

Thank you all for being the first-ever reviewers of this draft Introduction to our forthcoming book with Harvard University Press. As you will see, it is still very much a work in progress. Chapters 6, 7, and 8 (discussed at pages 4-13 below) are those most directly connected to legal history, though we welcome thoughts on all aspects of the project.

With gratitude,
Joseph & Brandon

CLEAR ERRORS: SAFEGUARDING CONSTITUTIONAL RIGHTS FROM UNSOUND JUDICIAL FACTFINDING

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I. Introduction

Late on a Friday evening, under the lights of Bremerton High School's Memorial Stadium, coach Joseph Kennedy stood at midfield with a helmet raised high in the air, surrounded by dozens of players from both teams. Their heads were bowed as Kennedy led a Christian prayer circle, as he had done for years following the traditional player handshakes at the end of every game.

Fearing that Coach Kennedy's practice of prayer might cause some students to feel coerced into participating and violate the Establishment Clause, the school district had asked him to conduct his prayers privately or after the players had left. He refused.

The matter drew the attention of politicians, the press, and public, many of whom saw the practice as a proxy for broader questions. In one instance, spectators ran onto the field after a game, knocking down members of the marching band and cursing at another coach, who expressed fear at being "shot from the crowd." Eventually, the district put Coach Kennedy on paid leave for violating the school's policies and endangering students, and his contract was not renewed at the end of the year. Kennedy sued, alleging a violation of his constitutional rights. His case bounced up and down the courts for years, with the Supreme Court sending it back to the trial court for further factfinding about whether

Coach Kennedy was on duty at the time of the prayers and whether students might have felt coerced into participating. The constitutionality of the district's actions depended on those factual matters.

The trial court dutifully built a factual record, including a deposition in which Coach Kennedy answered questions under oath, admitting that during these 5-yard-line prayers, he was on duty and performing his “football coaching functions,” which continued “until the last kid leaves.” The trial judge, reviewing material that included letters, policies, sworn declarations, and depositions from the school's principal and others, concluded that Kennedy's case should be dismissed. He appealed. The Ninth Circuit Court of Appeals reviewed the factual record and agreed with the district court. Kennedy sought review in the Supreme Court, which this time agreed to hear his case.

In the summer of 2022, the Supreme Court handed down its final decision in *Kennedy v. Bremerton*, siding squarely with Coach Kennedy. In reaching that result, the Justices changed the legal standard by which Establishment Clause cases should be evaluated—replacing the decades-old (if controversial) test from *Lemon v. Kurtzmann* with “analysis focused on original meaning and history.” This shift to a more originalist methodology drew significant attention from commentators and scholars.

But something else important happened in *Bremerton*—a change not in law, but in *fact*. Writing for the majority, Justice Neil Gorsuch based the decision in part on a conclusion that Kennedy “offered his prayers quietly while his students were otherwise occupied” and that he engaged in “short, private, personal prayer.” These facts, the majority concluded, differentiated Kennedy's case from those in which prayer in schools had been found “problematically coercive.” And these facts, the majority said, demonstrated that his conduct was not part of his official duties, but was private, under existing precedent regarding free speech and free exercise of religion rights.

This characterization of the facts was, in the words of Douglas Laycock, a leading scholar and advocate of religious rights, a “systematic gerrymander” of the factual record carefully set out by the trial judge.¹ In a strident dissent, Justice Sonia Sotomayor emphasized that the trial judge had found “direct record evidence that students felt coerced to participate,” that the

majority ignored the “severe disruption to school events caused by Kennedy’s conduct,” and that “[t]o the degree the court portrays petitioner Joseph Kennedy’s prayers as private and quiet, it misconstrues the facts.” She included photographs to prove the point.²



The Justices—like many Americans—are deeply divided about school prayer, just as they are about a wide range of other constitutional principles from the freedom of speech to the right to keep and bear arms to the rights of criminal defendants. And so, too, are they divided about how those principles should be evaluated: exclusively according to original understandings, for example, or by reference to contemporary means and ends. Such methodological matters have been the central battlefield of American constitutional law and scholarship for decades.

