through a PAC).

180. *Id.* at 909 (discussing the connection between independent expenditures and corruption).

181. *See supra* notes 128–140 and accompanying text.

implementation makes sense.[182] As one commentator has noted, "The ingredients of all lawmaking have to be policy ideas and facts, but the policy ideas are necessarily dependent, immediately or remotely, on facts."[183] It is no wonder, then, that the case law is replete with examples of court decisions—including significant ones in which the courts are settling highly contested legal issues—that turn on questions of legislative fact.[184]

This distinction between adjudicative and legislative facts helps explain why the legal system's adversarial commitment is often more myth than reality in the context of appellate factfinding. When legislative facts are at issue, adverse parties have less of an advantage over nonparties in presenting the facts because the relevant facts are not uniquely within the parties' knowledge.[185] Moreover, when legislative facts are at issue, it generally means the court is deciding a significant legal question that will have an impact that extends beyond the adverse parties. In such cases, other individuals and entities will often have an interest in advising the courts. As a result, rules and practices adopted for adjudicative facts make far less sense in the

182. *See* Jeffrey M. Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 236 (1983) ("Constitutional decisions, like all other legal decisions, are made by judges based upon their understanding of the world around them. Thus, constitutional law is determined by the judicial perception of factual reality." (footnote omitted)); *cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 ("[T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, *the consideration of policy consequences*." (emphasis added)).

183. Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931 (1980); *see also* Davis, *Judicial Notice*, *supra* note 162, at 949 ("A human being is probably unable to consider a problem—whether of fact, law, policy, judgment, or discretion—without using his past experience, much of which may be factual and much highly disputable.").

184. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003) (relying on legislative facts about the effect of diversity on higher education to conclude that diversity was a compelling interest that could justify some race-conscious admissions policies).

185. This is not to say that adverse parties can never—or do not ever—present the courts with legislative fact information. They undoubtedly do. Indeed, the famous "Brandeis brief," the brief in which Louis Brandeis "assembled all of the extant social science research on the detrimental impact of long work hours on the health of women," was the brief for the defendant state of Oregon in *Muller v. Oregon*, 208 U.S. 412 (1908). Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 93 n.5 (1993); *see also* Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783 (1958) (providing background on the "Brandeis brief"). My point is simply that adverse parties do not have the same advantage over nonparties when legislative facts are at issue as they do when adjudicative facts are. Of course, even the adversarial presentation of legislative facts can be a distortion of our traditional adversarial process when those facts are presented for the first time before an appellate court. *See supra* Part I.C.

context of legislative facts, and courts become more likely to look to extra-record facts in such cases.[186] Thus, the distinction between adjudicative and legislative facts helps explain why appellate court extra-record factfinding is pervasive and why, in that respect, the United States' commitment to an adversarial system of justice is more myth than reality.

B. Legislative Facts Let Loose

Although adjudicative and legislative facts are both important in the resolution of legal disputes, they are meaningfully different, and they play very different roles.[187] Given this reality, one might think that two sets of practices, procedures, and rules would be in place: one for adjudicative facts and one for legislative facts. Yet that is not the case.[188] Indeed, whereas rules and guidelines are in place to govern the former, the latter remain the subject of considerable confusion.[189]

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186. For a discussion of cases involving legislative facts in which appellate courts looked outside the record, see *supra* Part II.A.

187. *See* Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108 (1997) ("[S]tarting in 1991, there has been a substantial and continuing increase in the Court's citation of nonlegal sources. . . . [O]ur preliminary and informal examination indicates that there appear to be similar changes, although at lower levels and with some time lag, in the United States Courts of Appeals, the United States District Courts, the California Supreme Court, and the New York Court of Appeals.").

188. Even Judge Robert Keeton, who claims that "the legal system has developed one set of rules and practices for adjudicative facts and a different set of rules and practices for [legislative] facts," Keeton, *supra* note 163, at 14, seems to mean only that the courts regularly ignore the rules for adjudicative facts when legislative facts are at issue, not that there is a well-established set of rules and practices governing the development of legislative facts, *id.* at 23–24 & n.60 (citing *Massachusetts Medical Society v. Dukakis*, 815 F.2d 790 (1st Cir. 1986), for the proposition that appellate courts need not defer to district courts' resolution of legislative facts and explaining that "[a]lthough the First Circuit did not adopt [his] identification of the issue as a nonadjudicative, or [legislative], fact question, one may infer that it did not apply the rules of law and practice that ordinarily apply to adjudicative facts"); *cf. id.* at 14 n.36 ("The precedents and commentaries cited in support of other principles also implicitly support this principle.").

189. *See, e.g.*, James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae*, 14 LAW & HUM. BEHAV. 25, 26 (1990) (noting the "absence of formal procedures to assist the Court in locating or evaluating social science and other social fact information"); Richard B. Cappalli, *Bringing Internet Information to Court: Of "Legislative Facts,"* 75 TEMP. L. REV. 99, 103 (2002) ("No rules circumscribe how judges may receive legislative facts, it being a matter of their absolute discretion whether and how to consult them."); Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263, 1290 (2007) ("Judicial notice of legislative facts . . . is basically unregulated."); Cheng, *supra*, at 1267 ("[T]he rules governing independent research are astonishingly unclear."); Cathy Cochran, *Surfing the Web for a "Brandeis Brief": The Internet and Judicial Use of Legislative Facts*, 70 TEX. B.J. 780, 781 (2007) ("Judicial notice of legislative facts is limited only by a court's own sense of propriety."). In theory, ethical

As Professor Davis observes about the Supreme Court in particular, "[It] is a major lawmaker, but it has no procedure designed for lawmaking."[190]

The Federal Rules, for example, provide some guidelines for extra-record factfinding, but those guidelines apply only to adjudicative facts, not legislative ones. Federal Rule of Evidence 201 provides that courts, "whether requested or not," can take "judicial notice" of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[191] But the rule explicitly provides that "[it] governs only judicial notice of adjudicative facts."[192] Thus, the rule's requirement that a party, "upon timely request," be given "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter

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canons might affect how judges obtain legislative facts, *see, e.g.*, Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 135 (2008) (discussing the Model Code of Judicial Conduct), but in reality they operate as little constraint, *see id.* at 136 ("By including the reference to judicial notice . . . the Model Code opens a loophole. If the ethics rules are meant to incorporate the totality of federal and state evidence rules' approach to what judges can 'know' on their own, the research prohibition is a narrow one.").

190. Davis, *supra* note 47, at 5; *see also id.* at 7 ("[Courts] always have the needed adjudicative facts, that is, the facts about the immediate parties—who did what, where, when, how, and with what motive or intent. But courts often have inadequate legislative facts, that is, the facts that bear on the court's choices about law and policy."); *cf.* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 245 (5th Cir. 1976) ("Though a court, with its adversary procedure, is not necessarily precluded from resolving issues of legislative fact, it is generally thought that their determination is particularly appropriate to the administrative process, where staffs of specialists and great storehouses of information are available." (citation omitted)).

191. FED. R. EVID. 201(b)–(c).

192. *Id.* 201(a); *see also* United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976) ("Rule 201 . . . was deliberately drafted to cover only a small fraction of material usually subsumed under the concept of 'judicial notice.'" (omission in original) (quoting JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. MCLAUGHLIN, 1 WEINSTEIN'S EVIDENCE ¶ 201[01], at 201-15 (1996)) (internal quotation marks omitted)); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 899 (1992) ("The Rules' failure to address legislative facts has been criticized as too narrow and unambitious. This lack of guidance has led to concerns surrounding the process for noticing legislative facts." (footnote omitted)); Pieter S. de Ganon, Note, *Noticing Crisis*, 86 N.Y.U. L. REV. 573, 574 (2011) ("Judges take judicial notice of facts they deem relevant to a particular case. They may take judicial notice of 'adjudicative facts' . . . only when such 'facts are outside the area of reasonable controversy.' But no such sine qua non governs 'legislative facts' . . . . The scope of legislative facts is practically unlimited: Judges may invoke any legislative fact they choose, unconstrained by rules of evidence or procedure." (quoting FED. R. EVID. 201 advisory committee's note)).

noticed" does not apply to legislative facts.[193] As the Advisory Committee notes explain, "[A]ny limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level" would be inappropriate for legislative facts.[194]

The appropriate standard for appellate review of adjudicative facts is also clear,[195] but with respect to legislative facts, the question remains an open one. The Supreme Court has suggested that the typically deferential standard of review applicable to factual findings might not apply to "legislative findings,"[196] and some courts of appeals have taken the Court up on that suggestion.[197]

Moreover, even if courts of appeals are to review legislative facts de novo, the case law provides no framework for how they should do so. There are no procedures designed to ensure the quality of the sources on which the courts rely or to ensure that all views are adequately tested. Indeed, in the administrative context, courts have sometimes justified an administrative official's decision to look outside the submissions of the parties on the ground that he was only developing legislative facts, but even in these cases, the courts have

193. FED. R. EVID. 201(e).

194. *Id.* 201(a) advisory committee's note; *see also id.* (noting that judges who are attempting to determine domestic law "may make an independent search for persuasive data" and that "[t]his is the view which should govern judicial access to legislative facts").

195. *See supra* notes 91–92 and accompanying text.

196. *See* Lockhart v. McCree, 476 U.S. 162, 168 n.3 (1986) ("[Respondent] argues that the 'factual' findings of the District Court and the Eighth Circuit on the effects of 'death qualification' may be reviewed by this Court only under the 'clearly erroneous' standard of Federal Rule of Civil Procedure 52(a). Because we do not ultimately base our decision today on the invalidity of the lower courts' 'factual' findings, we need not decide the 'standard of review' issue. We are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here. The difficulty with applying such a standard to 'legislative' facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by [Respondent], has reached a conclusion contrary to that of the Eighth Circuit." (citation omitted)).

197. *See, e.g.*, Landell v. Sorrell, 382 F.3d 91, 135 n.24 (2d Cir. 2004) (noting that the Second Circuit "may ultimately undertake *de novo* review of any legislative facts found by the District Court on remand"), *rev'd sub nom.* Randall v. Sorrell, 548 U.S. 230 (2006); United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994) ("The clear error standard does not apply, however, when the fact-finding at issue concerns 'legislative,' as opposed to 'historical' facts."); *In re* Asbestos Litig., 829 F.2d 1233, 1252 n.11 (3d Cir. 1987) (Becker, J., concurring) ("Because the determination of legislative facts is thus a component of fashioning a rule of law, the clearly erroneous standard of Rule 52(a) does not apply to review of a federal court's findings concerning legislative facts.").

neglected to provide more general guidelines for how legislative facts should be found and how disputes about them should be resolved.[198]

The one context in which courts of appeals have recently given sustained attention to the distinction between adjudicative and legislative facts is in cases regarding abortion restrictions.[199] Although the courts seem to agree that general facts about the availability of abortions and the medical necessity of particular procedures are legislative facts, there is little agreement about what that classification means in terms of how appellate courts should go about finding those facts or reviewing the factual findings of district courts.

