Testimony of Thomas M. Fisher,* Indiana Solicitor General,
Before the Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight,
Agency Action, and Federal Rights
April 27, 2021

Chairman Whitehouse, Ranking Member Kennedy, and distinguished members of the Subcommittee:

Thank you for inviting me to testify at this hearing on "Supreme Court Fact-Finding and the Distortion of American Democracy."

The premise of today's hearing, as I understand it, is the suspicion that the Supreme Court regularly flouts both judicial and democratic norms by basing its decisions on factual evidence brought to its attention by obscure sources outside the adversarial process. The concern seems to be that organizations funded by confidential donors advancing their own private interests seek to influence the Court by filing amici curiae briefs packed with dubious factual assertions that have never been subjected to adversarial testing. As many lawyers and scholars have recounted, and as witnesses today will likely testify, it is indeed the case that various entities, individuals, scholars and organizations—some (but not all) funded by confidential donors—seek to influence the Court by filing amici curiae briefs packed with (occasionally dubious) factual assertions that have never been subjected to adversarial testing.

My view of the matter, however, is that concerns about *that* phenomenon are overblown. First, as my friend Mr. Shapiro will testify, it is not clear whether the Supreme Court decisions thought to typify this issue—*Shelby County v. Holder* (2013) and *Citizens United v. FEC* (2010)—depended on amici-supplied extra-record evidence. Second, the practice of amici curiae of various types across the ideological spectrum bringing relevant, extra-record evidence to the Supreme Court's attention is *not* a new phenomenon. Indeed, it has a distinguished pedigree going back at least to the original "Brandeis brief"—the amicus brief of then-scholar and eventual Supreme Court Justices Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908). And, broadly speaking, the legitimate parameters of Brandeis briefs are well understood by the legal profession: It is appropriate for such briefs to bring to the Court's attention matters of "legislative fact"—*i.e.*, facts about the state of the world—but *not* matters of "adjudicative fact," *i.e.*, evidence or claims about events or parties relevant to a particular case. Supreme Court justices and lower court judges alike can distinguish between the two and routinely dismiss attempts to advance extra-record adjudicative facts.

* The witness wishes to thank Indiana Deputy Solicitor General Kian Hudson and law clerks Michael Froedge and Andrew Ireland for assistance with researching and drafting this testimony. Any errors are those of the witness alone.

But that is not to say that no tension exists between the idea of Supreme Court legislative factfinding and the idea of democratically accountable decision-making. In short, when the state of the world is reasonably disputed, we generally look to legislatures, not courts, to make the critical decisions, as limited by constitutional safeguards protecting individual liberty. Precisely because legislators are accountable to voters, we lodge policy judgments in their hands.

The real problem underlying today's hearing, then, is not the practice of amici supplying the Court with extra-record material concerning legislative facts. It is instead the practice of the Supreme Court, arising largely in the latter half of the 20th century (but continuing today), of deciding constitutional cases based on vague, multipart balancing tests or standards instead of deciding them based on crisp rules derived from the original public meaning of constitutional text. That method of deciding cases exists in many areas, including free-speech doctrine and Eighth Amendment doctrine, among others. Balancing tests, in short, amount to policy judgments, not legal reasoning, and they invite the very reliance on extra-record state-of-the-world "factfinding" that has prompted this hearing.

Fortunately, the Court has shown signs in recent decades of retreating from amorphous, policy-laden constitutional standards and advancing toward a constitutional law characterized by rules grounded in constitutional text and history. That, and not any extraneous restraints on amicus practice, is the solution to any problems attendant to Supreme Court factfinding.

I

In American jurisprudence, factual questions are generally resolved at the trial level, either by the jury or the judge, via an adversarial process—perhaps the most important part of which is the cross-examination of witness testimony.[1] Appellate courts, accordingly, generally bar the introduction of new factual evidence.[2] Well-established exceptions to that general principle exist, including for material susceptible

[1] *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."); *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020) (Generally, questions of law are reviewed de novo and questions of fact, for clear error . . . ."); *California v. Green*, 399 U.S. 149, 158 (1970) (noting Professor Wigmore's famous conclusion that cross-examination is "the 'greatest legal engine ever invented for the discovery of truth'" (quoting 5 John Henry Wigmore, *Evidence* § 1367 (3d ed. 1940))).