But battles are shaped by terrain, and in constitutional law that includes the facts of cases. We have emphasized the story of *Bremerton* to bring those facts to the fore—to show that whatever one thinks about school prayer or the use of history in constitutional interpretation, the majority based its decision on a factual characterization that was at odds with the trial court record, Coach Kennedy’s own account of his conduct, and the

picture above.

The goal of this book is to re-center the problem of fact-finding in constitutional cases as crucial for the future of our rights and our courts. Court decisions depend on facts as well as law, even in constitutional cases broadly defining rights and government structure. The current Supreme Court’s increasing claims of power, its reliance on historical methods like originalism, and its decisions in particular cases, have all generated substantial scholarly, political, and public debate. We are sympathetic with many of those critiques and their sense of urgency. But not as much attention has been paid to the Supreme Court’s treatment of fact-finding when it makes momentous constitutional rulings. And especially during a time of social and legal change, grounding constitutional law in solid fact is critically important.

In many respects, our project is one of recovery rather than innovation. The challenges posed by fact-finding in constitutional cases are not new, and the legal system has developed a range of tools for the task. The Framers the importance of fact-finding, which is one reason why the Constitution specifically protects jury trial rights, and why the Founding generation wrestled with how to insulate trial-level facts from appellate review. We detail conflicts regarding fact-finding and standards of review in constitutional cases that date back more than a century and helped define contemporary standards of review. Getting fact-finding right has never been easy. But in what many fear has become a post-truth world, it is particularly important that our justice system follow the rules of fact-finding when constitutional rights are at stake.

In far too many cases, federal judges—including the Justices—recharacterize the facts, disregard facts in the record, rely on new facts that are not in the record, and send trial judges on pointless or impossible fact-finding missions. As in *Bremerton*, “gerrymandering” of the factual record might sometimes fade into the background, since commentary tends to focus on high-level constitutional principles. Anyone who has taught or studied law need only leaf through their books for confirmation: Constitutional law casebooks generally skim or skip the facts of cases as compared to those in other subjects. To some degree this is inevitable, or at least understandable. No amount of fact-finding will establish the meaning of constitutional principles like federalism, separation of

powers, Due Process, or Equal Protection. But constitutional cases are not exempt from the basic mantra that lawyers and judges should stay within the “four corners of the record,” and that the factual record must be compiled properly. Failure to respect the basic processes of fact-finding in constitutional cases, where the stakes are so high, can fundamentally distort the role of courts, the doctrines they create, and our fundamental rights.

Bad Facts Make Bad Law

Lawyers sometimes bemoan “bad” facts, meaning those that weaken their clients’ cases. Our focus in this book is on a different kind of “bad” facts: Those that are found by the wrong factfinder (a judge rather than a jury, for example), at the wrong stage of litigation (on appeal rather than at trial, for example), following the wrong kind of evidentiary showing (judges’ own research rather than expert testimony, for example), or otherwise outside the time-tested rules and practices that govern fact-finding. The result, too often, is that constitutional law is constructed on an unreliable foundation, and constitutional rights suffer as a result. Consider a few examples.

In one of the Supreme Court’s most rightly-reviled decisions, *Korematsu v. United States*, a six-Justice majority upheld the federal government’s authority to order the internment of more than 120,000 Japanese Americans during World War II. *Korematsu* represented a blatant violation of the Equal Protection Clause. But it also rested on faulty factual claims about group disloyalty. Defending the internment order before the Court, the federal government falsely suggested, citing a report from General John DeWitt, that Japanese Americans had committed espionage, and then further falsely claimed that there was no time to separate the loyal from the disloyal.³ Justice Hugo Black’s majority opinion, which cited that report, concluded that “the properly constituted military authorities,” acting during a time of “military urgency,” had decided these “proper security measures” were needed because they “feared an invasion of our West Coast.”⁴

Decades later, in 1983, Fred Korematsu filed a case in federal court seeking to overturn his conviction for refusing to abide by the curfew and exclusion orders. In the process of seeking to overturn Korematsu’s conviction, new World War II-era

documents were uncovered, and the federal judge found that government officials had “knowingly withheld information from the courts,” including the U.S. Supreme Court. Indeed, several Department of Justice officials at the time protested to their superiors that these were “intentional falsehoods.”⁵ General DeWitt’s final report was recalled and then altered so as to minimize highly racist statements he made, and to add false information suggesting Japanese Americans had posed an imminent threat. The Justice Department lawyer briefing the case to the Supreme Court was aware of the falsehoods, but did not notify the court, instead asking the Justices to take judicial notice of the report, which was not in the record. The Supreme Court, then, was gravely misled about key facts, in part because no meaningful fact-finding had occurred regarding that report.