In *Hope Clinic v. Ryan*,[200] the Seventh Circuit considered the constitutionality of two state laws prohibiting partial-birth abortions: one district court had held an Illinois statute unconstitutional, whereas another district court had held a similar Wisconsin statute constitutional.[201] The Seventh Circuit, sitting en banc, concluded that both statutes could be applied in a constitutional manner depending on how they were construed by their respective state courts.[202] Nevertheless, it granted the plaintiffs injunctive relief, limiting the statutes' application to the "medical procedure that each state insists is its sole concern."[203] In reaching this result, the court concluded that the statutes, as limited to a specific procedure, would not unduly burden the right to abortion.[204] It relied primarily on the factual

198. *See, e.g.*, Zamora v. INS, 534 F.2d 1055, 1062 (2d Cir. 1976) ("The attitude of the country of prospective deportation toward various types of former residents is a question of legislative fact, on which the safeguards of confrontation and cross-examination are not required and on which the [immigration judge] needs all the help he can get.").

199. In a line of cases, primarily from the 1970s, the courts also invoked the distinction to determine whether an administrative proceeding was properly viewed as an adjudication or a rulemaking. *See, e.g.*, Heckler v. Campbell, 461 U.S. 458, 467–68 (1983) ("The second inquiry requires the Secretary [of Health and Human Services] to determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy. This type of general factual issue may be resolved as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing."); Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1165 (D.C. Cir. 1979) (concluding that the proceeding at issue was a rulemaking because, in large part, it was "directed to all members of an affected industry and [was] based on legislative fact").

200. Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (en banc), *vacated*, 530 U.S. 1271 (2000).

201. *Id.* at 861.

202. *Id.*

203. *Id.*

204. *Id.* at 871.

findings of the Wisconsin district court, but buttressed those findings with citations to additional studies.[205]

In dissent, Judge Richard Posner maintained that he had

> no objection to a court's relying on extra-record evidence to determine the health effects of "partial birth" abortion. Those effects should indeed be treated as a legislative fact rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges, sheltered by the deferential "clear error" standard of appellate review of factfindings, to different records—the inconsistency illustrated by the different findings of [the two judges] in the two cases before us.[206]

Yet, he further observed, "[W]e should hesitate to play statistician. It is incongruous for this court to brush aside the findings of district judges in other cases while bolstering [the Wisconsin judge's] inadequate findings with extra-record evidence of its own."[207] Further, even though the question

> is rightly an issue of legislative fact, meaning that its resolution is not to be cabined by facts determined in an adjudicative hearing; still it must be resolved in accordance with the weight of the evidence, including such extra-record evidence as the consensus of the relevant expert community, in this case the medical community.[208]

Appellate court cases in this area have focused on not only appellate courts' freedom to review lower court factual findings, but also appellate courts' freedom to revisit Supreme Court factual findings. Unsurprisingly, there is not a uniform view. According to the Eighth Circuit, when the Supreme Court makes a finding of legislative fact, such as "the medical necessity of a health exception . . . , subsequent litigants need not relitigate [the]

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205. *Id.* at 872.

206. *Id.* at 884 (Posner, J., dissenting); *see also id.* at 883 ("Consistent deference to district court factfindings in this pair of cases would lead to an inconsistent result—the upholding of one statute and the condemnation of its sister. This demonstrates that the constitutional right of abortion cannot be made to depend on whether a particular district judge finds a particular physician who disagrees with the consensus of medical opinion to be more credible than the spokesmen for the consensus.").

207. *Id.* at 884.

208. *Id.* at 885. Judge Posner criticized the majority's suggestion that the statutes could be upheld so long as there was some "real, and not just hypothetical, support for a belief that the partial-birth-abortion laws do not pose hazards [to] maternal health." *Id.* (quoting *id.* at 873 (majority opinion)).

question[].”[209] Thus, in light of a Supreme Court decision that was then just five years old, the Eighth Circuit concluded that a ban on partial-birth abortions required a health exception.[210] Although the Eighth Circuit’s trust in the consistency of Supreme Court factual findings may have been misplaced,[211] other courts have adopted this view.[212] The Seventh Circuit, however, while suggesting that it probably should consider the Court’s findings of legislative fact binding,[213] nonetheless declined to do so, deciding instead to “review the evidence in [the record before it]” because “the Supreme Court ha[d] not made this point explicit.”[214] The Second Circuit, too, has taken this view.[215]

From these conflicting opinions, a few points emerge. First, many appellate courts view themselves as free to review legislative facts de novo, lest different courts adopt different positions on issues as to which there should be uniformity. As the Eighth Circuit explained,

> [A]ppellate courts can impose uniformity within their jurisdictions by according no deference to a lower court’s record-based conclusions. Indeed, adopting a deferential posture in such

209. Carhart v. Gonzales, 413 F.3d 791, 800 (8th Cir. 2005), *rev’d*, 550 U.S. 124 (2007); *see also id.* at 802 (“There is some evidence in the present record indicating . . . the banned procedures are never medically necessary. There were, however, such assertions in *Stenberg* as well.” (citation omitted)).

210. *Id.* at 796–97.

211. The Supreme Court subsequently reversed the Eighth Circuit’s decision. Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

212. *See, e.g.*, Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 625 (4th Cir. 2005) (“*Carhart* established the health exception requirement as a *per se* constitutional rule. This rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a ‘partial birth abortion’ statute lacking a health exception.”), *vacated sub nom.* Herring v. Richmond Med. Ctr. for Women, 550 U.S. 901 (2007).

213. A Woman’s Choice–E. Side Women’s Clinic v. Newman, 305 F.3d 684, 688 (7th Cir. 2002) (“[I]f the issue is one of legislative rather than adjudicative fact, it is unsound to say that, on records very similar in nature, [one] law could be valid . . . and [one] invalid, just because different district judges reached different conclusions about the inferences to be drawn from the same body of statistical work.”).

214. *Id.*; *see also Hicks*, 409 F.3d at 632 (Niemeyer, J., dissenting) (arguing that the Supreme Court did not apply a per se rule but instead concluded that the “findings and evidence” in the record supported the view that a health exception was required).

215. Nat’l Abortion Fed’n v. Gonzales, 437 F.3d 278, 287 (2d Cir. 2006) (“*Stenberg* does not leave it to a legislature (state or federal) to make a finding as to whether a statute prohibiting an abortion procedure constitutionally requires a health exception. On the contrary, *Stenberg* leaves it to the challenger of the statute . . . to point to evidence of ‘substantial medical authority’ that supports the view that the procedure might sometimes be necessary to avoid risk to a woman’s health.”), *vacated*, 224 F. App’x 88 (2d Cir. 2007).

> circumstances could lead to the absurd result where two district courts within the same circuit . . . might examine the same body of evidence and reach different conclusions as to the medical necessity of the partial-birth abortion procedures, but we would be forced to affirm both because the question is a close one.[216]

Of course, exactly what constitutes a legislative fact remains somewhat unclear: for example, the Seventh Circuit held that a district court's conclusions about studies were entitled to deference, but not its conclusions about the "*significance*" of those studies.[217]

Second, and related, even if review of legislative facts need not be as deferential as review of adjudicative facts, there is little consensus on how active appellate courts should be in engaging in that review. An appellate court might, as Judge Posner suggested, decide that it is no better positioned than the court below to assess conflicting statistical studies.[218] As Judge Diane Wood noted in one of these abortion cases,

> It is unclear at best to me why the two judges in the majority on this panel think that they know better than the district court judge, who heard all the testimony and weighed all the evidence, what the answer is to the question whether a critical number of Indiana women would experience the [statutory restriction] as such a significant burden that it would effectively prevent them from exercising their constitutionally protected choice.[219]

That said, one can query whether Judge Posner or Judge Wood would still have been hesitant to second-guess the district court if they had disagreed with its findings.[220]

Third, there is a real danger when judges, inexperienced in making empirical judgments and unrestrained in how they do so, are forced to make factual determinations that are highly contestable and

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216. Carhart v. Gonzales, 413 F.3d 791, 799 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); *see also id.* at 800 (suggesting that "constitutional uniformity" can best be achieved by "treat[ing] the issue as one of legislative fact"); *Newman*, 305 F.3d at 688 ("[C]onstitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges."); *cf. Newman*, 305 F.3d at 689 ("Th[e] admixture of fact and law, sometimes called an issue of 'constitutional fact,' is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.").

217. *Newman*, 305 F.3d at 689.

218. *See supra* note 207 and accompanying text.

219. *Newman*, 305 F.3d at 711 (Wood, J., dissenting).

220. *Cf. id.* at 715 (concluding that the district court's findings should stand whether reviewed de novo or under an abuse-of-discretion standard).

ideologically laden without any guidelines. This is particularly true when many of the "studies" on which courts might be tempted to rely arguably reflect the ideological biases of their authors.[221] In *Hope Clinic*, Judge Posner criticized the majority's review of extra-record evidence, noting that it relied on one article, which was "not a medical paper at all," and another that was focused primarily on the "ethical issues involved in abortion," while ignoring entirely another article in the same issue of the journal that reached the opposite conclusion.[222] In *A Woman's Choice–East Side Women's Clinic v. Newman*,[223] Judge John Coffey criticized the trial court for basing its factual findings on "a faulty study by biased researchers who operated in a vacuum of speculation."[224]

Fourth, and perhaps most significantly, there is real confusion about how the courts should treat legislative facts.[225] As I noted at the outset, the courts have not adopted established practices for dealing with legislative facts and, as a result, the distinction between adjudicative and legislative facts is often ignored. It is perhaps a surprising state of affairs given the prevalence of legislative facts. In the next Section, I offer an explanation for why this might be.

C. Willful Ignorance of Legislative Facts

Legislative facts are, in some sense, the proverbial elephant in the room—no one points or stares, even though chaos could ensue at any moment.[226] This lack of attention is, I argue, somewhat willful, even if not intentional. If courts were to recognize that legislative facts often play an important role in their decisions, then they would also have to recognize *why* legislative facts are important—namely, that courts are sometimes required to develop legal rules in a way

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221. *See* Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 232 (2000) ("Non-legal information itself may be the product of biased, advocacy-driven research.").