[2] *See, e.g.*, *Phonometrics, Inc. v. Westin Hotel Co.*, 319 F.3d 1328, 1333 (Fed. Cir. 2003) ("We, as a court of review, generally do not consider evidence that has not been considered by the district court."); *Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999) ("An appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling.").

of judicial notice.[3] And for many decades, American courts have analyzed whether to consider factual evidence that has been spared the rigors of trial-level testing by dividing the universe of facts into two categories: (1) "adjudicative facts," new evidence of which courts generally will not consider on appeal, and (2) "legislative facts," or "non-adjudicative facts," new evidence of which appellate courts frequently *will* consider.[4]

So-called "adjudicative facts" are the facts that underlie a given controversy. They are the facts in the street, the behavior and mental states of the parties, or, as put by my fellow witness Allison Larsen, the "whodunit facts."[5] These case-specific facts address "who did what, where, when, how, and with what motive or intent."[6]

"Legislative facts," meanwhile, are more general facts that have some significance or bearing to society more broadly.[7] Or, in more limited terms, they are the

---

[3] *See N.Y. Indians v. United States*, 170 U.S. 1, 32 (1898) ("While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.").

[4] This division, long-established in practice, was first coined in 1942. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402–03 (1942). It has been widely adopted by the Supreme Court and other courts of appeal. *See, e.g.*, *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist*., 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting) ("As Mr. Justice Holmes recognized, the determination of legislative facts does not necessarily implicate the same considerations as does the determination of adjudicative facts." (citing *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915))); *Unger v. Young*, 571 U.S. 1015, 1018 n.1 (2013) (Alito, J., dissenting) ("The analysis of the court below cannot be defended on the ground that *Pinholster* concerns only adjudicative facts and that the data in the social science studies constituted legislative facts."); *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) ("Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case."); *Broz v. Heckler*, 721 F.2d 1297, 1299 (11th Cir. 1983) (holding the effect of a claimant's age on his ability to work was an adjudicative fact and "must be made on a case-by-case basis"); *State ex rel. TB v. CPC Fairfax Hosp.*, 129 Wash 2d 439 (1996) (permitting amicus to offer "scholarly articles and excerpts" in connection with minor's constitutional challenge to her involuntary confinement at a mental hospital).

[5] Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1265 (2012).

[6] 1 Weinstein's Federal Evidence § 201.02 (2021); Henry Paul Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985) ("The important point about law is that it yields a proposition that is *general* in character. Fact identification, by contrast, is a case-specific inquiry into what *happened here*.").

[7] *See, e.g.*, Fed. R. Evid. 201 Advisory Committee's Note ("Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2770 (2011) (Breyer, J., dissenting) (referring to "elected legislature's" factual conclusions regarding the dangers of video games as "legislative facts").

kinds of facts that legislatures "find"—or *could* find—as part of the legislative process. They do not turn on the conduct of the individual parties and do not arise out of the individual case or controversy.

Traditionally, appellate courts have considered legislative facts for many purposes regardless whether they have been subjected to trial-court adversarial testing—even if dispositive.[8] In constitutional cases, however, the Supreme Court historically *assumed* plausible factual premises underlying challenged laws regardless whether such premises were disputable or represented the actual motivations of legislators.[9] That is, in such cases the Court declined to resolve disputes over legislative facts and instead left such questions to the political branches—an approach the Court continues to use today in rational-basis cases.[10] Only in the last century has express reliance on legislative facts—and a willingness to resolve disputes over contested legislative facts—become a hallmark of the Court's constitutional-law cases.[11]

Just as the Supreme Court's constitutional doctrines have come to embrace greater consideration of legislative facts, so have American appellate courts

---

[8] *See Brimmer v. Rebman*, 138 U.S. 78, 83 (1891) ("If that presumption could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case . . . .").