Not all of the Justices accepted the report at face value, and some of them noted the departure from normal fact-finding practices. Justice Robert H. Jackson dissented in *Kennedy*, asking why the General’s report—his “own unsworn, self-serving statement, untested by cross-examination,” was being credited. He asked: “How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court.”⁶ It is of course impossible to know if *Korematsu* would have come out the other way if the government’s assertions had been subject to testing. But doing so would at least have created a possibility that more Justices would have joined Jackson, saving the Court—and more than 100,000 Americans—from one of its worst mistakes.

Justice Jackson was right to argue, in effect, that bad facts made bad law.⁷ He was also right when, years later, he wrote of the Supreme Court: “We are not final because we are infallible, but we are infallible only because we are final.” When it comes to fact-finding in particular, the Court is decidedly fallible, and yet because no court sits above it, the Court’s errors—including its factual errors—become etched into constitutional law, potentially distorting the scope of our constitutional rights.

Consider *Crawford v. Marion County*, in which the Supreme Court upheld Indiana’s voter ID requirements partly on the basis that they are a way of preventing voter fraud.⁸ But Judge Richard Posner, author of the Seventh Circuit decision that the Court affirmed, would later describe Indiana’s requirement “a type of law

now widely regarded as a means of voter suppression rather than of fraud prevention” and that he “may well have been wrong” to uphold it. The reason? The facts were uncertain. As Judge Posner put it, using *Crawford* as an example, “in many cases judges can’t have any confidence in the soundness of their decisions if they do not have empirical data concerning the likely consequences of deciding the case one way rather than another.” For Posner, a resolutely committed pragmatist, the relevant facts had to do with the law’s contemporary means and ends. For an originalist, the relevant facts might be historical, but the basic point is the same: The soundness of a constitutional decision depends in large part on the soundness of its factfinding.

Unreliable factfinding can weaken even the most celebrated opinions. In *Brown v. Board of Education*—arguably the Supreme Court’s finest hour—the Justices rightly concluded that “separate but equal is inherently unequal” with regard to racially segregated schools.⁹ But in doing so, the Court cited social science research purporting to illustrate the impact of segregation on Black children—evidence whose reliability and propriety would be criticized and debated for decades to come. The trial records in the cases that had come to the Court was substantial, but the Court selected only these studies for special attention. Would even *Brown* have been better off with better fact-finding?¹⁰ And what would that entail?

Types of Facts and the Role of Fact-Finding

The first part of this book focuses on the traditional rules and practices that govern fact-finding at trial and review on appeal, and then show how the Supreme Court has departed from those standards in a range of constitutional contexts.

In Chapter 2, we describe the basic rules of fact-finding in our legal system—the processes that courts are supposed to follow to ensure that facts are as reliable as possible. These rules are set by a combination of constitutional principles (like the right to a jury trial), legislation (like jurisdictional statutes), rules of evidence and civil procedure, and longstanding institutional practice.

And the relevant rules turn in large part on what kind of fact is at issue. “Adjudicative” facts—who, what, where, when and

how in dispute in a case—are found by the factfinder, whether that be a jury or a trial judge, and are subject to great deference on appeal. When it comes to “legislative” facts—supportive general information, like the research cited in *Brown*—judges have freer rein both at trial and on appeal, because such facts are not party-specific and are generally used to explain interpretation of the law.

The line between adjudicative and legislative facts is foundational, but is not straightforward and—as we show in later chapters—it has been further complicated by the Court’s use of facts (especially historical facts) to set the content of constitutional law. We call these “declarative” facts, and they raise novel challenges.