222. Hope Clinic v. Ryan, 195 F.3d 857, 884 (7th Cir. 1999) (en banc) (Posner, J., dissenting), *vacated*, 530 U.S. 1271 (2000).

223. A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002).

224. *Id.* at 694 (Coffey, J., concurring) ("[T]he 'key' piece of evidence relied upon by the district court was a study published in the . . . *Journal of the American Medical Association* [and] co-authored by a statistician employed by the Planned Parenthood-affiliated Alan Guttmacher Institute." (quoting *id.* at 713 (Wood, J., dissenting))).

225. *See supra* notes 200–224 and accompanying text.

226. The abortion cases just discussed are the exception that proves the rule; there are few other judicial opinions that give the same sustained attention to how courts should treat legislative facts.

that necessitates evaluation of the same kind of information considered by legislators.[227] For institutions that are committed to maintaining a more limited conception of their role,[228] such recognition could prompt nothing short of an existential crisis.

The history of scholarly recognition of the distinction between adjudicative and legislative facts is telling. Professor Davis discusses the distinction at length in his seminal work on the administrative process.[229] In setting out a number of "broad tentative principles" to assist agencies in developing processes for handling problems of evidence, he writes that "[t]he rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case."[230] He explains that "[w]hen an agency finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts."[231] By contrast, "[w]hen an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts."[232] "The distinction is important," he explains, because "the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts."[233]

Thus, the distinction between these two types of facts was first made in the context of the administrative process, where agencies

227. *See* Davis, *supra* note 47, at 1 ("Even though the Constitution explicitly puts the legislative power in Congress, judicial legislation is so deeply established that the legal profession takes it for granted, as though nature provided it.").

228. *See, e.g.*, *id.* (noting that "criticism of judicial lawmaking is plentiful").

229. Davis, *Problems of Evidence*, *supra* note 162, at 402–03. Professor Kenneth Culp Davis's work focuses on "problems of evidence in the administrative process," and his discussion of the distinction between adjudicative and legislative facts thus examines their role in administrative adjudication, not in judicial decisionmaking. *Id.*

230. *Id.* at 402.

231. *Id.*

232. *Id.*

233. *Id.* at 402–03; *see also id.* at 402 ("Frequently agencies' choices of law or policy must depend on fact-finding. But the fact-finding process for such purposes is different from the process of finding facts which concern only the parties to a particular case and calls for different rules of evidence.").

explicitly engage in both adjudication and rulemaking. Courts, by contrast, are traditionally—and erroneously—thought to be in the business of only adjudication, not rulemaking, and they thus have been unwilling to acknowledge that they need facts that are relevant to the latter task. To be sure, subsequent scholars have acknowledged that the distinction is also relevant to the work of courts, but scholars are much more willing than courts—particularly contemporary courts[234]—to acknowledge that courts not only apply law, but also make it.[235]

As a result, even though as a descriptive matter, legislative facts often are—and have been—critical to court decisions, courts often fail to explicitly recognize that their decisions about legal rules are turning on legislative facts. Whatever the explanation for the courts' failure to grapple with the pervasive role of legislative facts in judicial decisionmaking may be, the consequences of that failure are significant—perhaps as significant as the influence of legislative facts themselves. As I discuss in the next Part, the courts' failure to

234. The mere suggestion by Supreme Court nominee Sonia Sotomayor that unelected judges do, in fact, make policy was the source of considerable controversy during her confirmation battle. *See, e.g.*, Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, at A21 (discussing then-Judge Sotomayor's public statements regarding the role of judges); *see also* Emmett S. Collazo, *Applying the Rule of Law Subjectively: How Appellate Courts Adjudicate*, 4 SETON HALL CIR. REV. 303, 304 (2008) ("A ritual is enacted whenever a nominee for a federal judgeship appears before the Senate Judiciary Committee as part of the confirmation process. One Senator will ask, 'Do you intend to apply the law rather than make it?' Another will ask, 'Will you apply the words of the Constitution in the way that the framers intended?' Nominees, some of whom ought to know better, play their part in the ritual by answering 'Yes' to both questions."); Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391, 395 (2010) ("This vision of the judiciary as little more than umpires or referees at sporting events has become so pervasive that even jurists who would never contemplate describing themselves as conservatives are now rushing to establish their credentials as unmoved and unmoving enforcers of the proscribed rules and procedures.").

235. *See, e.g.*, George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1601 (2008) ("Common law courts are certainly engaged in the business of making law and policy. . . . [A]nyone who contends otherwise is falling into the trap of magisterial visions of the judiciary that have been discredited by legal realism and the work of political scientists."); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 504 (1994) ("[T]he fundamental insight of [Holmes's] legal realism is that judges can make and unmake law (though they customarily deny that this is what they are doing) . . . ."); Scot W. Anderson, Note, *Surveying the Realm: Description and Adjudication in* Law's Empire, 73 IOWA L. REV. 131, 133 (1987) ("In contrast to the declaratory theory of the natural lawyer, legal realism holds that judges only make law and never find law."). *But see* Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 78–80 (2009) (arguing that "judges have long admitted that they make law").

forthrightly acknowledge the role of legislative facts manifests itself in their decisionmaking and in their presentation of those decisions. It also means that insufficient attention has been paid to a more fundamental question: Are the rules and procedures that have been developed for resolving cases that turn primarily on adjudicative facts appropriate for cases that turn instead on legislative facts? I consider each of these issues in turn.

IV. THE TROUBLING CONSEQUENCES OF THE ADVERSARIAL MYTH

As previously noted, the distinction between adjudicative and legislative facts has received relatively little attention in the academic literature and even less in the case law. Even if unsurprising, the courts' disinterest is troubling. The courts' failure to recognize the distinction between adjudicative and legislative facts is largely responsible for the aspect of the adversarial myth that is the focus of this Article—appellate courts' purported commitment to an adversarial system of justice, even as they rely on extra-record facts presented by nonparties. And that myth has profound implications for the ways in which the courts resolve factual disputes and present the resolution of those disputes to the public. In this Part, I discuss several of the most troubling aspects of the courts' persistent belief in the adversarial myth.

A. Unfounded Assumptions

It is often said that everyone is entitled to his own opinion, but not to his own facts.[236] The difference between opinion and fact, however, is often subtle.[237] Value judgments often depend, to greater or lesser degrees, on the resolution of empirical questions about the larger world, and people often assume the answers to such questions unless they are confronted with objective evidence that their assumptions are unfounded.[238] When a case turns largely on

236. The expression originated with the late Senator Daniel Patrick Moynihan of New York. Steven R. Weisman, *Introduction* to DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY 1, 2 (Steven R. Weisman ed., 2010).

237. *Cf.* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 660 n.305 (1990) ("The legal interpretation of the fact/opinion distinction will . . . ultimately reflect our understanding of our own culture's separation from nature.").

238. *Cf.* John Veilleux, Note, *The Scientific Model in Law*, 75 GEO. L.J. 1967, 1990 (1987) ("Legal scholars and parties to litigation increasingly draw on empirical evidence to challenge the assumptions underlying legal rules and to influence factfinding by courts.").

adjudicative—as opposed to legislative—facts, the trier of fact is less likely to have preconceived notions about the factual questions that underlie a decision, at least outside of certain highly publicized cases, in which media accounts might inform the trier's understanding of what happened. Indeed, in such highly publicized cases, there are often motions to change venue precisely so that the triers of fact will not come into the case with preconceived notions about what happened.[239]

Yet when cases turn on legislative facts, judges—whether they recognize it or not—are far more likely to have preconceived views about those facts. Public opinion polls show that most Americans have views on the empirical questions that underlie some of the most high-profile cases that are currently working their way through the legal system. For example, people tend to have opinions about whether children are, generally speaking, affected by being raised by a same-sex couple, or whether the service of openly gay, lesbian, and bisexual individuals in the military will affect unit cohesion.[240] There is no reason to think that judges will not also have preformed views on these types of factual questions.[241]

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239. *See* FED. R. CRIM. P. 21(a) ("Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.").

240. *Cf. Same-Sex Marriage, Gay Rights*, POLLINGREPORT.COM, http://www.pollingreport.com/civil.htm (last visited Sept. 5, 2011) (reporting polling results on public views on same-sex marriage and the service of openly gay and lesbian individuals in the military).

241. *See, e.g.*, Miller & Barron, *supra* note 41, at 1222 ("The Justices bring certain predilections, sometimes known and sometimes unknown, to the decisional process."); David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1794 (2009) (reviewing RICHARD A. POSNER, HOW JUDGES THINK (2008)) ("Political and personal factors, according to Posner, generate preconceptions, often unconscious, that affect judicial decision making." (citing POSNER, *supra*, at 11)); *cf. In re* J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943) (Frank, J.) ("If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices."); Karst, *supra* note 168, at 84 ("[A]ll of [these questions of legislative fact relevant to a case] are answered, whether or not the judge recognizes what he is doing. If he does not hear testimony or receive memoranda illuminating these questions, he assumes their answers on the basis of his own experience and education."); Frank S. Ravitch, *Can an Old Dog Learn New Tricks? A Nonfoundationalist Analysis of Richard Posner's* The Problematics of Moral and Legal Theory, 37 TULSA L. REV. 967, 975 (2002) (book review) ("Society is more likely to accept decisions made based on empirical approaches and data, and the judge is more likely to question his or her preconceptions when confronted with empirical

The fact that judges have these preformed views is not necessarily problematic. Indeed, if it were a problem, it would likely be an insoluble one: selecting only individuals who pay no attention to the world around them would hardly be an ideal way to put together a strong judiciary. But it becomes problematic when those preformed views become the basis for a court's decision in a case. To put it slightly differently, when a case turns on adjudicative facts, there is generally little question about the relevance of those facts. For example, in a murder case, most jurors will recognize the centrality of the fact that the victim was killed between 9:45 and 10:15 p.m. and that someone was seen leaving the scene at 10:00 p.m. As a result, these facts will be thoroughly tested during the course of the trial. In the context of cases involving legislative facts, however, judges may not recognize that factual findings susceptible to empirical investigation are central to their ultimate legal conclusions. For example, in the same murder case, if there were evidence obtained in violation of the Fourth Amendment, the court would need to decide whether that evidence should be excluded from trial,[242] a decision that ultimately turns on whether exclusion would "result[] in appreciable deterrence."[243] The question of whether excluding certain evidence will "result[] in appreciable deterrence" can be answered only with reference to subsidiary empirical questions about police behavior and

data or when adopting an empirical approach to decision making."). There is reason to think, for example, that Justice Jackson's pragmatic view of executive power was the result of his own experience as attorney general. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction."). *See generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 354–70 (2010) (discussing *Youngstown*).