[9] *See, e.g.*, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (stating that "if any state of facts reasonably can be conceived that would sustain [a challenged statute], the existence of that state of facts at the time the law was enacted must be assumed.").

[10] *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (explaining that under the Court's rational-basis precedents a law is "constitutionally valid if 'there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[11] Davis, *supra* note 2, at 407 (discussing how "judicial decisions making direct and extensive use of legislative facts" remained exceptional in 1942 but had increased vastly since 1937); Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637, 642–43, 667 (1966); Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 Or. L. Rev. 111, 120–21 (1997) (observing that most legal scholars recognize the influence of legislative facts on constitutional decision making); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 Vand. L. Rev. 111, 115 (1988) (recounting but critiquing this phenomenon); *see also* Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75 (1960) (characterizing the proposition that judges make constitutional law "on the basis of facts proven and assumed" as "hardly earth-shaking.").

permitted parties and amici greater leeway to present verifiable extra-record evidence, especially social scientific evidence.[12]

In the early twentieth century courts became "increasingly receptive to the introduction of empirical research."[13] During this period future Supreme Court Justice Louis Brandeis became one of the first practitioners to employ social research to contest constitutional facts before the Court.[14] In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, Brandeis presented "existing social science research on the detrimental impact of long work hours on the health of women,"[15] to defend the constitutionality of an Oregon statute limiting the number of hours women could work in a day. So-called "Brandeis briefs" soon became famous and marked a paradigmatic shift toward the widespread use of "policy-oriented extra-legal arguments in briefs"—that is, towards the frequent invocation of extra-record legislative facts.[16]

The distinction between adjudicative and legislative facts has thus become a foundational part of judicial decision-making. Rule 201 of the Federal Rules of Evidence, for example, imposes strict rules on judicial notice of *adjudicative* facts: Such facts must either be "generally known" or "readily determined from sources whose accuracy cannot reasonably be questioned."[17] Accordingly, courts will reject attempts by parties or amici to introduce case-specific evidence of adjudicative facts (*e.g.*, what the parties did, when they did it, how they did it) for the first time on appeal.[18]

At the same time, Rule 201 expressly provides that its strict rules do *not* apply to judicial notice of "*legislative* facts" (e.g., empirical studies, statistics, social

---

[12] *See* Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197, 199 and n.12 (discussing the origin of the "Brandeis brief," a seminal work by future Supreme Court Justice Louis Brandeis that relied on scientific information); 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, 104–07 (1993) (elaborating on the origin of the Brandeis brief).

[13] Rustad & Koenig, *supra* note 12, at 104 (1993).

[14] *Id*. at 105.

[15] Margolis, *supra* note 12, at 199 and n.12.

[16] Rustad & Koenig, *supra* note 13, at 93 n.5.

[17] Fed. R. Evid. 201(b).

[18] *See, e.g.*, *Oviedo v. Washington Metropolitan Area Transit Authority*, 948 F.3d 386, 398 (D.C. Cir. 2020) ("*Amicus*'s argument for shifting explanations relies on evidence that was not put before the District Court at summary judgment."); *Snyder v. Phelps*, 580 F.3d 206, 216 (4th Cir. 2009) ("We respectfully reject our good friend's reliance on the amicus contention, because the evidentiary issue has plainly been waived by the only party entitled to pursue it."); *Smith v. United States*, 343 F.2d 539, 541 (5th Cir. 1965) ("Nor can the Court consider the new factual material included in the brief of the amicus.").

scientific theories, and historical information).[19] Appellate courts are accordingly free to consider legislative facts brought to their attention by parties and amici. Indeed, the Supreme Court Rules declare that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."[20]