The crucial role of trial judges and juries is insulated on appeal by deferential standards of review, which are the focus of Chapter 3. Normally, facts found at trial can only be reversed for “clear error” or a finding that a jury lacked “substantial evidence” to support its verdict. After all, appellate judges—including Supreme Court Justices—are primarily tasked with questions of law, not fact, given that they do not have access to witnesses and adversarial testing like trial courts do. As the Justices themselves often put it, the Supreme Court is “a court of review, not of first view.”¹¹ Such deference is not absolute, though, and appellate courts sometimes engage in de novo review when a case involves “mixed” questions of law and fact, or when employing the much-misunderstood doctrine of constitutional fact review. To capture broad trends in Supreme Court practice, we present novel empirical evidence of how deference doctrines like clear error and substantial evidence review have fallen into disfavor. The erosion of these and other doctrines of deference, like the long-neglected “two-court rule” prescribing especially strong deference when trial and appellate courts agree on the facts, helps to explain why factual findings are so contested and uncertain in constitutional cases today.

Having laid out the basic rules of fact-finding and appellate deference, in the next two chapters we show how the Supreme Court has departed from these practices and what that means for the development of constitutional law. Chapter 4 focuses on adjudicative facts. Cases like *Kennedy* unsettle trial court factfinding, sometimes without explaining why. This represents a major shift in power within the federal judiciary, and raises

uncomfortable questions about the reliability of the decisions. Such issues are increasingly prominent in cases involving equitable remedies like injunctions issued even before a trial has occurred, and in “shadow docket” cases that the Court decides without full briefing or oral argument.

Next, in Chapter 5, we turn to legislative facts, or the type of general facts and research that judges rely on when they interpret the law. Such facts are not subject to the same rules of evidence and deference as adjudicative facts. And yet it is not difficult to find examples of judges—and, we show, Justices—basing legal conclusions on highly unreliable information and distorting the law as a result.

Making History

We are concerned in this book with all kinds of fact-finding, and we discuss cases involving scientific, medical, empirical, and other kinds of fact claims. But *historical* facts have always been especially prominent in the Court’s constitutional decisionmaking, and in recent years they have taken center stage as the Court increasingly relies on originalism to resolve disputes about constitutional rights. The second part of this book, Chapters 6, 7, and 8, each explore the unique challenges that this interpretive shift poses for standard approaches to fact-finding.

Originalism is a family of interpretive methodologies which hold that the meaning of the Constitution was largely set at the time of the ratification; it naturally fixes the judicial gaze on the historical horizon. Sometimes that means figuring out how historical fact-finding fits into the standard categories of adjudicative and legislative fact-finding. But the turn to history also presents novel challenges, as we show in Chapter 6, because the Justices are using historical facts not only to resolve disputes or generally inform interpretation, but to *declare* the content of constitutional law. This type of factfinding is largely unprecedented, because it elevates the importance of judicial factfinding with no notice or guidance to the parties, no standards of evidence, and no standards of review.

In *Dobbs v. Jackson Women’s Health Organization*, to take one prominent example, the Supreme Court eliminated the federal constitutional right to an abortion. In his majority opinion, Justice

Samuel Alito concluded that the decades-old precedent of *Roe v. Wade* should be overruled in part because it allegedly rested on errors of historical fact.¹² In a striking example of what we call “declarative constitutional fact,” Justice Alito said that “the most important historical fact” in interpreting the Due Process Clause, was that most states restricted abortion at the time of the Fourteenth Amendment’s enactment; indeed, historical evidence provided “overwhelming” support for restricting abortion rights.¹³

These claims of historical fact emerged not from a trial record or the kinds of adversarial testing typical for specialized factual claims; they were apparently taken from appellate briefs,¹⁴ and many scholars have concluded that the Court’s statement of the “most important historical fact” rested on key errors. In fact, most states did *not* restrict or criminalize abortion during the time-period that Alito had focused on.¹⁵ The American Historians Association, the Organization of American Historians and other historical organizations, for example, concluded that the majority referred to “‘history’ 67 times,” but engaged in “misrepresentation” of the record.¹⁶

The historical facts at issue in cases like *Dobbs* are contested, and others might confidently believe that the historical experts are themselves wrong about the history. But from the perspective of the legal system, what matters most is that the *processes* of fact-finding are sensibly designed and defended. One might agree with factual or legal conclusions reached by other means—as in *Brown*, or perhaps in *Bremerton* or *Dobbs*—but when traditional rules are honored only in the breach, the legal system as a whole suffers, just as it would if a factually guilty person were imprisoned without trial.