242. *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 699 (2009) ("The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' but 'contains no provision expressly precluding the use of evidence obtained in violation of its commands.' Nonetheless, our decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial." (alteration in original) (quoting U.S. CONST. amend. IV; and Arizona v. Evans, 514 U.S. 1, 10 (1995))).

243. *Id.* at 700 (quoting United States v. Leon, 468 U.S. 897, 909 (1984)) (internal quotation marks omitted).

what affects it.[244] But it is less obvious that these subsidiary questions are as central to the court's legal conclusion as the adjudicative fact question, which is central to a determination of the defendant's guilt.

If judges are not conscious that they are making decisions that turn on legislative facts, then they may rest their decisions on assumptions—often unfounded assumptions—about the world around them and the way it operates.[245] As well educated and informed as members of the judiciary may be, there is no reason to think that they are well versed in all of the considerations that might inform a decision that turns on these types of empirical questions.[246] When legislators are deciding whether to enact legislation, the wisdom of which turns on empirical questions, they generally hold hearings to determine whether the legislation would be helpful.[247] Courts often issue decisions that turn on the exact same questions, but because they fail to recognize that their decisions are turning on such factual questions, they do not engage in any attempt to gather the relevant facts, even to the extent that their institutional resources might allow them to do so.[248] Thus, their opinions necessarily become dependent upon guesswork, intuition, and general impressions. They

244. *See, e.g.*, *Leon*, 468 U.S. at 927 (Blackmun, J., concurring) (noting that the adoption of the exclusionary rule involved an "empirical judgment").

245. *See* Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981) (Weinstein, C.J.) ("[W]hether we explore the economic, political or social settings to which the law must be applied explicitly, or suppress our assumptions by failing to take note of them, we cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts—and this effort requires judicial notice to educate the court."); Keeton, *supra* note 163, at 15 ("Judges do come to their roles of judging with knowledge that has influence on their legal thinking. Descriptively that is so, whether it is acknowledged or not.").

246. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2769 (2011) (Breyer, J., dissenting) ("Experts debate the conclusions of all these studies. . . . I, like most judges, lack the social science expertise to say definitively who is right."); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 125 (2009) ("Because of the explosion of federal law, it has become impossible for generalist judges sitting on federal district and circuit courts to develop specific expertise with respect to many of the subjects that come before them.").

247. *See, e.g.*, Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 363 n.204 (1987) ("[C]ommittee hearings provide an effective and useful means of securing relevant facts . . . .").

248. *See, e.g.*, Davis, *Judicial Notice*, *supra* note 162, at 953 ("[T]he opinion which specifically identifies extra-record materials used in creating law or in determining policy may involve less reliance on extra-record information than the more conventional opinion purporting to rest exclusively upon the record but which in reality is heavily dependent upon the assumption of unproved facts that are left vague and unidentified.").

may assume that a particular belief is established "fact" even when there is no basis for that assumption.

B. Lack of Rules and Regulations

Recognizing the significance of legislative facts will only get courts so far in the absence of established procedures to guide them in resolving legislative fact disputes. In the absence of such rules, courts may simply make up the rules as they go along. Sometimes courts make assumptions based on background knowledge and understandings,[249] and sometimes courts engage in their own research, scouring historical records and social science reports.[250] Sometimes courts will look to another court's resolution of the same or related factual questions, even if there is no reason to think that the other court was any better equipped to resolve the question.[251] As discussed in Part II.B, courts will often turn to amicus briefs that make factual claims about the larger world. As the examples I discussed in the prior Parts suggest, such reliance on extra-record facts frequently happens in the most significant cases the courts confront.

As an initial matter, this lack of established rules and regulations almost certainly creates inequities between litigants.[252] Courts will choose whether or not to engage in additional research based on the topic of the case and the resource constraints facing the judge. Sometimes a court will give parties an opportunity to respond to its

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249. *See* Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1542 (1987) ("[The] legal enshrinement [of legislative facts] is casual and unselfconscious, and their assessment often superficial and skewed by litigation imbalances.").

250. *See, e.g.*, Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 320 (2011) ("The majority of judges responded that they engage in additional research to compensate for . . . disparities [in legal representation] when they arise."); *see also* Cochran, *supra* note 189, at 781 ("Because of the ease of finding nonlegal information on the Internet, both practitioners and judges are referring to more sociology, psychology, criminology, medical, and economics texts and journals and to more nonacademic books, magazines, and newspapers."). For a good discussion of "independent judicial research," see generally Cheng, *supra* note 189. Cheng argues that judges should be "encouraged" to engage in independent research and notes that the judiciary is "extremely divided" on the propriety of such activity: "roughly equal numbers of judges support[] independent research enthusiastically, denounc[e] it vehemently, and appear[] undecided." *Id.* at 1266–67.

251. *See, e.g.*, *supra* notes 119–120 and accompanying text.

252. *See* Thornburg, *supra* note 189, at 139 ("[D]ivergent views [regarding independent research] may indicate that the nation's judiciary is also divergent in its practices—different litigants may be subject to differing treatment, often without even knowing it."). Such inequities can in turn hurt the legitimacy of the courts, which are supposed to treat all litigants the same.

extra-record research, and sometimes it will not. There is no reason the courts' treatment of legislative facts should vary across cases and litigants, but, in the absence of rules and guidelines governing the use of such facts, variance is inevitable.

The absence of established rules and procedures also means that courts will often not find the legislative facts that they need to reach the proper result in a case. As one commentator has explained:

> In a world in which parties had unlimited and equal resources, relying on the parties to supply information relevant to a court's lawmaking function would be safe. . . . Real courts do not operate in that ideal world, however, and the presentation of evidence can be skewed by inadequate party resources or incentives.[253]

To be sure, courts can—and often will—search out the relevant facts themselves; yet even though courts may have the power to search out the relevant facts, there is little reason to think that they will always avail themselves of that power or be successful in doing so.

Finally, even when courts do attempt to find the relevant legislative facts on their own, they do so without the benefit of processes that will help ensure that those facts are accurate and properly applied.[254] As I noted at the outset, in a world of highly contestable facts, judges cannot easily discern factual reality simply by picking up a book. Yet virtually no attention has been paid to how courts find "facts" when those facts are legislative in nature.

In theory, district courts are structured to allow for the taking of evidence and the resolution of factual conflicts.[255] Justice Scalia has

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253. *Id.* at 188; *see also* Posner & Yoon, *supra* note 250, at 320 (noting that federal judges perceive significant disparities in the quality of legal representation, particularly in the fields of "immigration and civil rights").

254. *See, e.g.*, Rustad & Koenig, *supra* note 185, at 94–95 ("At trial, when statistical and social science evidence is employed, 'it will be the subject of expert testimony and knowledgeable cross-examination from both sides.' Amicus briefs are not subject to the same safeguards." (quoting Wilkins v. Univ. of Hous., 654 F.2d 388, 403 (5th Cir. 1981), *vacated*, 459 U.S. 809 (1982))); *see also id.* at 113 ("The Court routinely receives social science information in amicus as well as main briefs without subjecting it to quality control.").

255. One can query, of course, whether district courts are structured to allow for the resolution of legislative facts, as opposed to adjudicative facts. Professor Davis, while recognizing that trial courts are better positioned to engage in such inquiries than appellate courts, *see* Davis, *supra* note 47, at 11 ("When legislative facts are needed for a sound decision, a trial court can do better than an appellate court, because it is free to take evidence on questions of legislative facts. Some trial courts do so, with desirable results."), nonetheless recognizes that they are not especially well equipped to do so either, *see id.* ("[T]he normal evidence-taking process may be a total misfit for legislative facts. . . . As the law [regarding the Federal Rules of Evidence] was interpreted, the court was barred from considering precisely the kind of

pointed to this fact in arguing that factual development should occur before trial courts, and not in Supreme Court briefs: "An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all."[256] In the context of adjudicative facts, this structure often entails competing witnesses and cross-examination. In the context of legislative facts, this structure often means not only competing witnesses and cross-examination, but also strict standards that govern whether the evidence is admissible.[257] It is unclear why procedural safeguards are considered more necessary at the district court level than at the appellate court level. If anything, one might think the opposite would be true, especially when the comparison is between adjudicative facts at the district court level and legislative facts at the appellate court level. Legislative facts will often be more complicated than adjudicative facts, and the resolution of any legislative fact will

information that was most helpful and most needed."). But as some judges have noted, there are ways for trial courts to more creatively engage in the discovery of legislative facts. *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) ("[A]s cases presenting significant science-related issues have increased in number, judges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence. Among these techniques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks." (citation omitted)).

256. Sykes v. United States, 131 S. Ct. 2267, 2286 (2011) (Scalia, J., dissenting); *see also id.* (discussing various potential flaws in the data on which the majority relied and concluding that "[the Court's] statistical analysis in [Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2006),] cases is untested judicial factfinding masquerading as statutory interpretation"). Notwithstanding Justice Scalia's pointed criticism of the majority in *Sykes*, he often cites amicus briefs and other extra-record materials to support factual claims in his own opinions. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2736–41 (2011) (citing amicus briefs filed by the Cato Institute and the Comic Book Legal Defense Fund and a 1955 *Harvard Law Review* note).