Just a few weeks ago, for example, the Supreme Court, when interpreting the Telephone Consumer Protection Act's ban on autodialers, had to address whether it makes sense to say that a piece of equipment "stores" numbers using a random number "generator." And while Justice Sotomayor's majority opinion for the Court acknowledged that formulation does sound odd "as a matter of ordinary parlance," her opinion cited an amicus brief supporting petitioner Facebook to supply legislative facts suggesting the formulation "is less odd as a technical matter."[21]

In sum, American *appellate* courts have long been willing to consider new legislative facts—including facts adduced by amici. Parties and amici from representing many distinct perspectives take this opportunity to bring what they consider to be important information to courts' attention. In keeping with that practice, the Supreme Court this term is considering many cases featuring dozens of amicus briefs from interests across the ideological spectrum.[22]

II

The core problem with constitutional adjudication premised on legislative facts is not that *amici* furnish their views of legislative facts. Any problems that attend the lack of adversarial testing are equally present when *parties* cite new legislative facts on appeal, which happens frequently. Indeed, any such problems are undoubtedly worse when *courts* take cognizance of legislative facts without any input from parties or amici at all, which courts are of course free to do.[23]

---

[19] Fed. R. Evid. 201(a).

[20] Supreme Court Rule 37.

[21] *Facebook, Inc. v. Duguid*, No. 19-511 (U.S.), slip op. at 10 (citing Amicus Br. of Professional Association for Customer Engagement, *et al.* at 15–21). In that same case, Indiana joined with North Carolina to lead a multi-state amicus curiae brief supporting respondent Duguid. *See Facebook, Inc. v. Duguid*, No. 19-511 (U.S.), Amicus Br. of Indiana, *et al.*

[22] *See, e.g.*, *Brnovich v. Democratic National Committee*, No. 19-1257 (more than 50 amicus briefs filed, with organizations ranging from the Pacific Legal Foundation and Cato Institute to Fair Action Fight, Inc. and the Brennan Center for Justice at NYU Law School); *Mahanoy Area School District v. B.L.*, No. 20-255 (36 amicus briefs filed from organizations including Parents Defending Education, The Becket Fund for Religious Liberty, American Center for Law and Justice, and the Cyberbullying Research Center).

[23] *See* Fed. R. Evid. 201 Advisory Committee's Note.

Because judges will inevitably consider legislative facts, interested parties should have an opportunity to bring such facts to the attention of the judiciary—including appellate courts—in an open and honest manner. After all, issues to which legislative facts may be relevant often will not rise to the surface until after a case is already on appeal, particularly in criminal cases and tort cases. And there is no reason to limit the introduction of new legislative facts to the parties, since even sophisticated parties will have limited resources and perspectives. If the Supreme Court is going to evaluate the constitutionality of statutes based on legislative facts and policy judgments, it is reasonable to permit interested amici to provide input. To take another recent case, *Jones v. Mississippi*, where the Court ultimately upheld a life sentence for a juvenile offender, amicus briefs cited neuroscience findings and social scientific research to support the argument that courts must, a matter of constitutional law, make special findings before imposing life sentences on juveniles.[24]

Instead, any problem with Supreme Court consideration of legislative facts arises from constitutional law doctrines that depend on judicial *evaluation* of such facts in the first place. Hence, the more fundamental problem at the heart of today's hearing today is this: *Are courts best equipped to answer complex policy questions*?

Courts are of course well-suited to resolve disputes over adjudicative facts. Such factual questions (Was the light green? Did the defendant have malicious intent?) affect only the parties to a single case and are not apt to be manipulated by courts to achieve policy ends. And even when such questions are disputed by reasonable people, they are the sorts of questions our adversarial trial process was designed to resolve. That is why appellate courts defer to lower-court historical factfinding and refuse to go outside the record to consider evidence bearing on matters of adjudicative facts.