That is why the Justices’ invocation of historical facts in cases like *Dobbs* is so troubling—this use of factfinding to declare constitutional law does not comport with any of the standard approaches to fact-finding in our legal system. And that complication is one that the Justices themselves are starting to confront. Indeed, some of the most significant divides within the Supreme Court’s current majority have been *among* the Justices that endorse the use of originalist and history-focused methods. In *Vidal v. Elster*, for example, the Court upheld the name clause of the Lanham Act, which prohibits a trademark that includes the name of a living individual. Justice Clarence Thomas said that this

was because the clause has “deep roots in our legal tradition,” while Justice Amy Coney Barrett agreed with the conclusion but not the methodology, arguing that doctrine should not rely “exclusively on history and tradition.”¹⁷ *Vidal* and many other cases like it show that reliance on historical facts raises difficult, longstanding, and important questions that cross areas of constitutional law, judicial philosophies, and partisan divides in the present and in the past.

Using History to Define and Protect Constitutional Rights

To be clear, our concern is not an argument against all forms of originalism—only that to the degree originalism claims to be fact-based, it should follow good practices of fact-finding. The Justices have relied on historical evidence since the very beginning, and even amidst the decades-long methodological war between originalism and its alternatives, there is broad agreement that history is important to constitutional interpretation. But when constitutional law makes unreasonable demands on history—for example by seeking more specific guidance than history can produce—the result can be both shaky legal doctrine and unreliable fact-finding.

Chapter 7 shows how the shift to originalist doctrine presents special challenges for lower courts, which are increasingly tasked with novel forms of historical fact-finding. We have called this the turn to “originalist doctrinalism,” and represents a new and particularly difficult challenge for factfinding in the lower courts.

The day before it handed down its decision in *Dobbs*, the Supreme Court redefined the right to bear arms in *New York State Rifle & Pistol Association v. Bruen*. In *Bruen*, the Justices explicitly rejected the Second Amendment standard that the lower courts had been applying for more than a decade, instead concluding that the constitutionality of modern gun laws depends on whether they are consistent with historical tradition.¹⁸ This represented a major change from *Bruen*’s landmark originalist predecessor, *District of Columbia v. Heller*, in which the Supreme Court first concluded that the Second Amendment encompasses an individual right to keep and bear arms for private purposes disconnected from militia service. Unlike *Bruen*, *Heller* explicitly blessed the constitutionality of a potentially wide range of gun regulation, and

generally left it to lower courts to come up with rules to sort permissible from impermissible laws.

Whatever one thinks of the proper balance between gun rights and regulation, *Bruen* displayed—and has generated—many fundamental problems of factfinding. Justice Clarence Thomas wrote for the majority that courts should decide Second Amendment cases “based on the historical record compiled by the parties.”¹⁹ But there was no “historical record” in *Bruen*. Applying then-existing law, the trial judge correctly disposed of the Second Amendment claim, based on a preliminary motion to dismiss,²⁰ meaning that there had been no trial—no expert witnesses, no testing of evidence, and nothing establishing a record about either the history of gun regulation or the operation of the New York licensing law at issue. The factual evidence, historical and otherwise, that the Supreme Court invoked was based on appellate submissions, mostly by amici, or the Justices’ own research. The parties never had a chance to develop a proper factual record on the questions of historical fact forming the basis for the Court’s decision, and no trial judge had ruled on whether those facts were reliable.