257. Often the presentation of legislative facts will require the testimony of experts with specialized knowledge in the field; the admission of such expert testimony is governed by the Federal Rules of Evidence, as well as by case law. *See* FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993) (establishing the standard for assessing the admissibility of novel scientific evidence); *see also* Lewis A. Kaplan, *Experts in the Courthouse: Problems and Opportunities*, 2006 COLUM. BUS. L. REV. 247, 254 ("Even where we have full cross-examination of competing expert witnesses, we are not always as capable as we would like to be in reaching reliable, reasoned decisions.").

have a much more significant impact on society as a whole. Moreover, in the vast majority of cases, the appellate court's word on the subject will be the final one, given the limited scope of Supreme Court review.[258]

Some have argued that traditional adversarial testing may be less valuable when legislative facts—as opposed to adjudicative facts—are at issue,[259] but even if that argument is right, it does not follow that there should be no testing of legislative facts at all,[260] as is often the case when they come to the Court's attention through amicus briefs. To be sure, there will sometimes be competing claims in amicus briefs, but that will not always be the case. Moreover, as previously noted, page limitations make briefs an awkward mechanism for addressing factual claims and expert testimony. After all, as much space as it may take to explain a factual claim based on empirical evidence, it will likely take even more to explain why that claim is wrong and offer an alternative understanding.[261] Thus, amicus practice presents, at best, a limited and ad hoc opportunity for the

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258. *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987) ("[T]he Justices have only 150 full opportunities yearly to carry out their function. No one suggests this number could be increased very much. Given the steady, if not explosive, growth of the Court's potential docket, each of these 150 cases represents an increasingly precious opportunity for the Court to perform its supervisory task." (footnote omitted)).

259. *See, e.g.*, Cheng, *supra* note 189, at 1281 ("In the scientific evidence context . . . . adversarialism may be ineffective or even counterproductive . . . ."); *see also, e.g.*, Broz v. Schweiker, 677 F.2d 1351, 1357–58 (11th Cir. 1982) ("Trial procedure is best suited for adjudicative facts because the best source of information about specific facts concerning the individual parties is the parties themselves. Facts that concern scientific truths, sociological data, and industry-wide practices, on the other hand, are not peculiarly within the knowledge of the parties and are not of the type that generally would be aided by viewing the demeanor of witnesses, by cross-examination, and other aspects of adversarial factual development."), *vacated*, 461 U.S. 952 (1983).

260. Professor Michael Saks seems to take the view that special procedures for the examination of legislative facts are unnecessary because, even if courts' treatment of legislative facts is sometimes sloppy, the same is true of courts' treatment of cases and statutes. *See* Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1023–24 (1990) ("[The] complaint that courts are careless about the social inquiries they make is of a different order than whether they should conduct such inquiries. . . . [This] complaint is no different from a complaint that a court has indulged in a casual or careless reading of cases or statutes."). But this argument ignores the fact that judges are trained in the reading of cases and statutes, even if they may often do so imperfectly. Judges have no special training for the type of research that goes into determining legislative facts.

261. In any event, whatever discussion of factual claims might occur in amicus briefs, none of those claims are subjected to the same sort of vigorous adversarial testing that ideally occurs in the district court.

presentation of adversarial ideas, not the structured opportunity for give-and-take presented by the party-centered adversarial system. The paradoxical result of the courts' inattention to this tension is that those facts that are most in need of meaningful testing are often least likely to receive it.[262] This lack of proper testing can affect not only the quality of a court's decision in any given case, but also the courts' overall legitimacy.[263]

C. Transparency

In the two preceding Sections, I have discussed how the courts' inattention to the difference between legislative and adjudicative facts can affect the courts' decisionmaking. But that inattention affects not only how courts make decisions, but also how they present their decisions to the public and to other governmental actors. As a general matter, the judicial process is often shrouded in mystery—a veritable black box.[264] The general public's window into the process by which courts resolve judicial disputes is often quite narrow.[265] To be sure, briefs are publicly available, and oral arguments sometimes are. But deliberations are conducted outside public view,[266] meaning that the public often has little understanding of why a court made the decision it did. This secrecy can give rise to a lack of understanding and to a

262. *See* Davis, *supra* note 183, at 940 ("When only the immediate parties are affected, allocating the burden of producing legislative facts and holding against a party who fails to sustain his burden is both customary and sound. But when the Court is making law that affects the many, and especially when it holds legislation unconstitutional, nothing less than adequate factual development can be acceptable.").

263. Margolis, *supra* note 221, at 209 ("Consistent misuse of non-legal information can serve to undermine a court's legitimacy, the court may appear irrational, and its decisions may be considered unpersuasive.").

264. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987) ("[T]o a large extent, the [Court's Fourth Amendment] balancing takes place inside a black box. Of course, the hidden process raises the specter of the kind of judicial decisionmaking that the Realists warned us about and that balancing promised to overcome." (footnote omitted)).

265. *See, e.g.*, F. Dennis Hale, *Court Decisions as Information Sources for Journalists: How Journalists Can Better Cover Appellate Decisions*, 23 U. ARK. LITTLE ROCK L. REV. 111, 111–12 (2000) (discussing the difficulties of reporting on appellate courts and the importance of the published opinion).

266. *See* Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 47–48 (2004) ("Apart from the final opinion or the publication of briefs, oral argument is the only public proceeding in the appellate process.").

lack of faith that judges' decisions are motivated by proper considerations.[267]

The only meaningful counter to this secrecy is the judicial opinion. As old as the courts themselves, judicial opinions are supposed to be transparent in both their conclusions and their reasoning. By explaining courts' decisions to the public, they facilitate public knowledge and public understanding of those decisions.[268] As two commentators note, "[P]ublishing an opinion can help ameliorate legitimacy concerns. The opinion allows the judges to explain their reasoning."[269] Moreover, the judicial opinion can "advance[] the goal of judicial constraint . . . by limiting idiosyncratic or ideological decisionmaking."[270] In the absence of the explanation judicial opinions provide, judicial decisions, particularly controversial ones, might find less acceptance by the public.[271] Judicial opinions also enable other governmental actors, such as Congress, to respond more effectively to the Court's decisions.[272] But the courts' failure to acknowledge that

267. This concern is not trivial because "public acceptance [of the Court's decisions] is not automatic and cannot be taken for granted." STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW, at xiii (2010).

268. *See* Ryan Benjamin Witte, *The Judge as Author/The Author as Judge*, 40 GOLDEN GATE U. L. REV. 37, 40 (2009) ("The last audience of judicial opinions is the general public. Although the general populace rarely reads more of court opinions than the quotes they gather from the newspaper, it is nonetheless important that judges keep the layperson in mind when crafting their opinions."); *cf.* Carl A. Auerbach, Essay, *A Revival of Some Ancient Learning: A Critique of Eisenberg's* The Nature of the Common Law, 75 MINN. L. REV. 539, 557 (1991) ("Judicial decisions and opinions may educate the legislature and public and alter prevailing notions of morality and policy.").

269. Abramowicz & Colby, *supra* note 98, at 993–94.

270. *Id.* at 994; *see also* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447–48 (1995) (discussing how the writing of judicial opinions can discipline thinking and make apparent the "[i]narticulable or even unconscious feelings and impressions" that may be underlying a judge's conclusions); Meighan A. Rowe, *Protecting Those Who Protect Others: The Implications of the State Bar Act on Attorneys' Adjudication Rights in Disciplinary Proceedings*, 4 J. LEGAL ADVOC. & PRAC. 137, 153 (2002) ("It is this facet of the written opinion, imposing a judicial standard of fairness by opening opinions for the world to see, that is another fundamental brick in the wall of procedural due process . . . ."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.").

271. *See, e.g.*, Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 768 (1983) ("[T]he courts' opinions should contain reasoned explanations of their decisions to lend them legitimacy, permit public evaluation, and impose a discipline on judges.").

272. *See, e.g.*, Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 165, 178–81

legislative decisions are informing their consideration of issues—and their resolution of those issues—means that judicial opinions are not actually giving an honest account of judges' decisions.

Instead of acknowledging that their decisions are based on factual premises, courts will instead subsume factual understandings in statements about values. Because courts often obfuscate—intentionally or not—what is really motivating their decisions, it is difficult for both the public and other actors to understand a given decision and respond to it. After all, if potential litigants and other governmental actors do not understand that the courts' decisions are predicated on empirical understandings, they have no opportunity to challenge such understandings in future litigation or in other responses to the courts' decisions. And if the true bases for a decision are unclear, the public's ability to meaningfully evaluate and debate that decision will be impaired.[273] Moreover, as I discuss in the next Section, it may mean that determinations that are essentially empirical—facts that can and should be revisited over time—become embedded in the law as immutable statements of reality.

D. Factual Stare Decisis

Courts explain the reasoning underlying their decisions in judicial opinions not only to inform the public, but also to inform each other. Appellate courts are aided in reviewing lower court decisions by the lower court's explanation of why it reached the decision that it did.[274] And lower courts are aided in resolving new

(1999) (providing an empirical analysis of the Supreme Court decisions that invite Congress to overturn the Court on questions of federal statutory interpretation); *see also* ROBERT A. KATZMANN, COURTS AND CONGRESS 73 (1997) (noting that federal appellate judges sometimes seek to bring issues to the attention of Congress); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6 (2010) (identifying an entire genre of dissents that were intended "to attract immediate public attention and, thereby, to propel legislative change").

273. *Cf.* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 962 (2004) ("The Constitution of the United States originated within a system of 'popular constitutionalism.' In this system, government officials were required to do their best to interpret the Constitution while going about the daily business of governing, but their interpretations were not authoritative and were instead subject to direct supervision and correction by the superior authority of 'the people themselves' . . . ." (footnote omitted)).

274. *See, e.g.*, Peter S. Menell, Matthew D. Powers & Steven C. Carlson, *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 BERKELEY TECH. L.J. 711, 818–19 (2010) ("[A district court resolving patent claims] should provide a detailed explanation for the basis for its ruling. Although the Federal Circuit currently reviews claim construction rulings de novo, it is more likely to defer to the trial court's interpretation when the ruling is detailed and is accompanied by a detailed record."); Anne Louise Marshall, Note, *How Do*

questions of law by the guidance higher courts have provided in the course of resolving similar questions.[275] Indeed, as a general matter, lower courts are bound by higher court decisions when those decisions' holdings address the precise legal question before the lower court.[276] What is less clear is the extent to which lower courts are—or should be—bound by higher courts' factual findings. This question has been, as previously noted, a source of significant dispute amongst courts of appeals following the Supreme Court's decision in *Carhart*.[277]

Whatever the law might require, lower courts will, as a practical matter, often reflexively follow a statement by a higher court, even if the statement is only dictum or a factual finding that perhaps ought not be binding. As Professor Davis notes,

> The reality seems to be that courts often go beyond the record for disputable facts, and . . . one of the principal sources of such extra-record facts is factual propositions of law that have been laid down in earlier cases . . . . Whatever the theory about stare decisis may be, the tendency of the courts to apply that principle to findings of fact is a rather substantial one.[278]

Federal Courts of Appeals Apply Booker *Reasonableness Review After* Gall*?*, 45 AM. CRIM. L. REV. 1419, 1432 (2008) ("The most important part of the record for the appellate judges to review is the district court's explanation of why a sentence was imposed . . . .").