In contrast, courts are not well suited to resolve disputes over *legislative* facts. Legislative facts implicate complex questions that are subject to reasonable disagreement and necessarily affect a broad array of citizens. For these reasons, these factual determinations should be squarely lodged with the people's branch, which is best suited to debate, discuss, and decide how to address these social and political debates. Austrian economist F.A. Hayek put this point well in his famous "The Pretense of Knowledge" 1974 Nobel Prize Lecture: Judges who "act on the belief that we possess the knowledge and the power which enable us to shape the processes of society entirely to our liking, knowledge which in fact we do *not* possess" are likely to "do much harm."[25] Indeed, it is for this reason that courts historically have adopted a

---

[24] *See Jones v. Mississippi*, No. 18-1259 (U.S.), Amicus Br. of Current and Former Prosecutors, *et al.* at 6–7; *Jones v. Mississippi*, No. 18-1259 (U.S.), Amicus Br. of Juvenile Law Center, *et al.* at 21–25. In that same case, Indiana led a multi-state amicus curiae brief supporting respondent Mississippi. *See Jones v. Mississippi*, No. 18-1259 (U.S.), Amicus Br. of Indiana, *et al.*

[25] Friedrich A. Hayek, *The Pretense of Knowledge*, Nobel Memorial Lecture (Dec. 11, 1974), in 79 Am. Econ. Rev. 3, 7 (1989).

presumption of constitutionality, giving broad deference to the version of legislative facts provided by governments defending statutes—and why appellate courts do not defer to district court "findings" of legislative fact the way that they would for findings of adjudicative facts.

As Professor Charles Reich explained in an important 1963 article in the Harvard Law Review, "Courts have no sources of information other than the records before them, and judges have no special knowledge to assist them in evaluating information of a *social* and *political* nature if it were able to obtain it."[26] Because the task of evaluating information is situated "beyond the capacity of mortal men,"[27] judges should avoid attempts "to resolve these conflicts by the exercise of judgment,"[28] and should instead adopt a frame of reference—"the *words* of the Constitution itself."[29]

Yet courts often employ a variety of "balancing" tests to assess the constitutionality of statutes. Such multi-factor tests necessarily invite—and ultimately *require*—a broad account of competing policy judgments about the prospective impact of a legal rule. They thereby effectively grant courts freewheeling discretion to circumvent the fixed, original public meaning of the text of the Constitution.

In the First Amendment context, for example, the Court has held that even content-neutral time, place, and manner regulations must both "serve a *significant* governmental interest" and "leave open *ample* alternatives for communication."[30] And in deciding whether a governmental interest is "significant" or whether remaining speech opportunities are sufficiently "ample," the Court has resolved disputed questions of legislative fact and made its own policy judgments.[31] Similarly, in the

---

[26] Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 740 (1963) (emphasis added).

[27] Alfange, *supra* note 11, at 641.

[28] Reich, *supra* note 26, at 740.

[29] Reich, *supra* note 26, at 744 (emphasis added).

[30] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (emphases added); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[31] *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 182 (1983) ("We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner or device on the public sidewalks substantially serves these purposes."); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977) (invalidating a municipal ordinance that prohibited "For Sale" or "Sold" signs in order to stem the flight of white homeowners from a racially integrated community, explaining its alternative view that while "in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. . . . The alternatives, then, are far from satisfactory."); *Linmark Assocs., Inc. v. Willingboro Twp.*, No. 76-357 (U.S.), Amicus Br. of Housing Advocates, Inc. (arguing that limitations on "For Sale" signs are essential to maintaining integrated neighborhoods).

Eighth Amendment context the Court has suggested that Excessive Fines Clause challenges should be evaluated by asking whether the amount of a fine "is grossly disproportional to the gravity of the defendant's offense."[32] And as lower court decisions applying this standard demonstrate, judicial consideration of offense "gravity" means judges, not democratically accountable legislators, invoking social science (and their own intuitions) to decide whether a crime is actually serious.[33]