In mandating a history-and-tradition test for all Second Amendment cases going forward, *Bruen* not only exemplified improper fact-finding but has led lower courts to do the same. A continuing theme throughout this book is a growing disconnect between the Supreme Court and the lower courts—especially trial courts—which have primary responsibility for applying the tests that the Justices announce. *Bruen* put those trial judges in an bind, effectively requiring them to conduct dissertation-level historical research without anything approaching the Justices’ resources, which include multiple clerks, dozens of amicus briefs, and a small docket. The chorus of criticism arose not only from the academy, but—to a remarkable degree—from the lower courts, with many openly criticizing the method as unworkable. Ironically, *Dobbs* overturned *Roe* based in part on its conclusion that the right to abortion was “unworkable” as a matter of law; in *Bruen*, the Court launched a new test that presented far more serious problems of implementation than *Roe* ever did.

Responding to originalist doctrines like *Bruen* has fundamentally altered various kinds of trial practice, including increasing reliance on historians as experts in constitutional cases,

as we describe in Chapter 8. Now that facts regarding historical evidence are front and center in constitutional law, historians have become increasingly prominent as experts witnesses, just as economists, social scientists, and psychiatrists have been in areas of law where other kinds of facts are legally relevant. Yet, the demands and expense of retaining historian experts are not trivial. And the demands of conducting the relevant research are substantial, including because the most important records may not be preserved.

We fear that incorporating historical factfinding into constitutional law reflects a fundamental misunderstanding, bordering on disrespect, of how fact-finding works at trial. As a federal trial judge said to one of us in the course of discussing *Bruen*, “I find it galling that none of the Justices who wrote that opinion have ever said, ‘Government, call your first witness.’” Indeed, the only two current Justices to have served as trial court judges—Justices Sonia Sotomayor and Ketanji Brown Jackson—have been among the most vociferous critics not only of *Bruen* but of the Court’s cavalier treatment of trial court fact-finding in other contexts as well. To flip the familiar “bad facts make bad law,” one might equally say that “bad law makes bad facts.”

A Return to Fundamentals

In the last part of this book, we end where we start, close to the ground, with an examination of how constitutional law is constructed on the basis of facts and how to assure that such fact-finding is reliable. Judicial fact-finding is crucial to our legal system and our democracy as a whole, but our concerns are lawyers’ concerns and our solutions are lawyers’ solutions. We need not overhaul the Supreme Court, let alone the Constitution, to get fact-finding back on track. In many ways, we need only remember and reaffirm foundational legal principles and practices that, amidst the debate over high-impact constitutional holdings, have a tendency to disappear from view.

In Chapter 9, we focus on solutions inside the courts, including careful attention to standards of review on appeal, and more rigorous development of a record in the trial court. We also explore whether and when lower court judges should disregard inappropriate factual findings made by a higher court. We suggest

trial judges can most comfortably assert their factfinding role when a case is remanded or sent back to them.

In Chapter 10, we turn to solutions outside the courts. Congress has sometimes stepped in to pass laws regarding fact-finding by federal judges, including in the earliest days of the Republic, due to concerns that the Supreme Court would endanger jury trial rights and decide questions of fact. Those choices can cut in very different policy directions. Congress has generally regulated fact-finding to limit, not expand, access to remedies for constitutional rights, for example by imposing deferential standards regarding facts for people challenging state-court convictions using habeas corpus and non-citizens facing removal seeking to challenge immigration court rulings. Such laws are a form of what we call “fact-stripping”—a parallel to the better-known justification-stripping, which deprives courts of jurisdiction to hear certain legal questions—and they might be repurposed to protect rather than undermine constitutional rights.

All of these institutional choices have benefits but they also have important costs. They can be used to expand but also to limit remedies for violations of constitutional rights. These are lawyerly solutions to what is ultimately a lawyerly problem. We hope that makes them more, not less, attractive. We certainly share many of the widespread concerns about the direction of the current Supreme Court, and many of our examples throughout this book—including, of course, the one with which we opened this Introduction—are critical of the Justices’ cavalier approach to fact-finding. But our goal is not to question the motives, politics, or ideology of Justices or judges, and we take as given their adoption of history-based approaches to constitutional interpretation. Our plea is for a return to longstanding, fundamental principles of legal practice—to build our shared constitutional future based on reliable facts.

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