275. *See, e.g.*, Thomas Grey, *Holmes's Language of Judging—Some Philistine Remarks*, 70 ST. JOHN'S L. REV. 5, 6 (1996) ("[T]he immediate practical point of accompanying appellate judgments with opinions is to provide guidance to lower court judges and to lawyers counseling clients"); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 53 (2002) ("Others have noted that appellate judges must address opinions to both lower and higher courts, 'lawyers seeking understanding and guidance,' other members of the judicial panel, 'judges in other jurisdictions, legislative and executive officials, scholars, and the community at large,' any of whom might plan future transactions based on the courts' opinions." (quoting Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 87 (1994))).

276. Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 128 (1997) (noting that, because of "[p]rinciples of *stare decisis*," once a "question is decided in an appellate court, . . . lower courts are then responsible for following that decision").

277. *See supra* notes 209–215 and accompanying text.

278. Davis, *Judicial Notice*, *supra* note 162, at 970; *see also* Keeton, *supra* note 163, at 26 ("[A legislative fact] decision has force analogous to that of the decision of law for which it served as a [legislative] fact . . . . [I]t is not subject to challenge except as part of the challenge to the precedent for which it served as a premise. A contention that its factual premises are false cannot evade the precedent. Rather, one may assert the falsity of the premises in support of the contention that a court should overrule the precedent.").

Indeed, in the aftermath of *Citizens United*, numerous courts have treated as gospel the Court's factual claim that independent expenditures do not result in corruption.[279]

Even under ideal circumstances, there would be something troubling about the perpetuation of court decisions based on factual findings that have outlived their time and merit reexamination.[280] It is particularly troubling when one remembers that the original factual findings may have been based on virtually no evidence at all and whether they were based on evidence may have been due in large part to chance—that is, whether the particular parties that brought the first case raising those factual issues litigated the case well. To be sure, Supreme Court rulings can be overruled, but overruling occurs only in limited circumstances.[281] It is unclear why factual findings should be held to such a high standard. It may be beneficial for legal precedents to enjoy a certain stability, but it is unclear why factual findings should be equally stable when the world they are describing may not be, and when new research inevitably provides a better and more precise understanding of the world.[282] Moreover, this

279. *See, e.g.*, SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir.) (en banc) ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'"), *cert. denied sub nom.* Keating v. FEC, 131 S. Ct. 553 (2010); *see also* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 695 (9th Cir. 2010) ("Supreme Court precedent forecloses the City's argument that independent expenditures by independent expenditure committees ('IECs'), like the Chamber PACs, raise the specter of corruption or the appearance thereof."); Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 158 (D.D.C.) ("To the extent the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence, *Citizens United* makes clear that those theories are not viable."), *aff'd mem.*, 130 S. Ct. 3544 (2010). *But see Long Beach*, 603 F.3d at 695 ("[T]he City's broadly based anti-corruption rationale for restricting contributions to IECs is lacking in legal and factual support because the City has not offered sufficient evidence of corruption to support its asserted governmental interest in restricting contributions to IECs.").

280. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (noting that it may be appropriate to overrule an earlier precedent when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

281. *See id.* at 854–55 (discussing the circumstances under which a Supreme Court decision may be overruled).

282. *See, e.g.*, *id.* at 860 ("We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier." (citation omitted)). Even commentators who have argued that trial courts should treat social science research the same way they treat case precedent, *e.g.*, John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social*

entrenchment can pose real problems for subsequent litigants bringing a claim that turns on the same facts. Such litigants end up virtually bound by the prior court's factual findings, even though they had no opportunity to present evidence regarding those findings. At a minimum, whatever the appropriate precedential effect of legislative factfindings may be, it should be the result of a considered decision. It should not become a matter of course simply as a result of an unreflective conflation of facts and law.

E. More Fundamental Questions

Most fundamentally, the fact that there has been so little attention paid to the distinction between adjudicative and legislative facts raises the question whether the U.S. legal system, which is primarily designed to address adjudicative facts, should be modified to take more explicit account of the existence of legislative facts and the critical role that they play in establishing the nation's legal rules. It also raises the question whether the U.S. legal system should continue to view itself as focused almost entirely on narrow adversarial disputes when some of the most consequential cases the courts resolve are not conflicts between two opposing parties, but between two opposing ideas about the law or public policy.[283]

Consider the litigation challenging the constitutionality of the healthcare-reform legislation. By early 2011, at least thirteen suits had been filed in nearly as many districts.[284] The plaintiffs in these suits are not prototypical plaintiffs who have suffered some particularized or personal injury; indeed, some are state attorneys general.[285] And the courts considering these challenges are hearing virtually no facts that

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Science in Law, 134 U. PA. L. REV. 477, 478 (1986), have acknowledged that "a lower court should be able to reach empirical conclusions that differ from those of an appellate court when it has obtained new research not previously before the reviewing court," *id.* at 516. Of course, it is unclear how exactly this would work. Courts adopting legislative facts rarely go into depth about all of the sources that they have considered in adopting that position, so it is unclear how lower courts would know when they have considered new research that was not previously reviewed by the appellate court.

283. *Cf.* Davis, *supra* note 47, at 6 ("Legislators have no problem about considering the way a policy may affect a nonparty; judges usually focus mainly on parties, even when a decision may vitally affect nonparties.").

284. For a good overview of the current status of the various suits challenging the healthcare reform legislation, see ACA LITIG. BLOG, http://acalitigationblog.blogspot.com (last updated Sept. 2, 2011, 5:12 PM).

285. *E.g.*, Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, 2011 WL 3519178 (11th Cir. Aug. 12, 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).

are unique to the particular parties before them; instead, they are all considering essentially the same legislative fact questions about the effect of uninsured persons on the healthcare market and the effect of the healthcare market on the larger economy.[286] There is arguably something odd about different judges in different parts of the country all considering the same factual questions—and reaching different answers. To be sure, judges often reach different answers to the same questions, but generally those questions are legal rather than factual. There is a considerable difference, and even some oddity, in courts' efforts to answer these factual questions—key questions on which the constitutionality of this important legislation will inevitably turn—without as many resources as possible.

I do not mean to suggest that there is necessarily anything wrong with courts hearing these cases, although whether the plaintiffs have standing under traditional standing doctrine is a close question at best.[287] But even if it is desirable for courts to hear these cases, it does not follow that this is the ideal way for the courts to hear them. The procedures these courts are using would make sense if the courts were resolving cases that turned primarily on adjudicative facts. The question is simply whether they make as much sense when the cases turn on legislative facts.

Perhaps the parties in these cases will be able to present the courts with all of the information that they need, but there are certainly many other interested organizations and individuals that will be just as affected by the courts' decisions and that will have just as much access, if not more, to the relevant facts. When these cases go up on appeal, those groups may offer the appellate courts their own factual claims. But at that point, those claims will be subject to little, if any, adversarial testing, in part because the U.S. legal system—so sure that factual development is confined to parties before the trial

286. *See, e.g.*, Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *12 (6th Cir. June 29, 2011) ("Congress had a rational basis to believe that the practice of self-insuring for the cost of health care, in the aggregate, substantially affects interstate commerce."); *see also Florida*, 2011 WL 3519178, at *61 (concluding that the individual mandate exceeds Congress's authority under the Commerce Clause); *Sebelius*, 728 F. Supp. 2d at 775–82 (finding that the Minimum Essential Coverage Provision exceeds the scope of Congress's historical Commerce Clause power and therefore cannot be justified under the Necessary and Proper Clause).

287. *See, e.g.*, Brief of *Amici Curiae* Professors of Federal Jurisdiction in Support of Appellant, Virginia *ex rel.* Cuccinelli v. Sebelius, No. 11-1057 (4th Cir. Mar. 7, 2011) (arguing that the plaintiffs lack Article III standing); *cf.* Kevin C. Walsh, *The Ghost That Slew the Mandate*, 64 STAN. L. REV. (forthcoming 2011) (arguing that the district court in *Sebelius* lacked subject matter jurisdiction to declare the healthcare reform unconstitutional).

court—has developed no methods for testing facts that do not enter the case in that way. They will, in other words, have fallen victim to the adversarial myth.

The adversarial myth suggests that all of the factual disputes being resolved in the nation's courts are being subject to rigorous adversarial testing, and that suitable procedures are in place to deal with all of the cases in the nation's court system, those that turn on adjudicative and legislative facts alike. But the myth is maintained only by ignoring the extent to which courts regularly disregard those practices and procedures. This tension between the myth and the reality teaches an important lesson: if courts are not content to rely on traditional adversarialism, there is likely a reason. Court practices and procedures may need to be modified to ensure that all facts, not just adjudicative ones, are rigorously tested before they become the basis for legally binding rules. In the next Part, I offer some preliminary thoughts on how to address this problem.

V. SOME THOUGHTS ON MOVING FORWARD

Having recognized the existence of the adversarial myth—and the numerous consequences that follow from it—the question remains how best to address those consequences. I offer some preliminary thoughts on larger solutions—ideas to restructure the nation's legal system to take account of the reality that not all facts are created equal, and that the current system is designed to resolve disputes that turn on adjudicative facts, not legislative facts. But recognizing that such large-scale changes may not be imminent, I also offer some thoughts on steps judges can take in the meantime to address the problems created by the tension between the adversarial myth and the legal system's quasi-adversarial reality. In the end, all of the solutions I suggest rest on recognizing the difference between adjudicative and legislative facts, which, in turn, helps identify both where the nation's adversarial system is more myth than reality and how to address the problem.

A. Larger Solutions

As I discussed in the preceding Parts, the U.S. legal system has long struggled—albeit quietly—with its multiplicity of roles. The system has at once resolved narrow disputes that will affect only the parties before the court and more general disputes that will have far more significant consequences for society as a whole. The U.S. legal

system was designed to address the former, and is not necessarily well suited to addressing the latter. It is perhaps worth considering, then, whether the myth that the current system is ensuring adequate testing of all of the disputes that come before the courts should be abandoned and replaced with an alternative model that employs different practices and procedures when legislative facts are at issue.