Our Constitution, however, places the authority to decide policy questions in the political branches. Courts, meanwhile, simply have the power and responsibility to adjudicate real cases and controversies, and, incidental to that role, the power of constitutional *interpretation*. As Justice Antonin Scalia and Bryan Garner both underscore in the canonical *Reading Law: The Interpretation of Legal Texts*, "the words of a governing text are of paramount concern, and what they convey, in their context, is what the text *means*."[34] As Justice Cardozo similarly wrote in *United States v. Great Northern Ry.,* "We have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."[35]

Constitutional Interpretation Should be Governed by Legal Rules

For these reasons, courts should not be in the business of considering legislative facts—policy questions, in other words—as qualitative inputs in their overall constitutional calculus. To execute more faithfully their institutional role as independent arbiters of constitutional meaning in our system of government, courts should instead, as necessary to decide individual cases, apply traditional canons of legal interpretation to shape and define the doctrinal contours of constitutional law. In so doing, courts can ensure consistency, increase predictability, deepen public faith in the rule of law, and lessen the significance of amicus briefs—from any source—that present untested assertions about the state of the world.

Originalism offers the best way for courts to fulfill their responsibility to interpret the Constitution while leaving the policymaking to the political branches. Under this method of interpretation, judges place a premium on fidelity to the Constitution's *text* and *structure*. Instead of relying on a range of legislative facts and corresponding policy judgments to supply the appropriate meaning and scope of a specific

---

[32] *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

[33] *See, e.g., Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 189 (Pa. 2017) (noting that "[a]ssessing the gravity of the offense has engendered wide discussion and approaches regarding the appropriate factors for making this determination."); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1309 (11th Cir. 1999) ("Translating the gravity of a crime into monetary terms . . . is not a simple task.").

[34] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (emphasis added).

[35] *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932).

constitutional provision, under this method of interpretation, judges ascertain a "public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[36] As Justice Scalia aptly explained in *A Matter of Interpretation: Federal Courts and the Law*, "[w]e look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."[37] At its most basic, the "text of the Constitution," including its "structural design," remains the primary source of constitutional rules.[38] Of course, to answer questions not directly resolved by the Constitution's text, originalists will often look to historical evidence[39] or corpus linguistics,[40] but the objective remains the same—to discern the original public meaning of constitutional provisions.

In opposition to originalism, some argue for a *dynamic* interpretation of the Constitution, "adapting statutes to new circumstances and responding to new political preferences . . . even when the interpretation goes against as well as beyond original legislative expectations."[41] Under such a discretionary interpretative framework, judges "update" the meaning of constitutional and statutory provisions to account for new, ostensibly unanticipated social circumstances—circumstances reflected by, of course, *legislative* facts. When courts undertake such analysis, parties and amici will inevitably respond by offering alternative versions of the relevant legislative facts, citing their own competing experts and studies.

Originalism, however, "is the *only* approach to text that is compatible with democracy."[42] "When government-adopted texts are given a new meaning, the law is changed," and "any changes in the written law is the function of the first two branches of government—elected legislators and . . . elected executive officials . . . ."[43] The practical consequence of such a "dynamic" interpretation, remains, as Chief Justice William H. Rehnquist wrote nearly five decades ago, a "formula for an end run around popular government."[44] And as today's hearing illustrates, when courts depart from

---

[36] Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 92 (2004).

[37] Scalia & Garner, *supra* note 34, at 17.

[38] Keith Whittington, *Originalism: A Critical Introduction*, 82 Fordham L. Rev. 375, 377 (2013).

[39] Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 35 (1999).

[40] *See* Thomas R. Lee & James Phillips, *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261 (2019).

[41] William N. Eskridge Jr., *Dynamic Statutory Interpretation* 108 (1994).

[42] Scalia & Garner, *supra* note 34, at 82.

[43] Scalia & Garner, *supra* note 34, at 82–83.

[44] William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 706 (1976).

the Constitution's original meaning they inevitably attempt to fill the gap with judicial policy judgments informed by untested, unexamined legislative facts.

Instead, when evaluating specific constitutional cases and controversies, judges should employ clear legal *rules* to pinpoint the original public meaning of a constitutional provision. By giving judges the tools to do so, originalism removes the prospect that legislative facts may determine the constitutionality of laws adopted by the democratically accountable branches.