As an initial matter, the courts' liberal acceptance and use of extra-record facts is an implicit recognition that adverseness is not sufficient to ensure that courts are provided with all of the facts they need to resolve cases. This, then, calls into question one of the primary assumptions on which standing doctrine is premised—the notion that adverseness will sharpen the presentation of issues to the court and thereby improve judicial decisionmaking. Indeed, as one commentator has argued, if "the concrete-adversity test is meant to guarantee . . . the best advocacy . . . standing doctrine does not provide that guarantee."[288] Others have also questioned the assumption that standing doctrine ensures higher-quality advocacy. Given that the plaintiff with the injury will not actually be the person arguing the case, there is reason to question whether the particularized nature of his injury will actually affect the quality of the advocacy.[289] Moreover, "the willingness of a plaintiff voluntarily to undergo the expense and inconvenience of litigation should itself provide adequate assurance of vigorous advocacy."[290] Indeed, there is reason to think that "the quality of advocacy in public actions, where interest groups competently assert their own special interests, is higher than the quality of advocacy in the average private suit, in which the plaintiff satisfies traditional requirements of particularized injury."[291]

This discussion suggests that courts should be more open to hearing disputes even when the plaintiff does not have the particularized injury that is the sine qua non of contemporary standing doctrine. After all, although there may be multiple justifications for standing doctrine,[292] the need for adverse

288. Elliott, *supra* note 64, at 474.

289. Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 650–51 (1983); *cf.* Healy, *supra* note 45, at 914 ("[E]ven supporters of public interest litigation do not question the need for an adversarial presentation of the issues. They question only the Court's insistence that the presentation be made by parties with a personal stake in the dispute." (footnote omitted)).

290. Spann, *supra* note 289, at 650.

291. *Id.* at 651.

292. *See supra* notes 64–78 and accompanying text.

presentation of the issues by the parties is frequently invoked.[293] If attention to the practice of appellate courts reveals that standing doctrine is unable to fulfill—and arguably undermines—one of its primary responsibilities, other traditional justifications for standing doctrine must be examined to determine whether they also fall away under scrutiny. Litigants and cases should not be denied entry into the court system based on a doctrine that does not actually serve the purposes it was designed to serve.

Moreover, allowing those actors who do not satisfy standing doctrine's traditional injury requirement to become parties may help ensure better development of the factual record before the trial court. To be sure, nonparties can, and often do, introduce factual evidence through amicus briefs, but as I have previously discussed, such factual evidence is generally introduced in the appellate courts in a way that allows it to escape the rigors of adversarial testing. It would be far better to bring those organizations and individuals with relevant facts into the process at the trial court stage, when the information they have to offer can be subjected to some form of scrutiny and testing. In that way, the trial court can have a meaningful opportunity to be the first real factfinder—as it is supposed to be—and the appellate court can look to the record the trial court developed for all of the facts that are relevant to the case.

To be sure, the requirement of standing is now very much entrenched in the law, and the Court has offered justifications for it beyond the need for adversity.[294] But it is worth remembering that standing is, in the view of many, a court-conceived doctrine. According to one commentator, the "constitutional bar to strangers as complainants against unconstitutional action . . . [is] without foundation" and exists, at least in part, because of "the mistaken assumption that the practice in such strictly private actions as tort and contract governed 'public actions' as well."[295] As I have argued

293. *See supra* notes 71–76 and accompanying text.

294. *See supra* notes 77–78 and accompanying text.

295. Berger, *supra* note 52, at 827; *see also* Winter, *supra* note 52, at 1374 ("[A] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase 'cases or controversies' or that it is a prerequisite for seeking governmental compliance with the law."); *cf.* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1139 (2009) (arguing that the Supreme Court used to "embrace[] a different approach to standing," one that "allowed Congress to authorize challenges to administrative action by those who did not have legal rights" so they could "raise the rights of the public").

throughout, appellate courts' failure to truly come to terms with the duality of their roles has meant that rules and practices designed for one type of case—private disputes involving adjudicative facts—have been awkwardly applied to a fundamentally different type of case—public disputes involving legislative facts.[296]

Moreover, if the need for adversity is not doing any meaningful work in the Court's standing analysis, it would be better if the Court stopped pretending otherwise. The Court's frequent invocation of adversity as a justification for standing limitations helps obscure the fact that the courts often do not rely on adverse parties for factual development. As I discussed in the prior Part, the courts' failure to recognize their reliance on extra-record factfinding is in many respects even more problematic than the fact that it occurs. Once the appellate courts' practice of looking beyond the parties for factual development is acknowledged, procedures can be developed to ensure that those extra-record facts are meaningfully tested. Indeed, although the courts' frequent resort to extra-record factfinding raises one reason to rethink traditional standing limitations, bringing more parties into the process earlier does not necessarily require liberalizing standing requirements; an alternative—and easier—initial step might be to liberalize the rules for intervention in cases in which traditional standing has been established by defining broadly who has an "interest" in litigation.[297]

In addition to opening the door to more parties, the courts could also play a more active role in determining which counsel will bear primary responsibility for litigating a case. Such an active role for the courts would not be wholly foreign even in the United States' adversarial system. In class actions, for example, courts have the

296. *Cf.* Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on* Marbury v. Madison*, Executive Inaction, and the Duty of the Courts To Enforce the Law*, 72 GEO. WASH. L. REV. 253, 281 (2003) ("[T]he private law model . . . dominated the world of *Marbury v. Madison*; a model that made sense then, but does not fairly represent the world we inhabit today.").

297. *See* FED. R. CIV. P. 24 (rule for intervention); *see also* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 251 (1990) (noting "the range of interests which have been required for intervention" under Rule 24); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 418 & n.372 (1997) ("Joinder and intervention should be liberally permitted."); Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing To Join a Lawsuit?*, 52 DUKE L.J. 455, 455–56 (2002) ("By allowing nonparties to intervene, Rule 24 lets them represent their interests and arguably improves the court's decisionmaking by allowing the presentation of different viewpoints and evidence. Courts may also benefit from granting motions to intervene, because by including intervenors up front, they may be spared relitigation of the same issue." (footnote omitted)).

authority to appoint "class counsel" and are supposed to consider, among other things, the potential counsel's resources and experience, as well as "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[298] And the Supreme Court regularly appoints counsel to "support an undefended judgment below, or to take a specific position as an amicus."[299]

Courts should also consider what procedures are most appropriate for resolution of disputes about legislative facts.[300] Courts and commentators alike have, at various times, suggested that adversarial, trial-type hearings are not the best method for resolving such disputes.[301] That may well be right. My point in this Article is not that adversarialism necessarily provides the best means of testing all facts,[302] but simply that the assumption that all of the factual findings in appellate court opinions are currently being subjected to such testing is a myth. And it is therefore necessary to think about what processes should be put in place to ensure that factual findings are, in fact, subjected to meaningful testing, whether adversarial or not. Perhaps courts should turn to experts to help with the adjudication of legislative facts,[303] or perhaps there should be panels of judges who specialize in the resolution of this particular type of factual dispute.[304]

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298. FED. R. CIV. P. 23(g).

299. Goldman, *supra* note 3, at 907 (noting that this has happened forty-three times since 1954).

300. To be sure, it may be difficult to determine which facts need to be subjected to this more rigorous testing. After all, there are any number of facts implicit in any judicial decision, and it cannot be that all of them are susceptible to formal proof. *See* FED. R. EVID. 201 advisory committee's note ("[E]very case involves the use of hundreds or thousands of nonevidence facts. . . . The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum.*"); *see also* Sykes v. United States, 131 S. Ct. 2267, 2291 (2011) (Kagan, J., dissenting) (suggesting that an "intuition . . . consistent with common sense and experience," "even though unsupported by data," could "be sufficient" to justify the Court's conclusion on an empirical question); Davis, *Judicial Notice*, *supra* note 162, at 975 ("Every simple case involves the assumption of hundreds of facts that have not been proved."). How to distinguish those facts that require meaningful testing from those that do not is a subject I hope to take up in a future Article.

301. *See, e.g.*, *supra* note 198.

302. Even if adversarialism is not always the best means of testing factual findings, it is important to consider whether due process concerns require providing some notice to parties before legislative fact disputes are resolved through nonadversarial means. *See* Thornburg, *supra* note 189, at 192–96 (discussing the due process concerns posed when judges engage in factfinding by conducting their own independent research).

303. *See, e.g.*, FED. R. EVID. 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations.").

304. *See* FED. R. CIV. P. 72–73 (establishing the rules applicable to magistrate judges).

Perhaps there should be guidelines for a more active research process on the part of judges.[305] Perhaps there should be officials who specialize in legislative factfinding to whom appellate judges can turn for assistance, just as district court judges often turn to magistrates.[306] At least one commentator suggests that there should be a research service for the Supreme Court to assist the Court in this regard. Professor Davis proposes that the Court

> formally ask Congress to explore the potential for creating a research service to assist the Court. The sole purpose should be to increase the Court's freedom to obtain whatever research assistance it decides it needs. The Court should have the privilege of asking for research either on a problem about a pending case or about a narrow or broad area of law.[307]

Whatever the best procedures or guidelines might be,[308] some procedures or guidelines should exist so that judges—be they trial or appellate—do not simply engage in the ad hoc cherry-picking of facts out of amicus briefs, their bedtime reading, or their nightly news program, and so that all litigants—parties and nonparties alike—

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305. Even if such an active role for the judge might be inconsistent with traditional norms of a judge's role in an adversarial system, it would not be unprecedented for the judicial system to "violate[] its own ideals of passivity and party control in the name of better decisionmaking." Cheng, *supra* note 189, at 1283; *see also* Goldman, *supra* note 3, at 971 (noting that the Court's "commit[ment] . . . to the goal of judicial restraint that the adversary system promotes" is "weak when the Court is presented with a vehicle to address a question of great interest").

306. *See, e.g.*, David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1699 (2005) (asking whether "the burdens on appellate courts [have] reached the point where Congress should consider the creation of a permanent corps of professional assistants to Article III court of appeals judges" and noting that "[s]uch assistants could fill a role modeled on that of the magistrate judge in district court litigation").

307. Davis, *supra* note 47, at 17. Of course, the Supreme Court currently has at its disposal the assistance of the excellent research staff of the Supreme Court library. *See, e.g.*, Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 665 (2006) ("When I was a clerk, in 1979–80, our best research tools were the excellent research librarians of the Supreme Court library. If asked by my justice, Thurgood Marshall, to find out all I could about tribal courts—a subject about which I knew nothing—I would have turned over the inquiry to one of them. In a few days, I would have received whatever she or he could locate in the Supreme Court library, the Library of Congress, and wherever else materials could be found."). The goal of a research service would be to make such assistance more formalized and more transparent.

308. *See* Margolis, *supra* note 221, at 205 (summarizing briefly past proposals to address the problem). It may well also be that different procedures or rules should apply depending on the type of legislative fact or the use to which it will be put in the court's analysis. *Id.* at 215.

know what sorts of information they can submit to the court and at what stage.[309]

Finally, if courts should employ special procedures to resolve disputes involving legislative facts, it is worth considering whether all cases that turn primarily on the same legislative facts should be consolidated in one court, rather than adjudicated in many different district courts across the country.[310] It will not always be easy, of course, to readily identify those cases in which legislative facts are dispositive. But in many cases it will be easy to make that determination, either because no adjudicative facts are relevant or because the parties can stipulate to any relevant adjudicative facts. Or it might be possible to bifurcate cases—with traditional district courts resolving the adjudicative facts—before the cases are consolidated in a single court that will resolve any legislative fact disputes. This sort of consolidation would not only facilitate the concentration of investigative resources, but would also avoid the awkwardness of different courts resolving factual disputes in different ways.[311] It could also, although it need not, facilitate some degree of judicial specialization, allowing judges with expertise in particular areas to hear cases in the relevant fields.[312] The possibility of courts engaging

309. *Id.* at 200 (arguing that "lawyers [have not made] effective use of non-legal materials in support of policy arguments in briefs" because, in part, "many attorneys believed they could not put factual information in their briefs if it had not been placed in evidence at trial").

310. There is, in fact, already a statute that provides for the consolidation or coordination of pretrial proceedings when "civil actions involving one or more common questions of fact are pending in different districts." 28 U.S.C. § 1407 (2006); *see also* FED. R. CIV. P. 42 (rule for consolidation). This multidistrict litigation statute may have lessons to teach about how courts could bifurcate cases to help address legislative facts. For more on consolidation in the federal courts, see generally Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. REV. 879; and Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995).

311. *See, e.g.*, A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684, 688 (7th Cir. 2002) ("[I]t is unsound to say that, on records very similar in nature, [one state's] law could be valid . . . and [another's] invalid, just because different district judges reached different conclusions about the inferences to be drawn from the same body of statistical work."); Hope Clinic v. Ryan, 195 F.3d 857, 883 (7th Cir. 1999) (en banc) (Posner, J., dissenting), *vacated*, 530 U.S. 1271 (2000) ("[T]he constitutional right of abortion cannot be made to depend on whether a particular district judge finds a particular physician who disagrees with the consensus of medical opinion to be more credible than the spokesmen for the consensus."). *But see* Saks, *supra* note 260, at 1013 ("Discovering that various courts make findings or announce holdings in contradictory directions is only to discover . . . what the early legal realists discovered about contracts, torts, and every other area of law.").

312. The prospect of specialized courts has, of course, long been the subject of controversy. *See, e.g.*, Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 520–21 (2008) ("Federal circuit judges, for example, frequently comment on the importance and

in the type of factual development typically undertaken by legislatures may give a reader some pause. But to the extent that engaging in that type of factual development is a fundamental part of the enterprise of judging, it is better that it be done in the open.

I do not mean to suggest that specialized courts of this nature are necessarily the right solution. Indeed, there would surely be downsides to such an approach. All I mean to do at this point is to identify the tensions in the existing system and to begin a conversation about the problems caused by those tensions, as well as possible solutions. If there is a big problem, it makes sense to think big about ways to address it.

B. In the Meantime . . . What Judges Can Do

That said, it takes time to implement big solutions. In the meantime, there are smaller and simpler steps that appellate judges can take when they are confronted with an inadequate factual record from the trial court below. First, one simple but significant step would be for appellate courts to remand the case to the trial court.[313] Trial courts may not be the perfect forums for resolving legislative fact disputes, but at present they are the only judicial bodies with formal experience making factual findings. Trial courts can hold hearings specifically on a legislative fact question with witnesses able to speak to the issue. Trial courts can encourage back-and-forth between

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desirability of being a generalist and acknowledge the generalist's iconic status in the American legal tradition." (footnote omitted)); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 866–67 (1990) (proposing a study of the Federal Circuit to help assess the effects of specialized courts); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1269 (2005) (proposing an "alternative path to judicial specialization" modeled on the Federal Constitutional Court of Germany).

313. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 668 (1994) ("Because of the unresolved factual questions, the importance of the issues . . . , and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions."); *see also* Alfange, *supra* note 165, at 668 ("Where an adequate trial of the facts is not held, however, and the appellate courts find it necessary to be more fully informed on factual questions, a remand to the lower court for a more thorough trial would be entirely in order."); Miller & Barron, *supra* note 41, at 1233–36 (suggesting that the Supreme Court should sometimes "remand the issue of the taking of judicial notice of a particular issue of legislative fact to the trial court").

parties and direct them to respond to specific claims and arguments.[314] And a trial court facing a remand from an appellate court to address a legislative fact question can encourage amicus participation and make sure that the opposing parties—and opposing amici—have ample opportunity to respond to each other's factual claims.[315] By adopting these practices, trial courts can subject legislative facts to far more rigorous testing than the current system provides.

When remand is not possible because time pressures require faster resolution of a case,[316] there may be circumstances in which it is not altogether inappropriate for the court to look at the factual records developed by other courts, as the Court did in *Citizens United*.[317] But there are important caveats to this suggestion. First, the court must ensure—as it failed to do in *Citizens United*[318]—that the relevant issue was actually in play in the prior litigation and was contested by the parties before that court. Second, if it was in play and contested, the court should give meaningful notice to the parties that it intends to use facts from an outside record and should give them at least some opportunity to respond, even if only by filing simultaneous letter briefs.

Another small step would be for courts to spell out, as the district court did in the Proposition 8 case,[319] the factual findings that are the basis for their decisions.[320] As I discussed earlier, a significant problem

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314. To be sure, appellate courts, like trial courts, could request supplemental briefing or schedule reargument on a specific question, but such departures from general practice occur much more frequently at the trial level than at the appellate level.

315. Even if amicus participation at the trial court level is currently rare, *see supra* notes 84–87 and accompanying text, there is no prohibition against it and thus no reason why district court judges cannot encourage it.

316. Time pressures may exist because of external circumstances surrounding the case or because the statute at issue itself requires expedited review. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(4), 116 Stat. 81, 113–14 ("It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.").

317. *See supra* note 119 and accompanying text.

318. *See supra* note 120.

319. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 953–91 (N.D. Cal. 2010), *appeal pending*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

320. Indeed, it might be helpful if district courts also make clear when they think the lawyers' presentations were weak, thus signaling to appellate courts that they did not have before them all of the evidence they needed to properly adjudicate the factual disputes. Thus, in such cases, if legislative facts end up being dispositive, the appellate court could remand to the trial court, which could then encourage better factual development by inviting amicus participation.

with the adversarial myth is the way in which it hides the distinction between adjudicative facts and legislative facts—and thus causes the relevance of legislative facts to be ignored in judicial decisionmaking. If courts were forced to identify expressly the legislative facts on which they have relied, it might increase the likelihood that judges would not rest their decisions on unfounded assumptions but instead would subject their assumptions to further research and testing, whatever form that further research and testing might take. Furthermore, that small step would contribute significantly to the transparency of the courts' decisions and would enable the public and other governmental actors to understand why the court did what it did. To the extent the court's decision rested on factual premises that may be contestable, it would give others an opportunity to try to gather more empirical evidence to contest those factual findings. As Professor Davis notes, "[T]he difference between appearing to stay within the record and frankly acknowledging resort to extra-record sources for legislative facts is usually only a difference in the degree of articulation of the grounds for decision."[321] Greater transparency in court decisions will thus make it more evident when courts are relying on extra-record facts.

CONCLUSION

At the outset, I observed that the most dangerous myths are those that are grounded in reality. They are the ones that most easily inculcate belief in the myth and prevent discovery of its imperfections. The adversarial myth is such a pervasive part of the U.S. legal system that it is easy to ignore its imperfections—to write them off as inconsequential and trivial. But some of these imperfections and tensions should not be so easily ignored: they reveal true weaknesses in the way appellate courts address legislative facts.

In this Article, I have argued that one respect in which the commitment to adversarialism is more myth than reality is appellate court extra-record factfinding—appellate courts' practice of looking outside the record created by the parties before the trial court and finding their own facts. As I have demonstrated, this practice occurs frequently, particularly at the Supreme Court, and particularly in cases raising significant legal issues with the potential for widespread

321. Davis, *Judicial Notice*, *supra* note 162, at 953.

impact. Future research could explore empirically just how often extra-record factfinding occurs, particularly in the courts of appeals, and whether it occurs particularly often in specific types of cases or in cases involving specific types of parties.

I have also argued that the distinction between adjudicative facts—party-specific facts—and legislative facts—general facts—helps explain why this extra-record factfinding so often occurs. The United States' adversarial system and the practices and rules that go along with it were adopted for cases that turn primarily on adjudicative facts. They prove far less useful in cases that turn primarily on legislative facts, even though such cases make up a significant amount of the work done by the federal courts. Again, further empirical investigation into the practice of appellate court extra-record factfinding—particularly a historical examination of the practice—could help elucidate the causes of the practice, including the extent to which it has become more prevalent as a result of changes in the nature of litigation and technological innovation.

But the causes of the practice are in some sense less important than its consequences. Although I have posited several troubling consequences that result from appellate court extra-record factfinding—and the little-considered way in which it currently occurs—there is more room for research. It would be helpful to have a richer understanding of how the extra-record nature of appellate court factfinding affects the quality of the courts' factual findings. Indeed, although I have assumed that adversarial testing tends to produce more accurate factual findings, a sample of cases in which courts have engaged in less adversarial-driven factfinding would provide an opportunity to test that premise. And it would be helpful to have a richer understanding of how this practice affects the way appellate court decisions are understood by the public, by the other branches, and by subsequent courts.

Understanding these consequences, of course, is merely a precursor to identifying appropriate solutions. Identifying what consequences follow—and follow most significantly and frequently—from the practice of appellate court extra-record factfinding will make it possible to identify the most promising potential solutions. I have provided some preliminary thoughts on possible solutions here, but there is much work that remains to be done, both in determining whether those solutions will effectively address the consequences of the practice and in ascertaining what other effects those solutions might have on the legal system.

This is important work, and it requires recognizing that appellate court extra-record factfinding is one respect in which the nation's commitment to adversarialism is more myth than reality. To recognize this imperfection in the adversarial system is not to destroy it. To the contrary, by recognizing the system's limitations, it becomes possible to begin a conversation about how to address them and, in the end, make the nation's legal system stronger.