Categorical Rules Promote Consistency and Rule of Law

We need not resign ourselves to judicial weighing and reweighing of legislative facts. In many areas of constitutional law the Supreme Court has already avoided the problems of judicial policymaking by adopting clear, consistent rules—and has indeed shown a willingness to retreat from policy-oriented doctrines. Take the Court's Confrontation Clause doctrine, for example. Under the rule established in *Ohio v. Roberts,* the Court held that an unavailable witness's out-of-court written statement could be admitted into evidence so long as the written statement provided "adequate indicia of reliability."[45] That standard in effect created a balancing test to measure whether a statement was "reliable" and therefore constitutionally admissible. And several cases after *Roberts* furnish examples where amici advanced policy arguments about the reliability of out-of-court statements.[46]

The Court came to recognize, however, that this test provided an unpredictable doctrinal framework that "failed to provide meaningful protections from even core confrontation violations."[47] Accordingly, in *Crawford v. Washington*, the Court, in an opinion by Justice Scalia, overruled *Roberts* and held that the Confrontation Clause's original meaning prohibits such "amorphous" judicial determinations of "reliability," which ultimately reflect "[a] subjective concept."[48] Instead, the Court furnished a categorical rule: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: *confrontation*."[49] This Clause, as Justice Scalia's majority opinion

---

[45] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quotation marks omitted).

[46] *See, e.g.*, *Coy v. Iowa*, No. 86-6757, Amicus Br. of Attorney General of Kentucky and Thirty-Five States (relying on a range of legislative facts to establish States' interest in minimizing psychological trauma to child abuse victims); *Idaho v. Wright*, No. 89-260, Amicus Br. of American Professional Society on the Abuse of Children, *et al.* (advancing policy arguments that children disclose sexual abuse in a variety of ways not conducive to audio or video recording); *Maryland v. Craig*, No. 89-478, Amicus Br. of People Against Child Abuse, *et al.* (citing evidence of child abuse victims' unique vulnerability and arguing that a strict face-to-face confrontation requirement would therefore damage child witnesses and hamper the prosecution of child abuse).

[47] *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

[48] *Id.*

[49] *Id.* at 68–69 (emphasis added).

recognized, "reflects a judgment, not only about the desirability of reliable evidence, but *how* reliability can best be determined."[50]

Crawford illustrates that courts need not answer constitutional questions by reference to their own policy judgments. And the Court's recent decision in *Jones v. Mississippi* is another example where the Court rejected an amorphous standard—"permanent incorrigibility"—for a clear rule: The Court has now held that "In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."[51] That categorical Eighth Amendment rule stands in contrast with the amorphous "gross disproportionality" standard applicable to fines, not to mention the "evolving standards of decency" standard that characterizes so much of Eighth Amendment doctrine. Perhaps *Jones*, like *Crawford*, heralds the Supreme Court's return to the Constitution's objective, fixed, rule-based meaning—and implicitly the Court's rejection of the sorts of broad standards that invite judicial determinations of legislative facts.

CONCLUSION

If we are to be governed by a constitutional law of broad standards and judicial balancing tests—inquiries that by their nature invite judicial policymaking—then Supreme Court factfinding is inevitable, and the current system of liberal Brandeis briefing is perfectly reasonable. Doing away with amicus briefs that bring extra-record legislative facts to the Court's attention would only cloud a practice that, at present, is relatively open and transparent. The real problem is not how Supreme Court practice copes with decision-making under current doctrines—it is the doctrines themselves. Only by eschewing the vague standards that characterize so many doctrines of constitutional law, and instead embracing rules-based decisions grounded in constitutional text and original meaning, can the Court leave the legislative factfinding where it belongs—in the Nation's legislatures.

[50] *Id.* at 61.

[51] *Jones v. Mississippi*, No. 18-1259 (U.S.), slip op. 5.